MASTER R2R Marshall

"A STUDY

(1958)

The Rule of Law in the United States

A STATEMENT
BY THE COMMITTEE TO COOPERATE
WITH THE
INTERNATIONAL COMMISSION OF JURISTS

THE AMERICAN BAR ASSOCIATION
SECTION ON INTERNATIONAL
AND COMPARATIVE LAW

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The Section of International and Comparative Law of the American Bar Association organized in 1955 the Committee to Cooperate with the International Commission of Jurists. The document here contained is a Statement by that Committee and is not to be deemed to represent the opinions or views of the American Bar Association or of its Section of International and Comparative Law unless and until adopted pursuant to the by-laws of the Association and of the Section.

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THE RULE OF LAW IN THE LEGAL SYSTEM AND PRACTICE OF THE UNITED STATES

An Outline Study Prepared for the International Commission of Jurists at The Hague

Introduction

The document which follows this foreword emanates from a representative group of American Bar Association members in support of the work of the International Commission of Jurists at The Hague.

The Section on International and Comparative Law of the A.B.A. in 1955 formed a Committee to Cooperate with the Commission as one mode of implementing the endorsement of the Commission given by a resolution adopted by the Association in 1953. This cooperating Committee has members, whose names are listed below, in seventeen of the principal United States cities. A few state and local bar associations in the United States have also either endorsed the Commission in general terms or created their own special committees for directed cooperation. The present study is an undertaking of this A.B.A. Committee.

The International Commission of Jurists is a non-political, nonprofit, private organization of lawyers, judges and legal scholars from many countries who are widely but unofficially representative of various legal systems of the free world. The Commission was created in 1952, was later incorporated under Dutch law and exists for the broad purpose of promoting through professional support the understanding and acceptance throughout the world of those principles of justice which constitute the basis of the "Rule of Law," the best traditions and the highest ideals of the administration of justice and the supremacy of law.

In partial furtherance of these purposes the Commission has initiated a study to ascertain and publicize those elements and characteristics of the Rule of Law which have been generally accepted by at least some of the principal societies and are incorporated in their several bodies of law. Legal materials for this essay in comparative law are to be provided by cooperating groups of lawyers (using the term in its broadest sense) in selected countries of the free world whose legal systems are known to reflect and embody important features of these concepts, institutions and practice. It is believed that the intended wide distribution of the distillation of these common elements will stimulate the friends of the Commission by use of their professional standing to promote progressive acceptance and application of those essentials of the Rule which can be adapted to other systems in which the Rule does not now prevail. The Commission is convinced

that the opportunity exists in many areas. Completion of the present project will focus the attention of lawyers upon the formal existing structure of liberties of the individual under law as generally recognized in the free world. The American Bar can play an important part in bringing this project to fruition.*

The A.B.A. Committee members, with the active participation of many other lawyers, judges and teachers of law in these various cities, have prepared the substance of the study analysis which is here presented as an "American" Statement of the Rule of Law. The material was written and collected in the form of answers to a topical outline of the entire subject which was drawn by the Secretary-General of the Commission for common use by national or regional representatives of various legal systems in formulating statements of the Rule as understood and now embodied in their legal structure.** Additions to the original outline were made in New York in order to elicit answers which would include elements of the Rule of Law peculiar to or significantly characteristic of the American system of government and law. These include the specification of many "rights" of the individual in our written constitutions, the dominant authority of those constitutions as overriding forms of law, the distribution of exclusive or concurrent jurisdictional powers between federal and state authorities created by the American federal system of government, separation of powers within the sovereignty and the power of judicial review of legislative and executive action.

The "Rule of Law" as a term in common usage by the disciples of Anglo-Saxon law is not susceptible of such precise definition as to carry the same meaning to all. For the purposes of the American analysis here presented it is assumed to be the body of precepts of fundamental individual legal rights permeating institutions of government which are vested with appropriate power of enforcement and those procedures by which such precepts may be applied to make those rights effective. These elements – of precepts, institutions and procedures – exist in law to effect the protection of essential interests of the individual guaranteed by society through limitations on the authority of the state.*** The precepts applied by our legislatures, executive

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* "There is abundant evidence that there may be a generally recognized and accepted body of principles to which men are expected to adhere in their relations with others and in their conduct without any general lawmaking or declaring political organization . . . Such a law of the world shall not need formulation by agencies of an omnicompetent superstate nor promulgation by a Parliament of man." *Roscoe Pound*, Address, Brooklyn, N.Y., November 1957.

** See Questionnaire, pp. 19–25.

*** The original, primary concern of the Rule with protection of fundamental rights against encroachment by the state has broadened to include rights or privileges based on affirmative action by the state to provide various forms of economic security, equal opportunity in public services such as education, public housing etc., and to protect against encroachments by other individuals or groups.

agencies, courts and the bar are thereby recognized to be the basic law establishing fundamental legal rights.

What is here projected in this American study, it must be emphasized, is law in these relations as it exists in the United States in 1957, not an ideal of *Civitas Dei.* It therefore becomes relevant to consider briefly, as introductory to the text, the nature of fundamental legal rights, then the nature of the institutions and of the procedures which are deemed to be essential parts of the Rule of Law.

Although the requirements of concise statement forbid excursion into the metaphysical nature of law and likewise into the history of the development of these concepts, institutions and procedures, passing reference to the recorded origins of some of these elements may make more concrete the necessary generality of terms used in the foregoing definition of the Rule of Law content. The fundamental legal rights with which the American lawyer is familiar include some which are abstractions in origin – "human rights" – and some which are concrete in origin and in present embodiment.

The Colony of Virginia which became one of the original thirteen component state units of the new American Union in 1789 adopted a "Declaration of Rights" in 1776, the year of the "Declaration of Independence" proclaimed by delegates from all of these thirteen colonies. This was thirteen years before the French "Declaration of the Rights of Man and of the Citizen" of 1789 and the American Constitution of that same year. The Secretary-General of the United Nations, Dag Hammarskjöld, has observed accurately: "What was new in the Virginia Declaration of Rights was the formal recognition of human rights as part of written constitutional law." Much of the substance of this Virginia Declaration was carried over into the American constitutions and has its place, an important place, in the Rule of Law as it is contained today in American law.

In this Virginia Declaration the word "right(s)" appears eight times. Some of the rights there proclaimed are extremely general abstractions of the purpose of government, e.g., ". . . the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety." These are stated to be "inherent rights." The Declaration includes a "Right to uniform Government." In contrast to these, other rights there specified are much more concrete, within a framework of readily identifiable institutions and procedures: "The Right of Suffrage," and "That in all capital or criminal Prosecutions a Man hath a Right to demand the Cause and Nature of his Accusation, to be confronted with the Accusers and Witnesses, to call for Evidence in his Favour, and to a speedy Trial by an impartial Jury of his Vicinage. . ."

A further breakdown of rights recognized in American law and government will identify some as of an essentially political rather than legal nature, e.g., the right of suffrage and, as expressly provided in the

Constitution, the guarantee by the United States to every state of "a republican form of government." Other rights are more strictly legal, such as the right of confrontation of the accused by the adverse witnesses in person, speedy trial of criminal charges by jury and prohibition of excessive bail. "Legal rights" are generally enforceable by appropriate action involving the judicial arm; "political rights" – however important they be – are more apt to lie beyond judicial jurisdiction.

Are all the elements of what we in the United States regard as essentials of the Rule of Law found in other "free" societies? It is arguable that a society in which the right of universal suffrage does not exist irrespective of sex, race, national origin, religion, etc., may, nevertheless, be governed by the principal fundamentals of the Rule of Law. The legal system of a colonial area which does not have full autonomy of self-government may still be found to live under those fundamentals. In Great Britain Parliament is supreme and the judiciary does not assume constitutional power to exercise review over statutory enactments, as it does in the American system; yet it would be absurd to assert that for this reason the Rule of Law is not an outstanding characteristic of the whole British system. Characterization of some rights as political rather than legal does no offense to the importance of the former in the scheme of government which has evolved and is judged by its citizens to be best fitted to the national needs.

The collaborators in this study have in their selection of relevant legal materials excluded rights and interests held by them to partake primarily of a political nature, in order to concentrate upon rights more generally susceptible to enforcement by executive and judicial action within the confines of the organic structure of an existing society – most importantly although not exclusively by recognition and enforcement through the courts.

Reverting to our definition of the Rule of Law as the framework within which this study has been made, the other elements – of institutions and procedures – call for no more than passing identification of their nature. As to the institutions which are vested with power effectively to transmute precepts into fundamental and accepted legal rights, a structure of courts staffed by judges who are independent of *ad hoc* government pressures is an obvious essential. The struggles of Lord Coke and his successors with the "prerogative" demands of the Stuart kings in the seventeenth century laid the foundations of an independent judiciary. Another institution of equal importance is a professionally trained bar, free from government direction, without taint of private corruption, devoted solely to the lawful interests of clients within the rules of the legal system of the country. Agencies of the executive branch which exercise self-restraint in the use of broad powers are no less vital to the force of the Rule.

Procedures are, to us, both generic and specific. The "due pro-

cess" requirements of our constitutional guarantees are of the former category and mean, among other things, fair trial with all its ramifications which are examined in considerable detail in the body of this study. To our British colleagues due process is long since a familiar term; to lawyers of the European Continent it is apparantly not indigenous, although the content may be.

Jury trial, right to reasonable bail, to representation by counsel, to an appeal from conviction of a criminal offense and many other modes of protection are so specific as to be readily understandable by lawyers generally. Terminology, however, is always a potential stumbling-block. Hence the effort is here made to use words and terms stripped of peculiarly local meaning in explaining the essentials and characteristics.

The study omits consideration of theories of law, the philosophical aspects of its content. American lawyers, especially practitioners, have exhibited but little interest in this more speculative field. Lawyers of the European Continent may, indeed probably will, find superficial a presentation in however summary form which by-passes not only the historical derivation and development from primitive sources, but likewise any discussion of "natural law," the positivist contention for law as the will of the sovereign, and other schools of insistent advocacy.

Every American lawyer learned as a school boy the inspired assertions by the framers of the Declaration of Independence in 1776: "We hold these truths to be self-evident – that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." This Declaration and other eighteenth century source-materials of American written constitutions derive from beliefs that these assertions and commands were but declaratory of principles of natural constitutional law deduced from the nature of free government, that natural law is the basis of all constitutions and is inherent in the idea of a government of limited powers. The beliefs stem from Locke in England, on the Continent from Montesquieu and Grotius: "It is beyond controversy among all good men that if the persons in authority command anything contrary to natural law or the Divine Precepts, it is not to be done." The later development by judicial interpretation of the Fifth and Fourteenth Amendments to the Federal Constitution has seriously impaired, if it has not in fact invalidated, these earlier American theories of rights.* Others are prepared to and do challenge the very premises of any natural law concepts.

There is an analogy and parallel in the conflicting theories of the judicial function. Coke, and later Blackstone, held that correct judicial decisions are framed in accordance with the law of the land and are

* *Pound*, "Introduction to the Philosophy of Law," p. 20.

the best evidence of the common law as an existing complete body of law. In the nineteenth and early twentieth centuries Austin and Maine in England, Gray and Holmes in the United States insisted that judges made rather than discovered law, from any antecedent corpus. The controversy over the essence and limits of the judicial function rages afresh today over interpretation of constitutional prescriptions by the United States Supreme Court.

For this study to attempt an authoritative statement of origins and nature of rights in terms of philosophy of law would multiply the pages unduly and expose the authors to domestic complaint, perhaps legitimate, that one school of such thought has been unduly favored and others have been slighted. Material within this area would be a diversion from the main stream of our attempt to summarize the state of the law concisely and as it is found to be now.*

* * *

There are certain peculiarly characteristic features of the American system of government and law which are within the scope of this study and to which some explanatory comment should be here offered.

One feature in our fabric is the federal structure of American government – a federation of forty-eight states, the national "federal" government, and some outlying dependencies under varying forms of federal government control or autonomy. The relations between the federal government and the forty-eight states (ignoring the other areas as of minor interest for our present purposes) are governed by the provisions of the federal Constitution of 1789 and subsequent amendments as the basic overriding law, and by statutes of the federal legislature, the "Congress." Acts of Congress purport to be adopted in exercise of the powers delegated to the federal government by the Constitution itself. Powers not so delegated are "reserved" to the several states. Certain types of action are forbidden to the federal authority, other types to the individual states and yet others to both of them. Some powers are "concurrent", open to exercise by both units of sovereignty.

Most of the federal powers are expressed in general rather than in detailed and specific terms, and as the original document was framed nearly 175 years ago there is constant question whether the federal government may, through its Congress or its executive and judicial branches, exercise control in a field which is not mentioned in the organic instrument and could hardly have been contemplated by the framers. Expansion of welfare state controls has thrust upon the na-

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* Those who desire an inquiry in this area should consult such authoritative studies as *Pound*, op. cit; *Friedman*, "Theory of Law."

tional government regulations of relations between employers, workers and their unions, of the use of child labor in industry and commerce, of equality of rights of access to and treatment of all races in schools maintained by the public purse and many other instances of the exercise of legislative, executive or judicial power. May the federal government meet the demands for effective control and uniformity; do the several states alone have such power; or do the states have the power in the absence of federal control and until the Congress has itself acted? Lack of certainty is a constant problem. The content of the law, in the United States as elsewhere, is in a stage of constant reexamination, considerable ferment and adaptation to meet the shifting demands of a complex industrial society.

Some of these issues lie outside the scope of our study as not inherently matters of fundamental rights of the individual; others do fall within our field. A federal statute of 1934, in undoubted exercise of federal power, forbids under criminal sanction the "tapping" of private telephone and telegraph wire messages sent across state boundary lines. A conversation or message intercepted in spite of the prohibition may not be introduced in evidence in any criminal or civil action in a federal court.* If a man is prosecuted for murder – in a state rather than in a federal court – may a telephone conversation between the accused and an accomplice which has been recorded by the state police (in violation of the federal statute) be produced by the prosecution before the judge and jury of that trial? The Supreme Court of the United States has held that the rule of the federal statute forbidding use of intercepted communications is not binding in state court prosecutions by state officers. Some states therefore permit the introduction of such evidence; others do not. There is no uniformity of practice in a matter which touches so closely the "right of privacy." No such complication in the realm of individual rights apparently arises to cloud the British or French pattern.

The perplexity created by this conflict of jurisdiction, federal versus state, is insistent and continuing, new situations present a recurrent test and in some topical areas there is a marked lack of uniformity, both legislative and judicial, between the laws of the forty-eight states themselves. The substance of our study will reveal in places this characteristic of the American legal picture.

The written constitutions of the American structure of government all contain prescriptions of fundamental rights, in addition to specification of organs of government and division of powers between them. These constitutions are not identical in their listing of rights, yet do not vary widely in substance. Of much greater importance than this lack of complete uniformity is the final authority of the protective

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* Nor by testimony of a federal agent in a state court prosecution. *Rea* v. *United States*, 350 U.S. 214.

guarantees themselves as superior to and binding upon the legislative, executive and judicial branches of the respective governments, federal and state. The principal "civil rights" of the person are listed in these organic documents in those portions which are referred to collectively as the "Bills of Rights." The most important, but not all, of these rights in the federal Constitution are found in the first ten amendments which were adopted *en bloc* in 1791. Others have been added by later amendments, chiefly those adopted at the close of the Civil War of 1861-1865.

The First Amendment says: "Congress shall make no law... abridging the freedom of speech, or of the press..." Though the words of this clause lack precision of meaning and scope (which must be determined by judicial interpretation), the verbal prohibition is absolute, not subject to overriding challenge by the legislative or the executive.* The Supreme Court has gradually extended this and other prohibitions and commands of the federal Bill of Rights to all encroaching action by organs of the state governments. Statutes may, and there are many which do, implement the general commands of these constitutions, give precision to their meaning and provide penalties for infraction. Other instances of the final authority of constitutional safeguards will be found in the text which follows.

Whatever be the conflict in theories of ultimate source of the basic precepts, we all agree that these written constitutions are the most important single element and form of the statement of these commands and of their embodiment in our law. Other rights may be added by legislative or executive action but those specified in the constitutions or which a court of last resort finds to be inherent in them may not be cancelled out or impaired. Ultimate sovereignty lies in the people, not in their executives or legislatures. The constitutions, both federal and state, prescribe how that final power may be exercised, formally, to amend a constitution by limitation, repeal or addition.

The two features of the American system which have been here sketched – the dual set of governments and powers in the federation, and the supremacy of the constitutions – gave rise early in the nineteenth century to the doctrine of judicial review. This is the power of our courts, not found in any express provision of these constitutions but evolved by the judges themselves, to find that a legislative enactment or an act of the executive branch or a decision of an inferior court contravenes a particular prohibition or command of a constitution. ** The enactment, executive act or court decision subject to such a

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* The prohibition, however, is not held to be so absolute as to invalidate statutes which penalize direct incitement to immediate commission of a crime or conspiracy to commit a crime, libel or obscenity.

** The origins of this lie in the colonial period, prior to creation of the Federal Union in 1789, Cf. Topic C (4).

pronouncement of contravention is thereby declared and thereafter held to be null and void, of no legal effect.* That conclusion is reached only as the final step in a litigated case in which the issue of such contravention is specifically alleged by one of the parties and cannot be avoided by determination of that case on any other ground.

The dual sovereignty scheme of American government created the need for some mechanism by which jurisdictional disputes between the national government and the states over allocation of constitutional exercise of power might be resolved with finality. The federal Constitution might have expressly conferred upon the Congress the obligation of such determination or might have created some other mode of resolution, as by a consultation among or a referendum vote by a fixed proportion of the several states. The Constitution, however, is silent. The judge-made doctrine of judicial review filled the gap. Chief Justice Marshall of the United States Supreme Court wrote in 1809: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States and destroy the rights acquired under these judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all . . ."

From time to time this power of final determination of the meaning of the Constitution in resolution of federal-state conflicts has aroused sharp challenge from citizens whose economic or regional or class interests have been adversely affected by a particular court decision upon the conflict presented in a litigated case.

Judicial review is also exercised for somewhat different historical reasons over legislative, judicial and executive acts within the same unit of sovereignty, where there is no issue between federal and state governments. The federal Constitution expresses the command that it "shall be the supreme Law of the Land." The federal Congress could have conceivably been designated the final arbiter of the question whether its own statute or an act of the executive branch was or was not in conflict with the federal Constitution; the states might have claimed the same power for their legislatures with respect to their own constitutions. Early in our history, however, the claim of the courts to be the final authority of determination was asserted and has long been accepted. This implements the command of the Constitulion that "the Judges in every State shall be bound thereby anything in the Constitution or Laws of any State to the Contrary notwithstanding."

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* There are a few exceptions, of collateral nature, to this concept of invalidity *ab initio*, such as preservation of property interests of substance, which have been created in reliance on and by operation of the statute before the judicial invalidation.

Courts have at times been prone to exercise this power of striking down legislative acts as unconstitutional. Criticism of the courts for so doing becomes shrill, and proposals are put forth to curb their powers. But judges die or resign, and are succeeded by others. The edge of the judicial sword becomes dulled and the way is found to reconcile statute with constitution.

A QUESTIONNAIRE ON THE RULE OF LAW

A. A Concept of the Rule of Law:

For the purposes of this comparative study, the "Rule of Law" is:

1. That body of legal precepts governing
2. those institutions vested with appropriate legal power, and
3. those legal procedures by which those precepts may be applied by those institutions –

which together are designed to effect the protection of essential interests of individuals guaranteed by our society through limitations on the authority of the State. The precepts thus embodied in law are thereby recognized to be basic law establishing the fundamental legal rights of substance. (This framework of the inquiry does not *per se* identify or prescribe standards for the determination of what are the "essential interests of individuals." Criticism and alternative formulations of this concept are invited.)

B. Elements of Basic Law:

1. What are the parts of basic law (U.S.A.) in which are found the several essential elements of the Rule of Law as defined in A above? (Constitutions; laws, rules and regulations of the legislative and of bodies created pursuant to law; decisions and rules of court and of bodies directly responsible to courts. Primary emphasis on federal provisions and features, with collateral attention to parallel or special provisions of (representative) states and local authorities).

2. What are the institutions that are vested, by the parts of basic law mentioned in B(1) above, with appropriate legal power to assert or to enforce the fundamental legal rights of substance ("legal precepts") embodied in the Rule of Law as defined in A above?

3. By what parts of basic law mentioned in B(1) above are the institutions mentioned in B(2) above, directly or indirectly created, and from what parts do they derive their authority?

4. What are the principal procedures by which the fundamental legal rights of substance ("legal precepts") embodied in the Rule of Law as defined in A above, may be effectively invoked and applied by the institutions mentioned in B(2) above? (Judicial review, including injunctions of prohibition and affirmative mandate, and "declaratory" judgments; overruling of prior decisions; legislative declarations and resolutions; petitions for interpretation and instruction, etc., etc. It is suggested that *names* of writs and particular forms of action

be avoided as confusing, e.g., "*certiorari*", "*quo warranto*","*prohibition*", etc.)

5. What parts of basic law mentioned in B(1) above make provision for the principal procedures mentioned in B(4) above?

6. What parts of basic law mentioned in B(1) above recognize and provide for the fundamental legal rights of substance ("legal precepts") embodied in the Rule of Law as defined in A above? (Enumeration of *particular* rights of substance and of the *details* of procedure are reserved for the following portions of the Questionnaire.)

C. Constitutional Limitations:

1. Which portions of the Rule of Law as defined in A above are embodied in (U.S.A.) Constitutions, federal and state (commonly), i.e.:

a. Fundamental legal rights of substance as limitations on the authority of the State?

b. Institutions vested with legal power to give effective protection to those rights?

c. Procedures essential to the invocation and enforcement of those rights?

2. a. Are the procedures mentioned in C(1) c above adequate for the effective protection of the fundamental legal rights of substance mentioned in C (1) a above?

b. If not, which ones are inadequate? How would you supplement or improve them?

3. Which of the provisions mentioned under C(1) above restrict:

a. The power of the legislative to enact statutes or to delegate to other bodies the power to make ordinances, decrees or regulations?

b. The power of executive and administrative authorities (organs) to make ordinances, rules and regulations, and to pronounce decisions affecting individual rights?

c. The power of judges to render decisions and to make rules and regulations directly or by delegation of power in the exercise of discretion and judicial judgment?

4. By what procedures and before what body may statutes of the legislative, rules, regulations and decisions of executive and administrative authorities, and decisions of lower ordinary courts and courts of special jurisdiction be declared invalid or be set aside as inconsistent with the limitations of C(1) above? (Cf. E(1)c and E(2)d. Judicial review; finality and non-reviewability of some administrative decisions).

5. To what extent do you consider these limitations (C(3) above) and the applicable procedures for their invocation or enforcement (C(4) above) essential to the maintenance of the Rule of Law? (Function of the judicial process, through decisions in litigated cases, in law-making or "discovery". A statute, an ordinance, decree or regulation found to be "constitutional", but "unconstitutionally" applied. *Stare decisis*. Distinction between "legal" rights and "political" rights).

6. a. Is a particular procedure provided for revision of the limitations mentioned in C(3) above? (Constitutional amendment process, federal and state).

b. Can this procedure (C(6)a above) be circumvented: e.g., by increasing the size of the legislative to provide a required majority?

7. What fundamental legal rights of substance embodied in the Rule of Law as defined in A above are found in those portions of constitutions mentioned in C(1) above? (See "N.B." to B(6) above).

D. The Legislative and the Law:

1. What fundamental legal rights of substance embodied in the Rule of Law as defined in A above are (if any) created by the legislative?

2. What procedures essential to the invocation and enforcement of fundamental legal rights of substance are (if any) created by the legislative?

3. What powers has the legislative to punish (a) its own members, (b) members of the general public?

4. What powers has the legislative to examine under oath (a) its own members, (b) members of the general public?

5. In what respects does the procedure adopted under D(3) and (4) differ from the procedure followed in the ordinary courts? (Subpoena power; disclosure of evidence; confrontation and cross-examination; right to be heard, etc.)

(Generally, Cf. C(1), (4), (5) and (7) above).

E. Administrative Authorities and The Law: (Cf. footnote to this topic E)

1. Legislative power

a. Have any administrative authorities (organs) the right to make laws (statutes, ordinances, decrees or regulations) by virtue of their own authority?

b. Have any administrative authorities the right to make laws (E(1)a above) by virtue of authority delegated to them by some other organ or organs of the State? If so, by what organ or organs of the State is such authority delegated?

c. By what procedure (if any) and before what body (if any) can the legality of a statute, ordinance, decree or regulation made by an administrative authority be determined? (Cf. C(4)).

d. What fundamental legal rights of substance embodied in the Rule of Law as defined in A above are (if any) created by administrative authorities (organs)?

e. What procedures essential to the invocation and enforcement of fundamental legal rights of substance are (if any) created by administrative authorities (organs)?

2. Activities (other than legislative) of Administrative Authorities (organs):

a. By what procedure (if any) can an administrative authority be compelled to carry out a duty which is imposed upon it by law?

b. By what procedure (if any) can an administrative authority be restrained from carrying out acts:

(1) in excess, or misapplication, of powers vested in it by law?

(2) which would, if committed by a private individual, constitute a legal wrong?

c. What remedies (if any) are available to the individual who has suffered damage as a result of acts of omission or commission falling under E(2)a and b above? In particular:

(1) against whom (e.g., the wrong-doing agent, the responsible organ or the State)?

(2) if against or concerning the State or a State organ, does the complainant have the same facilities for making good his case that he would have against another private individual where the State or a State organ was not concerned (e.g., compulsory production of State documents as evidence)?

d. By what body or bodies are the remedies available under E(2)c above determined? (Cf. C(4)).

3. Administrative Authorities (organs) and Criminal Prosecutions:

a. What persons or body are ultimately responsible for the initiation or discontinuance of criminal proceedings?

b. Does such a person or body enjoy a discretion in the exercise of the powers given under E(3)a above?

c. For what period can the authority responsible for criminal prosecutions hold an accused person in confinement without recourse to the court?

d. In the procedure applicable to criminal trials does the prosecutor have the same rights and duties, as regards presentation of the case and production of evidence, as the accused person?

e. What person or body (if any) can pardon or suspend the sentence of a convicted person? Is the exercise of such power subject to review or veto by any other authority (organ)?

4. The Legal Position of the Police:

a. What organ of the State is ultimately responsible for the conduct of the police?

b. What powers of arrest and confinement of accused persons are available to the police which are not accorded to the ordinary citizen?

c. What limits, directly by a legal prohibition or indirectly by exclusion of the evidence so obtained, are imposed on the methods employed by the police to obtain information or to extract confessions? (Wire-tap evidence: federal vs. state rules).

d. To what extent are the remedies dealt with in the answer to E(4)c above applicable in particular to the illegal acts or omissions of the police?

5. What fundamental legal rights of substance embodied in the Rule of Law as defined in A above are (if any) created by administrative agencies in the exercise by them of any lawmaking function? (Cf. E(1)a above).

Note: "Administrative" as used here includes "executive": i.e., both direct sub-divisions of the executive branch and "independent" (non-departmental) administrative agencies.

F. The Judiciary and The Law:

1. What fundamental legal rights of substance embodied in the Rule of law as defined in A above are (if any) created by the judiciary, directly or by power delegated by the judiciary? (Bar associations; other bodies).

2. What procedures essential to the invocation and enforcement of fundamental legal rights of substance are (if any) created by the judiciary, directly or in exercise of power delegated by the judiciary?

3. By whom are the judges appointed or otherwise selected for office?

4. Under what conditions can they be dismissed? Have any judges, in fact, been dismissed in the last ten years? (Give particulars, if possible). (Impeachment; recall).

5. By whom are the judges promoted?

6. What personal qualifications are required of judges? To what extent do laymen participate in the judicial process; what professional guidance are they given?

7. By what legal instruments are the conditions laid down in F(3-6 inclusive) guaranteed? Is any special procedure required to change them?

G. The Legal Profession and The Law:

1. What person or body is responsible for admission to, supervision of and expulsion from the practicing legal profession?

2. What factors (if any), other than the professional ability and moral rectitude of the lawyer in question and the extent to which the supply of lawyers is adequate to the demand, are allowed to influence the decisions made by the person or body mentioned in G(1) above?

3. Subject to what limitations, directly imposed by the law or indirectly (as, for example, by the threat of a diminution in his future practice), is a lawyer free to advise his client and to plead on his behalf in judicial proceedings?

4. Under what circumstances is a lawyer permitted to refuse to accept or to relinquish a brief (retainer) from a client?

H. The Individual and the Legal Process:

1. To what extent has the individual citizen the right to be heard on all matters, however determined, in which his life, liberty or property are concerned? (Differentiation in right to be heard between procedures in courts, before administrative authorities (organs), legislative committees. Rights to: appeal, subpoena, confrontation, etc., before the above organs).

2. To what extent has the individual citizen the right to legal advice and representation in the matters mentioned in H(1) above?

3. To what extent is the right (if any) under H(2) affected, if the individual has not the material means to secure the legal advice or representation necessary? (State appointment and payment of counsel; adequacy of private funds; legal aid ; public defender).

I. General Question (to be answered separately in respect of B-H above):

To what extent (if at all) do you consider that the answers to this questionnaire reveal a situation in which the fundamental principles of the Rule of Law, as you understand them, are endangered or ignored or are inadequate as presently developed? (Extra-legal pressures: intimidation, boycott, private-group censorship, etc.).

J. Additional Information or Comment:

What other questions should in your opinion be asked (and answered) in order to give a more complete picture of the way in which the Rule of Law is understood and observed in your country? (Function of judicial judgments as an institution and method of lawmaking; of cross-examination in maintaining the Rule of Law; of the practice of dissent in judicial judgments; of the "best evidence" rule).

November 30, 1956

A. THE CONCEPT OF THE RULE OF LAW IN THE UNITED STATES

Societies, including those of the free modern world, differ widely in the formal structure of their governments, in race, in predominant religions, in occupational and economic gravitations. There are monarchies and republics; federations and centralized orders; Christians of many branches and sects, Moslems, Buddhists, Hindus and Jews; industrial, agricultural, sea-faring folk. In contrast to this kaleidoscope many of these regional or national units do reveal the common characteristic of a substantial measure of formalized personal liberty within the framework of order and the pursuits of daily living. The nature of liberty, the reason – historical, metaphysical, spiritual – for the satisfaction which liberty affords, the needs which it strives to meet, are gropings beyond the scope of this essay. We are concerned solely with the forms which these freedom-of-living relations between the individual and the government and between the individual and his neighbors have assumed in the legal fabric of their particular society. What is the stuff of this bench-mark of representative free societies?

In the stream of the Anglo-Saxon legal tradition, which is of much wider reach than merely the English language, the term Rule of Law subsumes the accepted fundamental legal rights, privileges and immunities of the citizen-subject in these relationships and arouses a reasonably common understanding. This Statement of the American concept and practice – meaning in the United States of America – is one facet of the broader attempt to find, distill and make public for wider understanding through the legal profession the elements of the Rule of Law which are catholic to certain selected national and regional units of a commonwealth of legal culture.

As the Introduction has endeavored to emphasize, the presentation here offered is of the Rule of Law substance embodied in American law today, – law known to, invoked and applied by American lawyers and judges, with much aid from the teaching branch, and by the executive branch. Those who have participated in assembling the materials for this presentation would be the first to admit, it is believed, that even within the legal caste informed and thoughtful conclusions will differ on the precise content of our Rule: which rights are truly fundamental or are still peripheral; whether the blurring of the lines in the separation of powers structure of our government and laws bodes a weakening of liberty under law; whether our written constitutions do afford the most reliable and the more permanent dyke against encroachments by the state. Nor would our American participants in this collective committee undertaking want this Statement to be taken as a proclamation of self-evident superiority of the American pattern over all others.

This is what the American functional scene has to offer, what has been evolved through 200 years of effort and adaptation. We know that no system is perfect, that the gears of our own mechanism at times grind audibly, that some innocent men – rarely among the greater number – are convicted, that justice is an approximation. Our profession is studded with critics and revisionists, yet collectively we have pride in the framework of rights and guarantees which has been put together here.

Some of our collaborators feel that the Rule of Law in the sense here discussed exists in its fullest development under governments having written constitutions which contain a limited delegation of powers to the state and impose explicit restrictions on the power of the state to infringe upon fundamental rights, and that this is particularly true for the United States. Others may feel that this is too narrow a concept and that there may be equal security of these essentials in a society in which the principles of such protections have been fully worked out, are embodied in authoritative statutes, court decisions and administrative rules and practice, and where all of these exist in a temperate climate of deep respect for liberty and self-restraint in the exercise of powers that are unchecked by formal constitution prohibitions.

In the United States constitutional liberty is of two kinds, that which in the generality is framed by political checks and balances upon government action, and that which in specific instances of encroachment is assured by the protecting arm of judicial review of statutes, acts of administrative agencies and lower court decisions. The "checks and balances" of the federal Constitution are found in express denials of specific power, e.g., the prohibition against certain types of possible statutes and in the general reservation to the people and the several states of all powers not expressly conferred by the Constitution upon the federal government. Examples of prohibition as expressed limitations on the power of Congress are those against abridging the freedom of the press or the right to establish any religion, against denial of *habeas corpus*, forbidding bills of attainder and *ex post facto* laws. These matters will be treated more fully in the later sections; the few here cited are illustration only.

The state constitutions also contain many similar restrictions upon and denials of power to the state executive and legislative branches. The pattern of limitations in these respects at the local level of sovereignty is substantially uniform between the states and with the federal Constitution.

As has already been sketched in the Introduction, our study is concerned with the three elements of the Rule of Law: precepts recognized in law or fundamental legal rights, institutions through whose action these rights can be maintained and adapted to changed conditions, and procedures by which these rights can be invoked and

made effective in practice. What follows is the exposition of these three interwoven elements.

Some confusion may be created by the differentiation assumed by our definition and carried through the topical breakdown of our text between "rights" and "procedures." It must be conceded that if there be no legal institution by whose action a "right" may be recognized or no "procedure" by which it may be applied and enforced, there is little left of the particular concept other than an intangible thing supposedly but not in reality embodied in law.* It then exists, if at all, only in the speculative realm of ultimate values. If, however, enforcement procedures exist that are reasonably adequate in availability, cost, time required, etc., then the procedures can be viewed as embracing most of the fundamental rights which they serve. For example, the remedy ("Writ") of *habeas corpus* may be held to include all the substantive rights which this form of court procedure is designed to protect.

To illustrate this dual character, explanation of *habeas corpus* may be helpful. This right or remedy, which is viewed by many students as the most important single writ in the common law and in American constitutional development, is the power of the individual under arrest, imprisonment or other form of detention to obtain an order, on petition to a court of general jurisdiction, requiring the public authorities to produce him in person before the court and there to justify the jurisdictional basis of his detention. It is a summary civil remedy. It cannot be expanded into a general review or correction of errors in the administrative or judicial proceeding.

On the other hand procedures may be defective, they may lag behind the demand created by newer conditions and the desired validation of a right already identified and recognized by a judicial or administrative body. The rights with which we are concerned derive chiefly from constitutional prescriptions; the enforcement procedures more often derive from statutes or regulations, or the body of common law tradition found in court decisions, and are therefore different in origin. It seems on balance more exact to treat rights and procedures as of separate categories.

A variant of the structure of the Rule of Law as summarized in this Topic A above is offered by one of our participating groups in these words:

"1. Freedom from private lawlessness provided by the legal system of a politically organized society;

"2. A relatively high degree of objectivity in the formulation of legal norms and a like degree of even-handedness in their application;

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* "The history of liberty has largely been the history of observance of procedural safeguards." *Mr. Justice Felix Frankfurter*, 1943.

"3. Legal ideas and juristic devices for the attainment of individual and group objectives within the bounds of ordered liberty;

"4. Substantive and procedural limitations on governmental power in the interest of the individual for the enforcement of which there are appropriate legal institutions and machinery."

B. ELEMENTS OF BASIC LAW IN THE UNITED STATES

1. The Formalized Sources Of Rights And Institutions: Constitutions, Statutes, Court Decisions, Administrative Regulations

We turn to examine the structure of the American system of law from which the rights, institutions and procedures derive their existence and authority. "Basic law" as here analyzed means the aggregate of constitutions, statutes, decisions of authoritative judicial tribunals interpreting the constitutions and statutes, substantive and procedural rules and regulations adopted by institutional bodies other than the legislature, treaties entered into between the United States and foreign countries insofar as they affect (rarely) legal rights of substance. These are the sources in the immediate, not the historical sense.

(a) Although thirteen of the present forty-eight states of the Union were in existence as colonies of Great Britain with their own forms of government before the Union came into existence under the federal Constitution in 1789, it was the "people" of those thirteen areas and not their governments which formed the Union by ratification of the Constitution proposed by a constitutional convention. By its express terms the Constitution is the "supreme Law of the Land," and within the scope of the delegated powers and jurisdiction of the federal organization, the Constitution is the authoritative residuum of sovereignty, subject only to amendment by procedures specified in it. The Constitution takes precedence over the states, always within the limits of federal rule. It is unnecessary here to map those limits, for they are matters of a political rather than a legal order.

To say that the federal Constitution and the three branches of its government – legislative, executive and judicial – are supreme in their limited orbit calls immediately for recognition of the important part which the state governments play in the life of every American citizen through the corresponding fibers of their parallel elements. The fabric of rights, institutions and procedures found in the structure of the states closely follows those of the federal bodies. The average citizen has far more legal "business" (other than issues of constitutional import) with the organs and the men of state and municipal governments than with federal courts, agencies and committees of Congress. For every case decided by a federal court, there are a hundred in the local state courts.

If one bears in mind the relatively simple themes that rights, powers and limitations of the federal government are within the term of their prescriptions supreme everywhere in the country, that most of the fundamental legal rights of the citizen which are specified in the federal Constitution ("legal" as distinguished from political) are repeated in the state constitutions, and that alleged invasions of federal

legal rights may be challenged in the state as well as in the federal courts by use of appropriate state court procedures, it should not be difficult to understand why the institutions of the forty-eight states loom larger and closer in daily life than do the federal counterparts which derive their overriding, if always limited, authority from the national sovereignty.

Our attention, however, must be centered on the federal basic law because it is the principal expression of formal sovereignty and because we cannot devote space to the forty-eight state government structures. In spite of the considerable variations of culture patterns in the different parts of our country and some differences in specifications of rights and procedures within the state system, there is a basic uniformity in nation and state in most of the essentials.

Within the scope of our principal source of rights, the federal Constitution, we note at once that some of the provisions are narrow, specific and reasonably clear. For instance, Article III, Section 3, specifies the quantum of evidence necessary to sustain a conviction of treason. Others of broad wording have been narrowed by judicial decision. The Article I, Section 9 prohibition against *ex post facto* laws has been interpreted to apply only to laws of criminal sanction. Some provisions have been expanded by judicial interpretation almost beyond the original apparent meaning. The Fifth Amendment guarantee against self-incrimination refers in words only to criminal case prosecution – "nor shall be compelled in any criminal case to be a witness against himself"; it is now held to protect witnesses in civil as well as criminal judicial proceedings, and witnesses in non-judicial proceedings such as legislative investigations. These examples bear testimony to the flexible nature of the judicial function.

Narrow or broad, these provisions are chiefly limitations on the power of the federal government; but some prohibitions are in terms specifically applicable to the states. Others have been extended by judicial interpretation to state government action. Many of the specific limitations and prohibitions will be discussed in the next principal section of the Statement. At this point we are examining sources rather than rights and remedies.

With some exceptions these guarantees are quite general in nature, not self-evident nor self-executing. It is in greatest part the courts which have given explicit meaning to their generality, the legislature which has provided the implementing procedures where the common law of judicial evolution has lagged in adequacy of remedy.

Most of the principal fundamental rights are found in the first ten amendments of 1791, known as the "Bill of Rights", and in the Fourteenth Amendment. There are some other important provisions, however, in the body of the original instrument.

The Declaration of Independence is not accepted by our courts as a juridical source of individual rights – "source" in the sense of

embodiment in law and the subject of judicial application. The Declaration was, of course, a highly important stage in the long historical perspective which goes back to Magna Charta of 1215.

For a thumbnail summary of how the aggregate of the fundamental rights of substance and procedures found in the Constitution permeates the structure of our government and finds the channels of action, it may help to recall the chief politico-legal characteristics of the structure. We have the concept of federalism, the doctrine of separation of powers, and the concept that ours is a government of laws and not of men, as opposed especially to any theory of unlimited power in the Presidency.

Enough has been said of federalism and separation of powers between the three coordinate branches of the government. A few words may be added concerning limitations on the Presidency.

The direct conduct of the relations of the United States with other governments lies exclusively with the President, yet treaties negotiated by him must be ratified by the Senate of the Congress. His special powers in war time are beyond the scope of this paper. He has the power of appointment to many important offices but the Congress may vest this appointing power to "inferior" offices in the courts or heads of executive departments. The President may be removed from office by legislative impeachment for treason, bribery "or other high crimes and misdemeanors" – and one President was so tried but acquitted. Any act of the President of a legal nature other than in time of war is subject to review by the courts on a challenge to its constitutionality; more than one act of many Presidents has been set aside by the courts and that decision accepted by the President then in office. The President is subject to budget limitations imposed by Congress and there are a number of independent agencies created by and directly responsible to Congress which operate in the general field of foreign relations.

(b) Like the other organs of government the legislatures, federal and state, derive their authority from their respective constitutions, and all statutes are subject to their commands and prohibitions. Again it is the courts which on a challenge squarely presented in a litigated case – generally between the citizen and an organ or official of government – pronounce upon the constitutionality of a legislative or administrative act.

The constitutional provisions are for the most part so general in nature as to require legislative implementing to be fully effective. Congress, under the Constitution, has created the inferior federal courts in which suits are brought and determined – between citizens of different states on many issues of law, on the validity of patents and claims in admiralty, assessments of federal taxes, the sanctions or alleged violations of federal statutes or constitutional rights. Congress regulates appellate jurisdiction in these courts, including that of the

provide continuing protection to basic rights by indirect restraint upon possible excesses and abuses.

There is one solid bulwark of protection. A claimant who is entitled to a "hearing", as discussed later herein, may obtain judicial review of agency action which denies all hearing to him, after a regulation or decision has been promulgated. "Due process" cannot be abrogated, whether by a court or a creature of the legislature. This is but further illustration of the power of the judiciary, elsewhere discussed, as a profoundly important, residual part of basic law.*

2. The Institutions Vested With Legal Power To Assert And Enforce Fundamental Legal Rights Of Substance Embodied In The Rule Of Law; The Creating Sources Of These Institutions

(a) The courts are the principal institution. "The Judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (Article III, Sec. 1 of the federal Constitution). The federal judges are all appointed by the President, subject to confirming approval by the Senate. Congress has the sole power to determine the number of the judges of all the federal courts. In the Supreme Court the number under successive enactments has varied from six to ten; since 1869 it has been constant at nine.

At the next level and created by acts of Congress under the Constitution's mandate for "such inferior Courts" are eleven Courts of Appeal, and below them are the District Courts. Each Court of Appeal, for a specified area "Circuit", has jurisdiction over appeals from decisions of the Districts Courts of two or more states, except the Court of Appeal for the District of Columbia, the national capital. There are 128 District Courts in the continental area and the outlying dependencies.

Federal Courts of Appeal ordinarily sit with a bench of three judges, District Courts with a single judge. There are at present approximately 300 judges of these Courts of Appeal and District Courts in office. The federal judicial power extends by express provision of the Constitution to a wide variety of causes, all of which are within the scope of the federal powers of the Constitution.

When an individual feels that some action of government, federal or state, has infringed upon the rights guaranteed by the Constitution, he may bring his suit in a federal District Court if the right in question is a federal right, or otherwise in a state court. Appeal may be taken as of right from a decision of the federal District Court to the Court of Appeal, and by permission of the Supreme Court, to the latter.

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* Cf. the immediately following sections 2 and 4.

Alternatively, he may commence suit in a state court, and a decision of that court holding the statute or other state action is valid may be appealed directly to the United States Supreme Court, on an issue of federal law.

There are other federal courts with special, limited jurisdiction. Money claims against the government may be prosecuted in the Court of Claims, the assessment of federal taxes in the Tax Court; customs matters in the Court of Customs Appeals.

The state courts are all created by the several state constitutions. They follow in general the federal pattern of inferior courts of general jurisdiction, civil and criminal; commonly but not universally an intermediate court of appeal; and a single, final supreme court within the state.*

(b) The federal executive branch includes certain officers and agencies which together may be ranked as an "institution" or "institutions" having power to assert and enforce the rights of citizens. "The executive Power shall be vested in a President of the United States of America." Other than powers specifically delegated which are not directly relevant to the subject of our study – such as being commander-in-chief of the army and navy, negotiation of treaties, appointment of diplomatic representatives, judges of the Supreme Court and military officers – the Constitution is almost totally silent concerning the scope of executive powers.** One clause of the Constitution, however, is the all-important fountainhead of the President's power: "he shall take care that the laws are faithfully executed . . ." He also has the power to pardon for offenses against the United States, except in cases of impeachment.

The executive "departments" and "agencies" are all created by successive acts of Congress, either directly *eo nomine* or indirectly by the President in exercise of delegated powers. Some are directly responsible to the President, others to Congress. The function of the first group is solely executive – the application and administration of the laws. Some of the other agencies, however, exercise quasi-judicial powers. For our examination into the Rule of Law the most important of all these bodies is the Department of Justice, headed by the Attorney General of the United States who is appointed by the President. Courts and their judges, however, are not agencies and servants of the Department of Justice; they constitute one of the three independent, separate, top-level branches of the government.

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* Some inferior courts of local municipal jurisdiction derive their existence from permissive state legislation.

** The President has the right to refuse his assent to any act of Congress. If refused, the act does not become a law unless repassed by two-thirds of both Houses. This right of veto is one of the important "checks and balances" of the structure – upon intemperate or unwise legislation.

An injunction of executive mandate is an order by the court commanding that an affirmative act be performed by the defendant public body or official to redress a presently continuing wrong to the complainant. Courts are more reluctant to grant this type of discretionary relief because of an inherent difficulty, major inconvenience or relative unfairness in enforcing the order; if it is denied for this reason, the complainant may recover money damages.

The writ of *habeas corpus* is a special form of affirmative procedure initiated by an individual under arrest or in confinement and prosecuted against the public official who has that person behind bars, to determine whether he is being lawfully held. When presented to the court, a prompt hearing is held. If the demand for release is denied, the prisoner is remitted to the custody of the official. If the demand is found to be just, the court directs release upon the finding that there has been a constitutional infirmity in the original detention. *Habeas corpus* is sometimes viewed as a fundamental right of substance, sometimes as a procedural right; it is also discussed earlier in this study, (p. 29).

Declarations of right and protective public authority are a third category, of many forms. Between private litigants the courts will grant the relief of a declaration of rights only if there is an actual controversy, as for example by appointing a guardian to represent minors. Public officials may intervene or sue on behalf of charities or on behalf of individuals to challenge the invading acts of a corporation or other holder of a public charter, or of a public officer.

The fourth type is suits for compensation, in two forms. The action may be one to restore the complainant to his prior situation by delivery of property or by rescission and restitution. The other form is to endeavor to fulfill the expectations of the parties by award of money damages for a tort or a breach of contract.

The fifth type is government criminal prosecution for unlawful acts, punishable by fines, imprisonment, sentence to death, or forfeiture of property. Other sanctions may be imposed by the court to implement its orders in enforcing fundamental legal rights, for example by fine or imprisonment for a contempt of court by refusal to obey its orders.

Assertion of constitutional rights may be made by individuals as parties in any of these forms of procedure before the courts. Most of these procedures are inherent in the unwritten traditional power of courts of justice; a few, such as the penalties for offenses against the criminal law, are created or implemented or made explicit by statute. Criminal offenses against the federal authority are solely by virtue of federal statute; there is no federal criminal common law. State law offenses may be either at common law or created by statute.

Legislative action may be invoked to protect rights. The Constitution guarantees the right of every citizen to petition his representa-

tives in Congress for a "redress of grievances." State constitutions generally grant this right to petition the local legislature. In many states citizens may initiate legislation by the "initiative and referendum", i.e., by direct proposal of a bill to the legislature for formal enactment, or approval or disapproval by direct popular vote of an enactment. In many small communities legislation affecting important legal rights may be introduced and passed upon in "town meetings" in which the local citizens vote directly and not by representatives.

"Private" legislation is sometimes resorted to in order to redress a specific wrong suffered at the hands of the government, or to confer a specific right not otherwise available under existing law. This action is, however, much less common than before the statutes, federal and state, which waive the immunity of the sovereign to claims and suits against it – such as the federal Tort Claims Act and its counterpart in many of the states.

Finally, the administrative agencies are very important organs in the enforcement of the Rule of Law with respect to which they have jurisdiction, by exercise of their quasi-judicial function and procedures analogous to those of the courts. Legislation in recent years has been framed and adopted to bring about much more uniformity of procedures than formerly existed during the formative stage of these agency functions, and to insure that the basic principles of fundamental fairness will be observed by these bodies.

4. The Parts Of Basic Law Which Make Provision For The Principal Procedures

The federal Constitution is the first and primary source of these procedures. As noted, jury trial of criminal offenses, "due process" and *habeas corpus*, viewed as procedures, are specified in the Constitution. Statutes supplement and implement the federal and state constitutions.

Rules of court are the details, the finer parts of the implementing machinery of statutes and judicial custom. The federal rules of uniform civil procedure for all federal courts became effective in 1938 and federal rules of criminal procedure in 1946, adopted by the Supreme Court under express authorization of Congress – a confirming, rather than an original grant of power.

Though some of these constitutional provisions are self-executing, others require implementation by legislative action, and in some cases, legislative declarations and resolutions may themselves take on the nature of enforcement.

(c) *Essential Procedures*

While neither the federal nor the state constitutions recite in detail the procedures for invoking legal rights of substance as limitations on governmental authority, they prescribe in general that procedures, whatever their particular form, must conform to "due process of law", afford "equal protection of the laws", and other specified safeguards that are discussed under H(1). The emphasis on concepts made for an original flexibility of wording which, coupled with judicial interpretation, has enabled the federal Constitution to remain a living document without frequent or radical amendment.

2. Do These Procedures Afford Adequate Protection?

In the main, the answer to this question is an emphatic affirmative. This results from the broad scope and quality of procedural legislation, and from adherence to the doctrine of separation of powers among the executive, legislative and judicial organs of the government, tempered by a system of checks and balances on these powers. Remedial legislation and separation of function together are designed to and do in fact go far to insure that government shall be by law and not by individual judgment or whim. Furthermore, since every government is one "of men" in the sense that no part is any better than the man to whom it is entrusted, it becomes necessary at times to implement by statutes provisions of the constitution for the purpose of providing means for the enforcement of constitutional rights where means outside of the constitution itself seem to be required.

An illustration of this is the Civil Rights Acts which provide two remedies: criminal punishment of any private person or state officer who interferes with any individual's exercise of civil rights secured in the original articles and the Bill of Rights of the federal Constitution; criminal punishment of any state officer who interferes with any individual's exercise of civil rights secured by the Fourteenth Amendment. Another example is the eminent domain statutes of the United States establishing the means by which an individual receives the just compensation to which he is entitled under the Constitution for the public taking of his property. So also the legislation conferring rights upon individuals to sue the otherwise immune sovereign government to enforce its duties arising out of contracts with, or torts committed by, the government, which is thus placed in much the same position as a private citizen before its own courts. Other

statutes regulate procedure before government officers or boards in order to secure fair hearings to individuals appearing before them. The Code of Military Justice prescribes methods and procedures for the disposition of charges against military personnel and other persons subject to military justice calculated to provide impartial administration of military justice. Further examples are found in the laws regulating the civil service, so as to secure to government employees fair hearings and to prevent arbitrary dismissal without sufficient cause.

3. Constitutional Limitations On Governmental Authority

(a) Upon Delegation of Legislative and Rule-making Power

The fundamental structural principle of the separation of powers between the three branches of government and the constitutional vesting of "all legislative powers" in the legislature are the bases for the doctrine that the law-making power shall not be delegated by the legislature to either of the other branches or any subordinate body thereof. This, however, does not bar "delegation" of rule-making power where reasonably specific standards are provided by the legislature. There is a distinction of substance, more than merely verbal, between "legislation" and "rule-making". Cf. 3(b) *post* and E (1) for further discussion.

Many of the constitutional limitations such as those mentioned in C(1)(a) above apply directly to the legislative branch of government, most of these being concerned with substance and not with procedure. There are additional limitations upon state legislative powers in both the federal and state constitutions, noted earlier.

The Thirteenth Amendment, which prohibits slavery and involuntary servitude, limits both congressional and state legislative power. The same is true of the Fifteenth Amendment, which is concerned with voting rights.

Without enumerating all the particular provisions of state constitutions which serve as substantive limitations upon state legislative power, it is to be noted that some of these provisions have no counterpart in the federal Constitution. For example, provisions in state constitutions limiting special and private legislation are common. Again, some state constitutions do not stop at a ban on *ex post facto* laws as applied to criminal prosecutions, but also forbid all retroactive legislation; in some state constitutions there are provisions protecting collective bargaining in private employment. These are but examples.

Substantive limitations on action by legislative bodies may apply to the processes of lawmaking, as well as to legislation itself. In a recent decision by the Supreme Court Chief Justice Warren said, with reference to the work of congressional committees: "The First Amendment may be invoked against infringement of the protected freedoms

state. If the court originally hearing the claim decides adversely, it is generally possible to appeal such decision to a higher court for review. Statutes, in some instances, may also be reviewed in proceedings for a declaratory judgment; in Massachusetts the highest tribunal, on occasion, issues advisory opinions as to the legality of proposed legislation. Such a procedure is a rarity in the American system.

Statutes may also be called into question through the device of seeking an injunction to restrain an official charged with the statute's enforcement from implementing it. In the federal system the three-judge district court provides an expeditious means for obtaining a decision on such matters with a direct appeal to the United States Supreme Court. It is also possible to make an indirect attack upon a judgment by questioning its efficacy in other and subsequent legal proceedings in which a person who originally obtained the judgment seeks to use it as the basis for enforcement.

This expanded treatment of procedures should not lead to the view that in the American system they are an end in themselves. They are for the most part only other means, however essential, to validate the concepts which have become crystallized in accepted fundamental rights of substance.

Since the decision of Chief Justice Marshall in *Marbury* v. *Madison* in 1803, the United States has been committed to the theory of judicial supremacy in the interpretation of the Constitution. Litigation involving constitutionally guaranteed legal rights of substance may be determined initially in state courts, with ultimate resort to courts of the federal system, culminating in application to the Supreme Court of the United States for enforcement of the right. Both the theory of judicial supremacy in the interpretation of the Constitution and establishment of the supremacy of the highest federal court over the state courts are factors which have provided a strong unifying influence to the development of the country.

5. Constitutional Limitations And Procedures Essential To The Rule Of Law

A number of substantive and procedural limitations to which reference has been made are essential to the maintenance of the Rule of Law as understood in the United States, but it is difficult to specify which of these are indispensable. Certainly they would include, at the minimum, the guarantees of the First Amendment and procedural due process as developed by the Supreme Court of the United States. The fundamental objective is that the individual be protected in his liberty of mind and person, in his right of suffrage, and in his opportunities for the realization of his potentialities, from arbitrary exertion of government power.

6. Revision Of The Constitutional Limitations

(a) *Particular Procedures*

Procedures for such revision are prescribed in the portions of the federal and state constitutions dealing with amendments.

Under the federal Constitution Congress itself must propose amendments whenever voted by two-thirds of each House. It must call a convention whenever requested by the legislatures of two-thirds of the states. In practice, all proposals have been by Congress, by joint resolutions not requiring presidential approval. To obtain ratification of proposals, Congress must choose one of two methods – either by the legislatures of three-fourths of the states, or by conventions in three-fourths of the states, in either case approval within such time limit as Congress may prescribe. Once Congress has made this choice, neither a state legislature nor the people can change the method or the proposed text. However, if Congress specifies ratifications by convention, each state may provide under its own law for the selection of its convention members.

In state constitutions the methods, both of proposing and of ratifying amendments to them, vary generally from state to state, but fall into the following patterns. Each of these, as well as the amendments themselves, must meet the requirements of the federal Constitution (such as the due process and equal protection clauses) as to state action. (1) Absent constitutional procedural provision, the legislature may prescribe the method either by electorate approval of its own proposals or by approval recorded at a convention called for that purpose and selected as it prescribes. (2) The constitution may prescribe an initiative petition by electors, official filing and publication, submission to ratification by specified number or fraction of favorable votes cast at a general or special election. (3) Where there are constitutional provisions for conventions, some prescribe the manner of convening, etc., while others leave such detail to the legislature to prescribe.

There is a divergence of views as to the legal power and functions of a state constitutional convention: either (1) that it cannot do more than frame proposed state amendments within the limits and on the subjects stated in the call of the convention, and that its proposals become effective only when ratified by the people; or (2) that the convention is free to revise or replace all or any part of the basic law of the state, subject only to previously noted restrictions by the federal Constitution on state law, and that decisions of a convention, properly reached and published, require no further ratification by the electorate to become effective.

State legislatures have no inherent power to propose constitutional amendments. It must be granted by the existing constitution. When granted, the power must be exercised strictly in accord with

D. THE LEGISLATIVE AND THE LAW

1. Fundamental Legal Rights Of Substance And The Legislative

Under the American constitutional system those legal rights of substance which are embodied in the Rule of Law and are commonly regarded as "fundamental" are basic concepts formalized in the federal and state constitutions. The common law as developed by the courts in England and in the colonies before 1789 was the genesis of many of the rights which found authoritative expression in these constitutions.

As has been stated in Topic C, many constitutional guarantees – "fundamental legal rights" – are implemented, supplemented and made explicit and enforceable by legislation. Examples include the Civil Rights Acts of 1875 and 1957, particularizing the guarantees of the Fourteenth and Fifteenth Amendments against invasion by state action; and the Federal Communications Act of 1934, penalizing unauthorized disclosure of certain intercepted communications in interstate commerce as invasions of privacy leading to illegal searches and arrests. The most important federal legislation in this area is the Judiciary Act of 1789 which created the structure of lower federal courts of original and appellate jurisdiction (below the Supreme Court, which is the only court specifically required by the Constitution).*

2. Essential Procedures And The Legislative

The procedures essential to the invocation and enforcement of the fundamental legal rights of substance are created primarily by legislation and judicial decision, to a lesser degree by rules of court and only to a limited degree by the federal Constitution. The Judiciary Act of 1789 and its later amendments created the appellate jurisdiction of the Supreme Court of the United States as the means whereby decisions of lower courts on federal constitutional questions come to that Court for final determination. The details of procedure for federal judicial review are regulated by rules of the federal courts. This procedure varies somewhat from one "circuit" or "district" to another, but is generally uniform as to the principal elements prescribed by rules of the Supreme Court.

Within the states the principal courts are generally created by their constitutions, which tend to be more detailed than is the federal Constitution. Procedures regulated by statute in the federal system are often spelled out in the state constitutions. Again, judicial review procedure is regulated by the legislature. Procedure within the state

* In Article III the judicial power and jurisdiction of the Court are spelled out; but its formal creation and composition were left to legislation.

courts tends generally to be narrowly prescribed by statute, and many experts feel that the courts are granted too little latitude to establish, supplement and correct procedures in the light of their own experience, by the more flexible method of making their own rules.

The federal statutes cited in section 1 of this Topic D illustrate procedures essential to invocation and enforcement of rights. Under the Civil Rights Acts, individuals may sue for money damages and as complainants may instigate criminal proceedings which are formally prosecuted by the Department of Justice.

Relief by injunction against unconstitutional statutes, action of executive officers and administrative bodies, etc., upon complaint of an aggrieved individual, is part of the "equity" jurisdiction of the federal courts created by use of the phrase "suits in equity", in the Judiciary Act of 1789. The courts have construed this Act to refer to suits in which relief is sought according to the principles applied by the English Court of Chancery before 1789. Hence while this highly important form of procedure is based upon federal legislation, its original creation and later development have been principally achieved by judicial decision.*

The *habeas corpus* procedure mentioned in the federal and state constitutions is not defined in them, but is understood and held to refer to the writ as used in the American colonies before 1789. This meaning and use are substantially identical with the British Habeas Corpus Act of 1679.

Declaratory judgment procedures are established solely by statute.

The federal rule barring evidence obtained in violation of the constitutional guarantee against unlawful searches and seizures, (discussed in Topic E, *post*), was established by judicial decision and is now embodied in the Federal Rules of Criminal Procedure adopted by the Supreme Court in 1948.

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* While it is impossible to frame any short and satisfactory definition of equity, it may for our purposes be identified as a congeries of special rights and flexible remedies designed to supplement the more rigid concepts of rights and forms of action in the common law courts, and originally administered by special courts. Equity jurisdiction, always addressed to the discretion of its judges, created, for example, new remedies to forestall an act which would cause irreparable harm of substantial nature for which money damages would be an inadequate recompense; remedies to enforce trusts and other forms of fiduciary obligations, to afford relief to innocent victims of fraud, accidental loss of original documents or mistake, to avoid multiplicity of suits, etc.

Although equity is of judicial origin, in England, statutes have increasingly shaped its contours, many states have abolished the distinction between "law" and "equity" by merging the administration of both systems into a single court, and have created new remedies of "equitable" nature. In the federal courts, equity is still a separate division of the court function, governed by special rules promulgated by the Supreme Court. It has frequently been invoked to protect constitutional rights.

who refuses to obey a subpoena to appear and answer proper questions duly propounded. This inquiry power of each branch of the government is limited by the constitutional barrier against compulsory self-incrimination and the common law bar against compulsory disclosure of confidential communications between attorney and client, doctor and patient, priest and penitent. Some states, however, do not recognize all of these privileges.

As stated earlier, legislatures in the United States have no other power to impose fines or imprisonment on members of the general public. Constitutional or statutory judicial tribunals have such jurisdiction as may be conferred by statute to try criminal cases and, within the statutory limits, to fine, imprison or sentence to death.

The legislative branch has no power, as does the judicial, to determine civil controversies between individuals or between individuals and the state and its organs.* The partial exception already noted is the power of the legislative to enact a measure awarding to an individual claimant a sum of money to be paid to him by the state, *ex gratia.* In the early years of the Republic, charters of incorporation were granted by the state legislatures to private bodies; Congress has, on rare occasion, exercised the same power and has in a few instances granted citizenship to a particular person.

The legislative power to examine under oath is much broader than that of the judiciary. Examination of parties and witnesses in the courts is limited, by the due process requirement, the rules of admissible evidence, and the mass of judicial precedents thereunder, to matters relevant to the issues presented to the court in the particular trial, be it civil or criminal. As the function of the legislative – to enact statutes – is so fundamentally different from that of the judicial branch, there is of necessity a much broader area of discretion in the legislative conduct of an inquiry into the assumed or possible need for new enactments.

Legislators, particularly when acting in concert with others as members of an investigating committee, do in fact generally exercise the full measure of that discretion in their examination of witnesses summoned or voluntarily appearing before them. Reports of these committees are not limited by statute or judicial control to matters immediately relevant to the purpose of their creation; so they often contain conclusions concerning witnesses couched in highly critical terms, rarely found in formal court judgments. Providing only that the interrogation stays within the investigating committee's authorized

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* This want of power, however, does not invalidate legislation which has the effect of determining pending or threatened ligitation and is often so designed. Every year legislatures commonly pass "curative acts" to remedy the results of procedural defects in assessment, tax and municipal bond proceedings; or, often, to revise the effect of judicial interpretation of the previous statute language, even to expressly making such remedial enactments retroactive.

scope, the courts will not interfere to protect a witness or to support a refusal to testify.

In other important instances, also already indicated above, parties to a judicial proceeding enjoy greater protection than do witnesses before a legislature (where no one is a "party"). A party before a court, but not a witness, has the right to counsel, to be confronted by the witnesses adverse to his claim or defense, to cross-examination of them, to require by subpoena the appearance of other witnesses and the production of relevant documents, including (in federal court suits) prior reports made by an adverse witness of conversations with the party to the suit. There is also the right to have the trial conducted in public (except, in some jurisdictions, divorce trials and criminal proceedings against minors); whereas many legislative committee hearings are held *in camera*. There is the general statutory right to obtain a copy of the transcript of all court hearings and to an appeal from the judgment of the trial court. Since a legislative hearing is never a "trial", there are no issues to be submitted for determination by a jury or judge, and of course no appeal, as such. The federal Rules of Civil Procedure have widened the scope of the discovery right available to litigants and have simplified pleading requirements to a point that is often far beyond state court procedures.

None of these rights of parties to a court proceeding are recognized as "inherent" rights of witnesses before the legislative. Such rights as do exist in these respects – and the tendency is now to enlarge them – are by virtue of rules promulgated by the legislative for its committees or of rules of the particular committee for itself; and these are limited to those indicated in section 4 above. They are more in the nature of privileges bestowed *ex gratia*.

menting the legislative intent within the limits defined, but not by any inherent legislative power in the agencies themselves. The agencies prescribe the detailed rules of "fair play" which may not be specified by the constitution or by the specific standards of the creating enactment. For example, the Interstate Commerce Commission has in recent years forbidden the segregation of races in interstate railroads, buses and airplanes, before the courts had reached the same conclusion by constitutional interpretation of "due process" and "equal protection of the laws" and in the absence of any act of Congress.

The agencies generally adopt their own procedural rules within the constitutional and statutory framework, but do not create the more basic procedures which are a prerogative of the legislature, such as the right to be heard in assertion of or defense against a claim, the right to sue the government, judicial review, the means of obtaining payment by the government of a money award to a claimant, etc.

2. Administrative Functions, Powers, Procedures And Judicial Review; Some General Rules

This section attempts to summarize in generalized statements the principal characteristics which have been developed by constitutional prescription, statutory provisions, procedural rules of the agencies and sound policy. Limitation of space prevents resort to illustrative examples. Further development of these generalizations will be found in later sections of this and other Topics. A cardinal characteristic is lack of any complete uniformity, either within the federal or the state structure.

(*a*) *Functions*

Administrative agencies exercise legislative, executive and quasi-judicial functions. Rate-making – prescription of charges for services to the public performed by railroads and other public utilities – is legislative in nature. The issuance of licenses to carry on regulated occupations is executive. The determination of litigated questions of compliance or violation, when entrusted to the agencies, is quasl-judicial.

It is strongly advisable in quasi-judicial determinations to separate within the agency the powers of investigation, negotiation of settlements and litigation on the one hand from the powers of adjudication and review on the other hand. These two main categories of powers should not be exercised by the same personnel.

(*b*) *Powers and Policy*

The political doctrine of separation of powers is not applicable to agency action. Determination of basic policy is a function of the legislative branch, but policy plays an important part in agency action,

for example, in the formulation of regulations. Policy, however, should have no part in the determination of facts.

(*c*) *Procedures*

Uniformity is neither feasible nor desirable. The state is sometimes a party, sometimes merely an adjudicator between private parties. Rule-making by the legislature should not go too far in filling in procedural details which had better be left to the working experience of the agencies.

There is no general answer to the question whether notice of proposed action and opportunity for hearing are required by due process or by statute or only by sound policy. Fairness dictates that to the greatest extent practicable, the reasons for proposed agency action and the assumed facts that support it should be disclosed, with right to controvert them and to explain before the action is taken. Denial or limitation must be justified by urgent considerations, for judicial review or action for damages cannot offer a satisfactory substitute.

(*d*) *Judicial Review*

There are three types of such review of quasi-judicial determination: (1) of facts, (2) of law, (3) of discretion. Determination of questions of law is, in general, fully reviewable by the courts. Determination of matters of agency discretion is reviewable to the extent of ascertaining whether the action was unlawful, arbitrary or capricious. In review of determinations of facts the general and desirable rule is that the determination is conclusive if supported by substantial evidence.

Where the administrative determination has been made after a hearing prescribed by statute, review by *certiorari* is limited to the record of the administrative proceeding. Where made after a hearing voluntarily accorded by the agency, the review under *mandamus* is not so limited, and issues of fact are ordinarily triable on new evidence before the court, a referee or a jury.

3. Executive And Quasi-judicial Activities Of Administrative Authorities

(*a*) *Procedures to Compel Compliance*

There is an inherent power in our courts, except as specifically prohibited by statute as discussed above, to issue an order directed to the agency to carry out a ministerial duty imposed upon it by the legislature. This particular procedure is generally known as *mandamus*. If, however, the agency either by the specific demands of its organic statute or the nature of its powers enjoys a wide area of discretion, the courts are in corresponding degree reluctant to interfere with the

generality of the statutory waiver has minimized any judicial urge to circumvent the reserved immunity.

One area of sovereign immunity which has not been waived or abolished by legislative action is that of acts or omissions of administrative agencies and their officers in the good faith performance of discretionary functions within their jurisdiction. However, this immunity does not extend to an act beyond the scope of authority.

Remedial action, where permitted, is often brought jointly against the responsible organ and the wrong-doing agent. Waiver-of-immunity statutes generally provide for assumption of liability and payment of damages by the government, thus in effect absolving the individual wrong-doing agent from payment out of his own pocket, at least to the extent that his acts were performed within the general scope of his official powers.

Where a private claimant has a judicial remedy in damages, he normally has the same facilities for proving his case as he would in suing another private individual. This rule, however, is subject to the exception that the state can assert "privilege" against disclosure of confidential information and against producing certain types of documentary evidence which would be subject to forced disclosure and production if in the hands of a private litigant. Use of such privilege is normally limited to preventing the disclosure of information which might compromise the national security.

(*d*) *Determination of Remedies*

The form of remedies available is primarily determined by the courts. Legislation may create a special tribunal for certain kinds of claims, e.g., the federal Tax Court and Court of Claims, both of them created by Congress for adjudication of tax and other claims against the federal government. Some state constitutions similarly have created special tribunals for determination of claims against the state governments. The legislature may also specify the time within which actions may be instituted, procedures, appeal, review, etc. In occasional instances where the particular loss suffered does not fall within the area of permissive suit, the claimant may succeed in persuading the legislature to pass a special act appropriating a sum of money for his relief, or to permit him to sue for redress of a specified wrong.

4. Administrative Authorities And Criminal Prosecution

(*a*) *Initiation and Discontinuance*

Although the terminology may differ, the essential elements in the initiation of criminal proceedings are the same under federal and state law. In general, prosecution for the more common types of crimes – homicide, robbery and theft, misappropriation of money, etc. – are matters of state law. Federal crimes are offenses against the

functions, rights and property of the federal government and are defined by federal statutes.

Knowledge or belief that a crime has probably been committed, and which leads to formal initiation of the prosecution, may be derived from one or both of two sources. Evidence of the offense generally comes from the crime-detection activities of the police force and is passed to the prosecutor for study of its weight. Such evidence may, however, come from the complaint of a private person made directly to the prosecutor; this evidence may or may not require further investigation and supplementing by the police before the prosecutor takes formal action by presenting the evidence to the grand jury.

Trial prosecution of major federal crimes is initiated formally by the Department of Justice through its local United States Attorneys who, like the Attorney General, are appointees of the President. (Cf. the discussion of right of arrest and preliminary detention under E-(4)(b), *post*). The Fifth Amendment to the federal Constitution provides that no person shall be held to answer for a capital or otherwise infamous crime except upon a presentment or indictment of a grand jury. A federal grand jury consists of 16 to 23 members chosen by lot from a much larger group of individuals, men and women, residing in the judicial district for which the United States Attorney and the particular grand jury function. The concurrence of 12 or more of the grand jury members is required for an indictment. The federal grand jury generally receives the complaint and evidence of probable crime from the United States Attorney; but in many states the local grand jury may return a presentment on its own initiative.

A person who has been arrested under a warrant issued before indictment may, on appearance before the magistrate for preliminary examination, waive formal indictment, except in a "capital" case. The United States Attorney may thereupon proceed by "information" alone, i.e., a formal detailed charge prepared and filed by him in lieu of an indictment. Minor federal offenses, for which the penalty is only a fine or imprisonment for less than one year or without hard labor, may be prosecuted on an information.

In the states the prosecution is usually initiated by the local District Attorney of the county or other judicial district. He is generally elected by the voters for a specified term of years. The procedure varies somewhat from one state to another, depending on the provisions of the state constitution or statutes. A serious offense generally requires indictment by the local state-created grand jury, although the due process clause of the Fourteenth Amendment has been held not to require consideration of the alleged offense and indictment by a state grand jury in those states whose own constitutions do not contain such a requirement. However, if in either a federal or a state prosecution a grand jury is used, one of the early Civil Rights Acts requires

that its members must be selected by a fair and impartial method without discrimination as to race, color or religion. Where formal indictment by grand jury is not required, prosecution may be initiated by information alone. Minor state offenses may be prosecuted on an information filed by the prosecutor (the District Attorney) or on a criminal complaint of a police officer or of a private individual.

In the federal courts and in most of the state courts a person who has been arrested under indictment or information of a serious crime must be brought promptly before a magistrate for preliminary examination (cf. discussion below, (c)), first to allow the accused opportunity to enter his plea of guilty or not guilty; and if the plea is not guilty, then to determine whether there is probable cause for trial on the charge. The magistrate may discharge the accused in the absence of a showing of probable cause. If the accused pleads not guilty and the magistrate finds probable cause, he has no discretion to do otherwise than order the accused to stand formal trial and to fix bail for release pending trial.

The information or complaint of minor state law offenses usually comes before a committing magistrate who may have power under the local statute to fix and impose the penalty if the accused pleads guilty.

(*b*) *Discretion in Initiation and Discontinuance*

There is considerable latitude for discretion in possible discontinuance of criminal proceedings. Depending chiefly on the stage reached in the successive steps, from the first showing of evidence of a criminal offense to the eve of formal trial, the precise location of responsibility for a decision to continue or to discontinue the prosecution may rest with the prosecutor, the arresting police officer, the complaining private citizen, the magistrate holding the preliminary hearing, the presiding judge of the trial court or in some cases the accused.

The prosecutor may initially decide that the available evidence does not warrant a presentation to a grand jury or the filing of an information. The grand jury, itself, may effectively discontinue proceedings by refusing to indict on the evidence presented, *in camera*, by the prosecutor. The police officer or other public official having the right to initiate a criminal proceeding or the private person having knowledge of the probable crime may decide, for any number of reasons, not to act. The prosecutor, federal or state, may decide after an indictment or information has been filed or an arrest has been made that the available evidence is insufficient to convict, or that there has been a mistake in the identity of the person charged, or that the statute declaring the crime has been repealed, etc. The prosecutor then moves to dismiss the indictment or presentment; but this can generally be done only with the consent of the court. In some jurisdiction, by

statute, the charge may be dismissed only with the consent of the accused, who may insist on standing trial in the expectation of obtaining a more complete clearing of his good name by a jury verdict of not guilty. Prosecution for minor offenses may generally be discontinued without court approval, and solely by action of the public official or private complainant.

Because of the successive steps required by constitution or statute before an accused can be convicted of any serious offense, relatively few cases reach the stage of actual trial unless there is substantial reason for belief on the part of the prosecuting office that the accused is probably guilty of the offense charged and that the available evidence will be sufficient for probable conviction. The existence of discretion to discontinue serves to protect the individual from groundless trials.

A very large number of relatively trivial offenses – against traffic, health, cleanliness of street ordinances, peddling without a license, etc., for which the penalty is only a small fine for first offenses – never reach the stage of formal hearing or trial because the accused, probably guilty, prefers to pay the fine without contest, at the office of a court clerk.

(c) *Initial Detention of the Accused*

The period during which an accused person may be kept lawfully confined after arrest without recourse to the court, is limited to a relatively short time, which varies, however, considerably from one jurisdiction to another. Under federal law and procedure this period is generally shorter than in state proceedings. If the arrest is made while a magistrate is on the bench, the accused must be brought before him immediately; and in any event without unreasonable delay.

There are several legal sanctions which tend to produce compliance in most cases with the rule just stated. The accused or his family or friends may engage an attorney who then files a writ of *habeas corpus* and secures an almost immediate court review of the validity of his detention under the original arrest. Secondly, reversible error may be found in the conviction of an accused who has been held *incommunicado* or without commitment by a magistrate for an unreasonable period. The possibility of a reversal of a conviction, obtained after initial confinement without recourse for an unreasonable period of time, tends to effect compliance. Finally, one who has been discharged for want of probable cause or acquitted at trial may bring a civil action for damages against the arresting officer for "wrongful arrest" or against anyone who has brought about the prosecution for "malicious prosecution". Arrests and prosecutions are rarely undertaken in the absence of "probable cause" justifying the act.

(*d*) *The Prosecutor: Comparative Rights and Duties*

The rights and duties of a prosecutor are not the same as those of the accused and his counsel. In all courts the prosecutor must prove guilt "beyond a reasonable doubt", whereas the accused enjoys everywhere the presumption of innocence until found or adjudged guilty. In other respects the prosecution has fewer rights than the accused; for it may not take exception to exclusion or admission of evidence upon which to appeal to a higher court for a reversal of a verdict or finding of not guilty. The prosecutor may appeal from a dismissal of the charge ordered by the trial court upon a question of law, but never from acquittal upon the weight of evidence.

These differences in rights follow from the constitutional right of the accused not to be compelled to incriminate himself by his own testimony, and from the (separate) constitutional right not to be placed twice "in jeopardy", that is, to be tried twice for the same offense. Some acts may constitute an offense against the federal government and also an offense against the state government, under different statutes; under these circumstances a man may be (rarely) prosecuted, separately, for each offense.

In the federal courts, under certain circumstances, the accused may obtain an order authorizing him to inspect documents, but the prosecution enjoys no such right.

The prosecutor is under the affirmative duty to disclose evidence favorable to the accused. This rule is stated in the Canons of Professional Ethics of the American Bar Association thus: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." There is no corresponding burden upon the defendant to produce evidence favorable to the prosecution, since that would vitiate the fundamental constitutional protection against self-incrimination. For the same reason the accused cannot be required to testify at his trial.

Realistically viewed, the position and prestige of the prosecutor enables him, as he sometimes does, to make inflammatory statements against the accused in argument to the jury. The trial court may caution the jury to disregard this; but nevertheless an ineradicable impression may have been so made upon the minds of the jurors. If the statements by the prosecutor are viewed by the trial court, or the appeal court on review after conviction, as materially prejudicial to the accused, his conviction may be set aside by the trial court or reversed by the appellate court.

The prosecuting authorities, of course, have the power to investigate, to present evidence to the grand jury as the formal accusatory body, etc. A person under suspicion or indictment has no right to

invoke the investigatory power of the state and no right at all to appear before the grand jury.

(*e*) *Pardon and Suspension of Sentence*

The executive – the President or a state governor – can issue or refuse a pardon to the person convicted; and the exercise of this power is not subject to review by any court. The discretion is unfettered.

Usually, the trial judge, federal or state, may suspend sentence for a temporary period. There is a conflict of authority as to whether the suspension may be indefinite.

Parole authorities, created by statute, can release a prisoner before completion of sentence, within the statutory limits of such power. In some jurisdictions where the sentence of imprisonment is for an indefinite period, the parole boards control the length of actual confinement. The function and powers of parole authorities are in process of rapid development.

The legislature has the inherent power of general amnesty.

5. The Legal Position Of The Police

(*a*) *Responsibility for Control*

The police are an arm of the executive branch of the government, which has the ultimate responsibility for their conduct. In the federal government the principal investigatory unit, which also exercises police functions such as the right of arrest for commission of a federal crime, is the Federal Bureau of Investigation, which is a part of the Department of Justice headed by the Attorney General. There are some other smaller bodies of federal police, such as post office and customs inspectors, those who guard federal property, etc. These are also controlled by the executive branch.

In the states, the control and responsibility varies from one body to another, as does the degree of effective control exercised. State police organizations, as units of the state government, are often limited largely to highway traffic functions, and the chief is appointed by the governor to whom he is directly responsible.

Police organizations in cities, towns and smaller units of local government are responsible for the enforcement of the majority of the state laws defining criminal action and are almost always creatures of the executive. These units also enforce local ordinances of lesser criminal content. The local chiefs of police are generally appointed by the mayor, the city council or equivalent local governing body; in some places the chief is elected by the voters and in a few major cities he is appointed by the governor.

The degree of effective supervision and control over the police varies widely according to statutory provision, local customs and the

sense of responsibility exercised by the official or board having the right of control. In some areas the police, in effect, work under the direction of prosecuting attorneys.

The judiciary exerts an indirect effect on the conduct of the police through the power to review police action as it affects the rights of persons arrested and prosecuted. A prisoner may be liberated by court order or the confession excluded if, after arrest, he has not been brought promptly before an examining magistrate, or if there is substantial evidence that a confession of guilt has been extorted by illegal means, or he has been otherwise mistreated. Final responsibility for police action lies always with the executive.

An individual who has been arrested without just cause or who has been abused by the police has a right of action for damages against the offending officer.

(*b*) *Powers of Arrest and Confinement*

Warrants, i.e., orders issued by a court for the arrest of an individual suspected of a crime, are issued only to police officers and may not be obtained or exercised by private individuals. There are differences between the authority of a police officer and a private person to arrest an individual without a warrant. A private person may himself make an arrest without a warrant when the person to be arrested has committed a felony in his presence (a serious crime) or a misdemeanor amounting to a breach of the peace (a minor crime involving violence). He may also make such an arrest when a felony has in fact been committed and he has reasonable cause to believe that the person to be arrested has committed it. When an arrest is made without reasonable cause, or where no felony has in fact been committed, an action for false arrest will lie if the person arrested subsequently turns out to be innocent.

The police, both state and federal, may make an arrest without a warrant whenever a private person may do so. The police may also arrest when a misdemeanor not amounting to a breach of the peace has been committed in their presence and may do so when there is reasonable cause to believe that the person to be arrested has committed a felony, even though none in fact has been committed. In many states they may also arrest when the person has actually committed a felony, even though they have no reasonable cause to believe him guilty.

Some other types of state officials enjoy the powers of arrest that normally belong to the police, as do, for example employees of the state boards of automobile registration for certain traffic law and similar violations, game wardens for violation of the game laws, etc.

Federal police may obtain and execute warrants issued by a federal "commissioner", a subordinate official appointed by the

local federal district courts to exercise limited quasi-judicial functions. Federal warrants are also issued by federal district court judges.

(*c*) *Limits on Methods of Obtaining Information and Confessions*

Limitations derived from four sources are imposed upon methods employed by the police in obtaining evidence and in extracting confessions of guilt. The first source is the constitutions, federal and state, which are designed to prohibit (1) unlawful searches and seizures, and (2) forced self-incrimination. The federal constitutional provisions are the prohibitions against such searches in the Fourth Amendment, the requirement of due process and the express prohibition against self-incrimination in the Fifth Amendment applicable to the federal government, and the due process requirement of the Fourteenth Amendment applicable to the states.

These clauses forbid proceedings that offend "those canons of decency and fairness which express the notion of justice of English-speaking peoples even towards those charged with the most heinous offences". There are similar prohibitions in the constitutions of most of the states. However, these constitutional limitations do not carry direct penal sanction against the police violations.

Statutes are the second source of the control. They amplify the broad constitutional protections by providing additional and more specific limitations and penalties for violation. Court decisions, as the third source, apply the constitutional and statutory protections to particular cases.

Administrative regulation of police activities provide a substantial additional measure of effective limitation. In many communities the organized police force is given instruction upon the limits of their permissible exercise of power and in the corresponding rights of citizens to protection from abuse. There is a noticeable present trend toward education of police officers in these respects, and toward enforcement by administrative action within the police unit.

(*d*) *Unreasonable Searches and Seizures and Self-incrimination*

"Unreasonable" searches and seizures are proscribed under the constitutional provisions cited in order to achieve that security of one's privacy against arbitrary intrusion by the police as "basic to a free society". In general, any trespassory search and seizure of the person, premises, property or papers of an accused person is held to be unreasonable, and therefore illegal unless justified as incidental to a legal arrest or pursuant to a search warrant issued by a judge upon a showing made to him of probable commission of crime.

In the federal courts evidence obtained by the police beyond the legal limits of search and seizure may not be offered in evidence

against the accused.* In the state courts, the practice and rules are not uniform with those of the federal courts. In about two-thirds of the states the courts of last resort have held that their constitutions do not bar the use of evidence obtained by unlawful search, i.e., a search which is neither permitted by the individual subjected to it nor authorized by a court order. The Supreme Court of the United States has held that the provisions of the federal Constitution do not bar the use by state officials in state court proceedings of evidence illegally obtained. In the remaining states, however, their courts have decided the rule to be the same as in the federal courts. The extreme form of personal body search, such as the use of a stomach pump to reveal and extract narcotics, has been held a violation of the federal constitutional provision, even in a state court trial.

The federal constitutional prohibition does not bar use of evidence obtained by illegal "eavesdropping" or the use of electronic listening and recording devices. Under a federal statute (1934) a criminal penalty is prescribed for divulging or using information obtained by an unauthorized interception of a wire message, and the federal courts have excluded evidence of all such intercepted communications and also other evidence of secondary nature itself obtained by legal methods through initial use of the intercepted communication to which the accused was a party.

The police and prosecuting authorities of the federal government are restrained by the Fifth Amendment from forcing the accused or any other witness to testify in any kind of proceeding to a fact which would tend to incriminate that person by forging a link in the chain of evidence needed in a prosecution of a crime. A similar restraint is found in the law of every state (in all but one by constitutional provision). But testimony may be compelled from any witness, other than the accused, where there is no real or substantial danger that it would incriminate him, either because the tendency of the desired information to incriminate is too remote or because subsequent criminal prosecution is impossible, due to prior acquittal or conviction, pardon, or other absolute defense. Where there is a statute granting full immunity to the accused or witness from all prosecution, testimony may be required from one whose objection on the ground of possible self-incrimination would otherwise bar the inquiry. There is no general privilege against exposure to possible infamy or ignominy not involving penal consequences.

Although the accused cannot be required by the prosecutor in any court of the United States to take the witness stand at his own trial (the immunity from prosecution statutes being applicable only

* Nor may federal government agents testify in a state court prosecution with regard to information obtained from an illegal search. *Rea* v. *United States*, 350 U.S. 214.

to witnesses), the accused person on trial has the right to testify under oath in his own defense if he wishes to do so. If he does testify, he is subject to cross-examination by the prosecutor and cannot at that stage refuse to respond. In most states and in the federal courts neither the judge nor the prosecutor may comment upon the failure of the accused to testify in his own defense, nor should it be considered by the jury. In a few states the constitutional provisions against self-incrimination are not held to forbid adverse comment by court or prosecutor, and in these states such comment is not viewed as a violation of due process, nor is the local jury then precluded from considering the accused's failure to take the witness stand.

There is no rule forbidding the police to question the accused, either before or after arrest, as to his suspected complicity in an alleged crime, but a confession obtained by police questioning must be genuinely voluntary if it is to be admissible in evidence against the accused at his trial. Any confession obtained through threats or sustained pressure will be excluded under the due process clause of the Fifth and Fourteenth Amendments.* These forbidden procedures include detention in isolation for a long period, failure to take the person before a magistrate within a reasonable period of time, questioning by the police in relays, the use of promises and inducements, disregard of the rudimentary needs of life and other kinds of psychological pressure – not standing alone, but in the aggregate as a "combination" violating due process.** The courts give full scrutiny to all the circumstances surrounding the extraction of a confession later challenged by the accused as being involuntary.

In the federal courts even a voluntary confession obtained during a period of illegal detention is inadmissible.

(*e*) *Remedies for Illegal Acts or Omissions*

In addition to exclusion of evidence and confessions obtained in violation of constitution or statute, the police may be held liable in actions for damages by the accused for assault and battery, false arrest, false imprisonment, larceny of personal possessions and unlawful entry on the premises. There are federal criminal penalties for wire-tapping and violations of civil rights. The police may be enjoined from threatened violations and, as officers of the court, may be punished for contempt of court for past violations.*** Administrative remedies within the police force such as suspension, down-grading or discharge also serve as deterrents. The failure to use such remedies in

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* "The circumstances of pressure applied against the power of resistance"; *Fikes* v. *Alabama*, 352 U.S. 191.

** *Mallory* v. *United States*, 354 U.S. 449, (exclusion of confession under interpretation of the federal rules of criminal procedure).

*** The Fourteenth Amendment has been construed to prevent a state affirmatively to sanction an unreasonable search and seizure.

some states and localities, however, is a matter of common knowledge. Particularly do they fail to suppress unlawful searches and seizures. Cases of civil action for damages against police officers for such violations are very rare, and successful criminal prosecutions of police officers for this type of violation are rarer still. Only a few states have statutes which make their political subdivisions – counties and municipalities – civilly liable in damages for wrongs committed by their police officers, since, in acting illegally, they are usually regarded as having acted beyond the scope of their employment.

6. Creation Of Fundamental Legal Rights By Administrative Agencies

The basic protections extended to the individual are found primarily in the formal written constitutions, supplemented by statutes and by judicial decisions which make these general protections applicable to specific situations. Administrative agencies do not create, but merely effectuate, these basic protections, since the agencies operate within the framework prescribed by law.

Substantive and procedural rules promulgated by the agencies, as distinguished from broad discretion in the adjudicating officer, do create legal rights. Moreover, the exercise of discretion, as noted earlier, may not be carried to the point of invasion of constitutionally guaranteed rights. It is therefore a sound generalization that administrative agencies through exercise both of rule-making power and of discretion in determinations establishing predictable patterns of law enforcement, do contribute to elaboration of the rule of law. The continuing conscientious exploration of unsettled issues which lie at the periphery of this field of law is proof of the ability of our institutions to mould the rules under known principles and fair hearing procedures to fit the demands of our society.

F. THE JUDICIARY AND THE LAW

1. Fundamental Legal Rights Of Substance

Other portions of this text have disclosed that "fundamental legal rights of substance" originally derived from common law tradition and earlier statutes are made permanent by the written constitutions. These rights have then been supplemented by statutes and the judiciary. The judicial process adds to the corpus of rights by application of the written text to specific relationships and situations presented in litigated cases. The "rule" announced by a "court of last resort" in one decision then becomes, generally, the "law" by judicial acceptance and application to the same or closely similar situations presented in later cases in other courts. James Madison, one of the principal draftsmen of the Constitution of 1789 (and later President of the United States), said in proposing the Bill of Rights' first ten Amendments to the Constitution: "... independant tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative and executive."

Throughout American legal history the main constitutional guarantees have been developed and worked into the fibre of our society in probably greater and more effective degree by the day-to-day labors of the lower federal courts than by the courts of the several states. The final and authoritative meaning of the federal Constitution is pronounced by the United States Supreme Court.

"Due process" as a concept embodied in all American constitutions has acquired practical meaning and content through countless decisions of federal and state courts. See the more amplified discussions under Topics E(4)(d) *supra*, and H(1) *post*.

The decision of the Supreme Court in May 1954 that the "equal protection of the laws" guarantee of the Fourteenth Amendment requires that public, tax-supported schools be open to students of all races without compulsory "segregation" in separate schools is probably the most publicized – and the most criticized – judicial extension of a constitutional "fundamental right" in many years. This decree was not imposed by any federal legislation on the subject; moreover, the Court had in earlier years upheld "separate but equal facilities" for the two races, Negro and white, in public services as not such a denial. The 1954 decision, although a reversal of the Court's earlier decisions, was reached by the long-accepted process of judicial interpretation.

On the one hand this result has been widely recognized as an outstanding example of the capacity of the judicial branch to mould fundamental rights, even without guiding legislation, to meet insistent

demands of modern society. On the other hand the decision has been denounced as an "unconstitutional" judicial usurpation of power, because the federal Constitution itself is silent on the subject of education.

Irrespective of agreement or disagreement with the rationale of the decision, it illustrates how constitutional rights may acquire significantly new meaning 175 years after the original statement.

This process of moulding, of adaptation, of development of basic rights, guarantees and protections, with the attendant risks of criticism and disagreement, is characteristic of the function of judicial supremacy in American law. This adaptation process is dictated by the broad verbal form in which most of these fundamental rights are expressed in the constitutions. For many decades the Supreme Court has made clear that it does not feel compelled to follow earlier decisions as binding precedents in these matters.* This freedom to change the particular rule from time to time illustrates one difference between a legal system in which the judiciary is "supreme" in the field of constitutional interpretation and a system such as the British in which the legislature is supreme. This same freedom also prevails in the state highest courts.

As the judicial branch does not itself create fundamental rights in the same sense as they are canonized in the constitutions, it cannot and does not purport to delegate to other organs or bodies the power to do so. The courts do delegate limited administrative and procedural rule-making powers. A committee of judges may adopt and put into effect on behalf of the entire court, rules of practice to be followed in each division of that court.

Bar associations aid in ways varying from one state to another according to local rules of the higher courts, in the judicial control over members of the bar as an important form of protecting the public from improper action of such members. These associations, which in all but a few states are wholly voluntary, private units of which those formally admitted to practice before the courts may or may not become members, appoint committees to hear and investigate complaints of illegal or unethical acts of members of the bar. After investigation, *sua sponte* or following request by the court, the committee reports to the court any alleged dereliction of professional standards of conduct, with recommendations for court determination. The court then hears the charges in an adversary proceeding, with full opportunity to the respondent attorney to learn and to answer those

* Cf. a recent interesting, and important, instance: *Reid* v. *Covert*, 354 U.S. 1 (1957), holding that the civilian wife of a member of the United States Army, residing with her husband on temporary military duty in a foreign country, was entitled under the Constitution to trial by jury in a civilian court of a criminal charge, and could not be tried by an American military court, as had been held constitutional in earlier decisions.

charges; and formally either exonerates the respondent or finds him guilty and censures, suspends for a specified time or disbars him from the right to practice. Disbarment is cancellation of membership in the bar.*

Actual enjoyment and exercise of fundamental legal rights depend in substantial measure upon the disinterested, scrupulously honest and fearless professional services of trained lawyers. The defender of an accused under criminal charges who betrays to the prosecution the testimony intended to be offered by the accused or who reveals confidential conversations between himself and the accused, thereby in effect denies to his client the right to a "fair trial".

The disciplinary power of the court over members of the bar is a valuable protection of this basic right.

2. Essential Procedures

Courts have and exercise power to adopt procedural rules in aid of their judicial functions. Congress and the state legislatures have all in varying degree conferred by statute upon their respective courts specific rule-making powers or have assumed by such legislation to prescribe procedures and thereby to that extent to preempt the field. In the absence of statutory limitations the courts have inherent power to adopt rules of procedure designed to create a sensible balance between the needs for prompt justice and for careful adjudication.

3. Selection For Office

The judges of all the federal courts – Supreme Court, Courts of Appeal, District Courts and the special courts of limited jurisdiction (Court of Claims, Tax Court, Military Appeals, Customs Appeals, etc.) – are appointed by the President, with confirmation by the Senate required and only rarely withheld.

In the states the method of selection varies. In all but a few the judges of the principal courts are elected by popular vote for fixed terms of years and the governor has the power to fill mid-term vacancies by appointment. The judges of some of the lower courts in incorporated units of local government – cities and towns – are appointed by the mayor or other chief executive.

In the remaining few states the judges are appointed by the governor, either without restriction of choice or from a list of persons

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* In Virginia, a state in which membership of lawyers in the State Bar Association is compulsory for the 4500 lawyers there, 55 disciplinary actions were brought in 17 years. In 23 of these, the license to practice was revoked by the courts or voluntarily surrendered; in 22 cases the license was suspended, for varying terms. In 5 cases the court administered a reprimand and 5 cases, after hearing, were dismissed.

selected by a bar association. Such appointments are in some states subject to confirmation by the legislature.

4. Dismissal Of Judges

A judge may be removed from office by impeachment, a trial conducted by the legislature itself on specific charges. The impeachment may be for misfeasance or malfeasance in office, i.c., acts of serious nature such as dishonesty or substantial lack of impartiality or of basic integrity. In a few states judges are subject to "recall" by popular vote of dismissal at a regular election time. Conviction of a crime which carries the statutory penalty of imprisonment for a term of years or of disqualification from public office will automatically effect removal from the judicial office. Actual dismissal by impeachment or criminal conviction is exceedingly rare. No recent instances have been reported to us. A few judges have resigned in the face of an impending investigation.

5. Promotion

Judges of those courts whose members are chosen by executive appointment may be promoted by the executive from a lower to a higher court. In some states where judges are elected, the promotion is also made by executive appointment, as is the selection of the chief judge from the elected judges. In most of the elective system states, however, the judges stand for election to the higher court or to the position of chief judge.

6. Qualifications: Participation Of Laymen

Personal qualifications prescribed for judicial office are in general very limited.* Normally, the only constitutional or statutory requirement is that of being "learned in the law", but in a very few states even this requirement does not exist. In nearly all states candidates for the lowest judicial tier ("justices of the peace" and magistrates), who exercise limited jurisdiction over minor misdeamenors and offenses, need not be members of the bar; and these offices are therefore often filled by laymen.

Although only lawyers engaged in active practice or judges from other courts, federal or state, are usually appointed to the United

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* A recent "poll" taken by an experienced private agency of a cross-section of public opinion reports that 43% of those so polled believe judges are selected chiefly on the basis of their politics, 28% on the basis of their experience; the remaining 29% had no opinion. American Bar Association *Coordinator*, vol. 5, No. 11, p. 3, November 1, 1957.

States Supreme Court, there is no constitutional or legislative requirement to this effect. Some appointees to the Court will have been away from actual practice for some time in an executive, legislative or teaching post, prior to appointment. For this reason, such appointees bring with them a wide variety of experience valuable in handling the complex legal-sociological questions which they so often face. The foregoing statement holds good as to executive appointments to other courts, federal and state.

Laymen participate in the judicial process, otherwise than as inferior court magistrates, only in an administrative (chiefly clerical) or fact-finding capacity. The court may appoint as "master" any individual, even a layman, to investigate facts involved in a judicial proceeding, to report thereon, and to make recommendations for judicial determination by the court. The appointment of a layman to that temporary, *ad hoc* duty is a rare occurrence, where special knowledge cannot be otherwise found. Such an appointee does not exercise judicial powers.

Jurymen are always laymen, never lawyers.

7. Legal Instruments Governing Selection, Dismissal, Promotion, And Qualifications

The constitutions, federal and state, and the acts of Congress and of the state legislatures determine these conditions. Thus the federal Constitution expressly vests in the President the power to appoint justices of the Supreme Court. Acts of Congress have, from time to time, created all the other federal courts and made provision for the number of their judges. The President also has the sole power of appointment of incumbents, as "officers of the United States", to the judicial positions so created by the legistature. The state constitutions generally make provision for the structure and the composition of the courts, and the method of selection of judges by appointment or public election, their promotion and dismissal. Statutes supplement where these constitutions are silent.

Changes in these legal instruments can be made by formal amendment of the constitutional provision – a procedure prescribed in the particular constitution itself – or by repeal or modification of the statutory provisions, effected by the legislature in the same manner as the original adoption of the statute. Cf. discussion of constitutional amendment under Topic C (6) *supra*.

G. THE LEGAL PROFESSION AND THE LAW

1. The Persons Or Bodies Responsible For Admission To, Supervision Of And Expulsion From Practicing The Legal Profession

There is no formal distinction or separation between court and office practitioners; there is only one category of membership in the bar. In the United States the courts have inherent power to control and supervise the practice of law both in and out of court, and to discipline the members of the profession. This power has long been recognized by the legislative and executive branches of the government. The practice of law is a profession affected with public interest and for that reason it is also recognized that the legislature may prescribe minimum requirements for the admission of lawyers to practice and for their discipline. The courts hold that in so doing the legislature acts in aid of the judiciary, not in denial or exclusion of the basic constitutional power of the judiciary to admit, deny or disbar.

In the absence of a statute specifying causes for disbarment, the courts themselves may exercise over lawyers the disciplinary powers of censure, suspension or disbarment. The legislature does not assume to exercise its supplementary power by enactments addressed to any specific individual, nor except rarely to admit a candidate to practice or to prescribe the technical qualifications. Actual admission is generally by order of the highest court of the state. Some administrative agencies make their own rules governing admission to practice before them (see Topic H (2)).

Bar "associations" (voluntary,* private groupings of lawyers, generally by geographical or political area) carry much of the real responsibility, under delegation by rules of court, for initiation of disciplinary proceedings against errant members of the bar. Association committees hear complaints, investigate, make recommendations to the courts for disciplinary action and act as prosecutors of offenses against the professional standards of conduct, but not as prosecutors of a crime committed.

2. The Factors Other Than Professional Ability And Moral Rectitude Which Are Permitted To Influence The Decisions Of Courts In Exercise Of This Power Of Admission And Suspension

Almost without exception, applicants for admission must be adult citizens of the United States, residents of the state to whose court the application is made, innocent of conviction of any serious

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* In a few states membership in the association is compulsory and the organization is governed by state statute.

crime, and qualified by completion of minimum periods of professional study and examination. Good moral character is requisite. An oath of loyalty to the Constitution and government (not the particular administration in office) is required.

In recent years there has been increasing inquiry by the courts into the professional suitability of persons seeking admission to practice and to continue therein after admission, who have by close association or refusal to deny indicated a belief in or subservience to ideological concepts differing radically from the freedoms guaranteed by our form of constitutional government. An attorney is generally held to be an officer of the court and therefore holds a position of semi-public trust. From the ranks of the profession comes the judiciary which interprets the laws.

The courts take judicial notice of the existence and conspiratorial nature of the Communist Party and its advocacy of forcible overthrow of the government, and it is therefore recognized that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the customary oath of undivided loyalty to the Constitution and to the standards of practicing the profession. Refusal to answer an inquiry into membership in the Communist Party is relevant to these factors and may be cause for denying admission to practice law. The Supreme Court has recently held that membership in the Communist Party at an antecedent date, but subsequently abandoned, is not of itself alone proof of want of good moral character, nor is refusal to answer questions with respect to Communist membership.*

3. Limitations Upon A Lawyer's Freedom To Advise His Client And To Plead On His Behalf In Judicial Proceedings

The lawyer is everywhere regarded as being free to give such advice as is necessary to promote the lawful purposes of his client, to protect his rights or to prevent an imposition upon him. The lawyer is under a duty so to do. He is equally free in litigation to take such action as will adequately state, protect and enforce the rights of his client at law. The lawyer has the privilege to decide what rights the client enjoys and may assert, and to determine the course of action.

These freedoms and rights are subject to objective standards, not only of legality of action and advice but also of the ethics of the profession. As it is impossible even to summarize all of these ethical standards, known as "canons", only the more important of these principal rules can here be stated as illustration.

The lawyer is expected to ignore his own personal opinion of the

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* *Schware* v. *New Mexico*, 353 U.S. 232, and *Konigsberg* v. *California*, 353 U.S. 252.

guilt of his client who is accused of an offense; he is bound by fair and honorable means to present every defense and right allowed by law. As a prosecutor, his primary professional duty is not to obtain conviction of guilt of the accused but to see that justice is done. The lawyer should obtain full knowledge of the client's cause before advising upon it; he must give his candid opinion upon the merits of the cause and the probable result of litigation.

If fraud or deception has been practiced which has unjustly imposed upon the court or an adverse party, the lawyer should first inform his client and if the latter refuses to forego any advantage thereby gained, he should then inform the injured party or the latter's counsel. The lawyer should not communicate directly with a party represented by other counsel, but only with that counsel. In litigation he should not assert to the court or jury his own personal belief in the merits of his client's cause. He should not conduct a civil case or make a defense which is intended only to harass or injure an opposing party, to work oppression or a wrong.

There is the general standard, strictly imposed, of scrupulous honesty in all dealings with the client, including receipt and disbursement of funds provided by the client or received by the attorney for his client. Subornation of perjury, forbidden by statutes and canons of ethics, is a serious offense. Unfortunately it does occur and the occasional instances which come to light lead to disbarment proceedings.

The lawyer should not permit judicial disfavor or public unpopularity either of the client or of his cause to restrain him from full discharge of his duty within the bounds of the law. Realistically viewed, however, many lawyers do, on occasion, hesitate to accept representation of causes offered, out of fear that this may result in diminution of the volume of subsequent practice. Most recently, however, there have been notable instances in which recognized leaders of the bar in a number of cities have undertaken to represent as clients persons brought to trial upon charges of unlawful conspiracy or other actions in connection with activities of the Communist Party within the United States; such representation has elicited widespread approval by the bar at large.

4. Refusal To Accept Or Relinquishing The Representation Of A Client

The basic rule is that the lawyer is free to accept or decline professional employment, subject to one important exception. If appointed by the court to represent a party in a matter then pending, the lawyer is, in the absence of overwhelming personal reasons of compelling nature, bound to accept that appointment. Also, if he is requested by the court to represent an indigent person unable to

pay the customary fee, the lawyer should accede to that request.

A lawyer is disqualified to represent parties whose interests conflict, unless all of them consent, or to represent a party whose interests conflict with his own. He may not accept employment against a former client which involves the use of information given him by that person. He may not accept employment which in any way entails division of his fee with a layman. He may not advertise generally (other than within the profession) his particular qualifications nor make contact with persons unknown to him in order to obtain employment, nor may he employ others to seek retainers for him.

Having accepted such employment – a "retainer" – the lawyer should not, without good cause or the consent of his client, withdraw from representation and if the matter is in litigation, without the consent of the court.

The client may discharge the lawyer from continuing representation even before completion of the professional task, but may not diminish fees already earned or violate, without risk of claim for compensation, the provisions of a specific contractual arrangement.

A lawyer may represent a client before legislative or other bodies with respect to pending or new legislation which may affect the client's interest, and he may represent clients with respect to their claims before a government body – all under the same general rules of legality of action and ethical standards of practice.

He must respect completely the confidences of his client and may not without consent disclose information of confidential nature which he has obtained in the course of his representation. This obligation outlives the period of his employment.

In the United States judges may and often do retire from the bench and return to active practice of law. Under these circumstances a former judge should not accept a retainer in any matter which has previously been before him as a judge. Federal court judges are not permitted to practice law while in office; the judges of high state courts follow the same rule. In some states, however, judges of inferior local courts are permitted to practice while holding their judicial office, because the local communities which they serve are unable to pay fully adequate salary. Under these circumstances a judge in office accepting a retainer of private employment should not represent clients before any judge in his own court.

If a lawyer has retired from public employment (other than a judgeship) and returned to private practice, he should not accept retainers in connection with any matter which he has investigated or passed upon while in the public office.

H. THE INDIVIDUAL AND THE LEGAL PROCESS

1. Extent Of The Right To Be Heard: Due Process And Other Constitutional Rights Of Defense

(a) *A Fair Hearing*

The right to be heard is the chief and basic ingredient of due process under the Fifth and Fourteenth Amendments, and similar provisions of the state constitutions, i.e., that no person may be deprived of life, liberty and property without due process of law. Our inquiry here is not into the circumstances under which the government may exercise its power of deprivation, but into what protective rights surround the deprivation.

"Due process of law" has substantially the same meaning as "the law of the land", a phrase used in the English "Petition of Right" in 1628. Both expressions appeared in the Petition's recitals that no man should be "in any manner destroyed but by the lawful judgment of his peers or by the law of the land", and that no man should be "put out of his land or tenements, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law."

These constitutional guarantees do not define what is "due process." Many state constitutions expressly confer rights to particular kinds of hearings before certain organs of government. But the right to some sort of hearing is inherent in due process and that right does not derive from statutory provisions. The requirements are more exacting in criminal prosecutions which directly jeopardize life and liberty than in those which affect property rights only.

The elements of "full hearing" include at least: (1) notice of charges or claim sufficient to prepare a defense; (2) knowledge of the adverse evidence offered; (3) opportunity to rebut this by presentation of other evidence or cross-examination of adverse witnesses; (4) opportunity to argue on the law and the facts. These elements are required only to the extent necessary to provide fairness of procedure. Thus one who has been found guilty of a criminal offense at trial may be sentenced by the trial judge upon the basis of a probation officer's report to the court of other circumstances relevant to the length of term of imprisonment to be imposed, without disclosure to the prisoner of the contents of the report. Within the statutory limit the length of prison term is a matter solely for the discretion of the trial judge.

The courts have the power to decide what kind of a hearing is required by due process under the particular circumstances of the act of deprivation ("taking") of life, liberty or property.

(*b*) *Life and Liberty: Trials*

In a criminal prosecution entailing possible loss of life or liberty, the highest degree of judicial protection is accorded. Here the constitutions guarantee trial by jury, not as an implication of due process but as a separately specified right. This means a judicial proceeding with certain traditional safeguards which are from time to time supplemented by statutes. The requirement of trial by jury does not extend to lesser offenses for which the maximum sentence of imprisonment is for a relatively short period of time, although this, too, can only be imposed after a judicial proceeding. Money fines for minor infractions may be determined by administrative hearings.

Procedural due process is another name for legislative, judicial, and executive fair play. It does not mean that the determination by a court or a jury is always essential. Fair procedures of an administrative institution may suffice.

Despite the impossibility of framing a comprehensive definition of procedural due process and closely allied constitutional rights, their essential elements in defense against prosecution of criminal offenses may be said to be:

(1) An ascertainable statutory standard of conduct, openly published.

(2) A fair accusatory procedure, e.g., the grand jury or a forma "information" or a warrant on a complaint.

(3) Jurisdiction over the defendant, necessitating the giving of proper notice to him.

(4) In the absence of a formal accusation by grand jury or information, a preliminary hearing to determine the existence of probable cause for trial.

(5) A fair trial and determination of guilt by jury verdict:*

a. An unbiased judge.
b. A fair jury.
c. A prosecutor who acts within reasonable self-restraint, such as declining to offer testimony known to be or suspected

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* There is a strong tendency today to eliminate jury trials in state court *civil* actions between private parties, particularly in small claims below certain maximum dollar limits. This tendency, however, does not impair the right of the accused to a trial by jury in *criminal* prosecutions, or in civil suits on common law causes of action in the federal courts. The accused may in open court waive trial by jury, except for heinous offenses, and consent, to determination of guilt or innocence by the judge alone. The absolute right to trial of criminal offenses by jury is sometimes characterized as a "fundamental right", sometimes as a "procedural safeguard." Cf. *Reid* v. *Covert*, 354 U.S. 1(1957).

of being perjurious, avoiding attempts to induce the accused unwittingly to incriminate himself or to influence the jury by comments barred by due process generally, etc.
d. The assistance of counsel.
e. Personal appearance of the witnesses for the prosecution and the right of the accused to cross-examine them before the jury.
f. A public trial.

(6) Freedom from compulsory self-incrimination.

(7) Freedom from unreasonable searches and seizures.

(8) Bail, i.e., the right of the accused to release after arrest, except under charge of murder or treason, upon posting of a bond or other from of security in a reasonable, not excessive, amount for his appearance at trial. The right to bail as a separately designated constitutional right may be restricted by statute.

(9) Guarantees against cruel punishments.

(10) Fair remedies after conviction.

These procedural safeguards are all firmly rooted in our American constitutions, and are further strengthened by appropriate federal and state legislation. Some exist within the broad concept of due process and developed in the stream of judicial decisions, some by specific prescriptions of the constitutions. Not all of the federal guarantees of this specific origin in the federal Constitution are therefore applicable, under "due process" or "equal protection of the laws", to proceedings in the state courts – except as they also may be provided by state constitutions or state statutes.

A recent decision by the Supreme Court set aside a criminal conviction because at the trial the prosecutor was allowed to attack the credibility of the accused for having at the trial testified (voluntarily) *pro se* on matters as to which he had refused to testify to the grand jury as a witness before his indictment, on plea of possible self-incrimination.

There are two categories of imprisonment which are not classified as punishment for crime and therefore do not fall within the specific constitutional protections. One is for a "criminal contempt" of court, i.e., imprisonment for a past act which was an affront to the authority of a court acting in representation of public right. Trial by jury is not required by the constitutions, but is by some statutes. Statutes ordinarily set the time limit for the period of such imprisonment.

The other category is "civil contempt", i.e., wilfull refusal of a witness or a party to carry out a legal obligation as determined by legal process, – for example, testify or to perform a remedial act

for the benefit of a private suitor to the enforcement of whose rights the court lends its power to impose such penalty for refusal to comply. The offender may be imprisoned until he is prepared to obey the order of the court, or a fine may be levied, subject to possible remittance upon compliance. Again, trial by jury is not required. A statute may also make this refusal, alternatively, a criminal contempt subject to trial by jury.

The legislature may, without judicial intervention, imprison one who has refused to appear and testify before it, but the courts will, by *habeas corpus*, require the legislature to produce the offender in person and to justify the lawfulness of its command.

Imprisonment for criminal contempt may be invoked for violation of a lawful administrative order, but the determination of violation is by judicial process and generally by jury where refusal to obey the order is a crime. There are a few isolated instances of agencies which have the power by state constitutions and statutes thereunder to imprison without judicial intervention.

A member of the armed forces may be tried and imprisoned by the military authorities for statutory offenses including breach of discipline, without judicial trial or full appellate review. The individual is entitled to a fair trial and the judiciary will intervene by *habeas corpus* to determine whether: (1) he is subject to military authority, and (2) whether he has there received a fair hearing. If martial law has been validly declared (only in time of war and growing out of the exigencies thereof), military rule may entirely supersede civil process so that the entire civilian population becomes subject to military process.

One suspected of a crime may be arraigned and temporarily detained, although he must be promptly brought before a magistrate to determine the existence of probable cause as the basis for orderly trial. Under certain well-defined circumstances a person may be confined for other reasons not of a criminal nature, such as insanity, affliction with a contagious disease, etc. That person is entitled to have judicial determination of the legality of his proposed confinement, but not by jury trial.

In time of war enemy aliens may be indefinitely detained or confined. The Internal Security Act of 1950 empowers the President to detain an alien or a citizen on a reasonable showing that he may engage in espionage or sabotage, with right to that person to an administrative hearing at which the government is not required to reveal evidence inconsistent with national security. That statute has never been invoked and serious doubts as to its constitutionality have been voiced.

An alien may not be deported without a fair hearing, because deportation is held to be a deprivation of liberty. As the administrative order of deportation is not punishment, the alien is not entitled to a

judicial or jury trial. The hearing on which the order is based must be full, and the finding of deportability may not rest on undisclosed evidence. The alien may obtain judicial review of the administrative finding to determine that the deportation order is supported by evidence and is not contrary to the governing statute. Immigration, naturalization and residence of aliens are matters solely of federal cognizance and control.

An alien seeking admission is under the statutes ordinarily given an administrative hearing, but he may be excluded on unrevealed evidence if the government objects to disclosure for reasons of state. Constitutionally he is not entitled to any hearing, as a decision of exclusion is held not to involve a deprivation of liberty but only the denial of the privilege of entry into the country.

(*c*) *Property Proceedings*

An individual's "property" may not be taken without a fair hearing before or, in some instances, after the event. This hearing may be judicial, administrative or a combination of both. The constitutional requirement that the fair hearing protection be satisfied does not *per se* bar the act of deprivation upon compliance with other requirements of orderly exercise of vested state power by the appropriate organ of government. If there has been a denial of fair hearing, the court has inherent power to declare invalid the act of purported taking, to order restitution or money damages as compensation.

The issue presented may be with respect to a contract right, or an interference with the ownership, possession or use of property (in a broad context). The determination may be merely declaratory of the individual right, or there may be an order to restore or deliver to him an object, a judgment or order in his favor to pay money or to the government to desist from certain acts which threaten cognizable legal wrong to the complainant. In a great majority of these cases the individual owner or claimant is entitled to a judicial trial, sometimes with and sometimes without a jury.

Where the individual's property has actually been "taken" by the government, the determination of the amount to be paid as just compensation is ordinarily made by the judicial tribunals but this may, alternatively, be made by commissioners acting judicially. The right to a jury trial would be matter for statutory prescription. The hearing may take place after the formal act of taking and transfer of title. What is a "fair" hearing depends on the circumstances and it does not necessarily include all of the elements previously identified for a full hearing. Typical examples include cases relating to the use of injunctive relief, seizure of contraband property and commandeering of property in emergencies.

The law of due process has been refined in recent decades by the growth of administrative agencies and the statutory creation of new

rights and obligations. These agencies partake of the function of all of the three traditional branches of government – executive, legislative and judicial. This has complicated the law and made necessary the analysis of the several powers and fields of operation of the agencies, procedures established by statutes and the agencies' own rules measured against the constitutional requirements and prohibitions.

Where the administrative proceeding is similar to that of a court of law and the interests of a limited number of individuals are involved in an order which affects only them and stems from private facts not of a continuing nature, the essentials of due process will usually resemble those affecting the operation of a court. Analogies to traditional court process are useful in determining them. A fair hearing is always requisite. Statutes may add procedural requirements to the constitutional minima.

Administrative agency orders for payment of compensation to an employee for an injury or for lost wages following an illegal discharge, or to a person to cease violating certain regulatory laws, etc., do not involve deprivation of rights in the same sense as do criminal judgments. Many of these rights and obligations whose determination is committed to administrative agencies are of recent statutory origin, created to satisfy modern concepts of public policy and not originally enforcible at common law. It is not clear how far judicial process can be susperseded in matters of this nature.

Some courts have refused to permit actions in this field to be submitted exclusively to an administrative process and hold that the province of the constitutionally established judiciary cannot be excluded. Most courts, however, have upheld administrative process for the determination of these newly established rights and obligations, provided that prior to the final extinguishment of the private right the individual may secure judicial review of the validity of the order. Such a judicial determination is not the equivalent of a full appeal hearing on the merits, as it is restricted to the questions whether the order or procedure offends the constitution or the applicable statute, and whether the order is supported by sufficient evidence. The court will not determine the weight of conflicting evidence. Many of these principles are embodied in federal law in the Administrative Procedure Act.

(d) Appeal and Judicial Review

Although appeal is not a necessary ingredient of due process, as a rule, it may become so under certain circumstances. If the administrative procedure is summary, without full investigation and deliberation, a judicial review may be required by due process. Remedial and corrective judicial action has been elsewhere discussed – injunction, mandatory order, and the so-called prerogative writs fitted to special situations.

The existence and extent of the right of judicial review in matters of certain special interests is determined by the statutes. The right to receive a pension is ordinarily determined only by a full administrative hearing and judicial review is excluded. The legal position of a government civil servant is highly controversial. An applicant is not constitutionally entitled to any hearing; the courts will, however, entertain an action to enforce official compliance with competitive procedures established by statute. Once appointed, the civil servant is protected by at least informal administrative procedure – of a statement of reasons for demotion, discipline or dismissal, and a judicial determination of the legality both of the reasons adduced and of the statutory or administrative bases for these reasons. Charges of misconduct or inefficiency do not under the statutes generally require formal hearing, but an informal hearing is nevertheless usually granted. Discharge for misconduct, including treasonable or criminal conduct, may be made without disclosure of all the admissible evidence. It is questionable whether, in the present state of law, an individual's reputation or his interest in his job is "property" and whether the discharge is a "taking". Imputation or determination of crime not leading to punishment by imprisonment is not within the constitutional guarantee of trial by jury.

Where a license is required for a particular occupation, the protection to which the individual is entitled is also not yet clear. Denial is often without formal hearing. If the license is revoked, courts are coming to the conclusion that due process does require a hearing. Statutes usually require this and many now also require a hearing before denial of employment on the original application.

(*e*) *Before Legislative Action*

There is no constitutional right to a hearing in advance of enactment of a statute. Legislators do, however, often hold hearings before a committee of members. After adoption of a statute an individual may, when it is applied to him, assert that it is unconstitutional and secure a judicial determination of his claim, but not on the ground that no hearing was held prior to enactment. A few municipal charters require hearings prior to adoption of specified types of local laws.

In the nineteenth century it was held by some courts that the legislature might enact legislation directly adjudicating certain individual rights, e.g., decreeing divorce between named persons. A "decree" would ordinarily be preceded by a formal hearing held by a committee, but constitutionally part or all of this formality might be omitted. This power was based on the historical reason that divorce had been viewed as exceptional and legislative in nature. It may be that courts today would invalidate such action on the ground that it

is not properly legislative, but judicial. Divorce matters are today solely of judicial cognizance.

When administrative action partakes of the nature of legislation, i.e., rule-making which is prospective in operation and public in nature, rather than determination of individual claims, a hearing is not in general required by due process but may be by statute.

(*f*) *Confrontation*

The right of confrontation of a party to a proceeding by witnesses adverse to his defense or claim is concomitant with the concept of the due process right to a hearing; yet actual confrontation in person is not always required by what is "fair" under the circumstances. The "hearing" may be a mockery unless the respondent (claimant) has full opportunity both to present his own evidence and to test the truth of adverse evidence by cross-examination of opposing witnesses present before the tribunal. In a criminal case this special constitutional protective guarantee under the Sixth Amendment requires direct face-to-face presence of the accusing witnesses in the courtroom. In civil judicial cases there is no requirement of court-room appearance, but the government or other adverse party must expose their witnesses to cross-examination at some place, with opportunity to challenge evidence other than oral testimony before admission to court consideration.

In quasi-judicial administrative hearings there is no rule of confrontation, but ordinarily an opportunity must be afforded to cross-examine witnesses who testify in person. Some evidence of secondary probative nature, i.e., "hearsay", may be, however, admitted - this without opportunity to cross-examine. The courts have refrained from generalization, leaving to future determination the question whether absence of such opportunity vitiates the minimum of fairness of the hearing under the particular circumstances.

2. The Right To Legal Advice And Representation

The right to legal advice and representation has two aspects, first, the individual's right to be permitted by the tribunal to appear by an attorney of his choice who may participate freely in the proceeding, and second, the individual's right to have legal assistance provided by the state where he is financially unable to pay for such assistance.

In federal criminal prosecutions the right to the assistance of counsel, by appearance and participation, is specifically guaranteed by the Sixth Amendment of the Constitution. This right is as broad as the right of the individual as a party to be heard. Beyond this, the right to appear by counsel is a basic if implied guarantee in all matters subject to judicial trial. Some state constitutions expressly so provide.

It is fair to assume that the right would be similarly guaranteed for all administrative proceedings which are subject to the due process guarantee. The question has never been acutely raised because under statutes, regulations and custom the right to appear by an attorney is universally recognized.

In civil cases personal appearance of the parties is not ordinarily necessary and they may appear by counsel alone. Only in a very few situations which are ordinarily viewed as not amounting to a "taking" is the right limited, as, for example, in preliminary investigatory proceedings before a grand jury, administrative tribunals or legislatures. Here there is no constitutional right to appear by attorney, whether the individual appears under subpoena or voluntarily to protect his own interests.

Statutes and practice modify the situation to some extent. The Administrative Procedure Act entitles an individual who is compelled to appear in person before the agencies to which the act applies, to be accompanied, represented and advised by counsel. Legislative bodies allow limited representation by lawyers.

Some administrative agencies have established special requirements for admission of attorneys to practice before them but most of these agencies do admit attorneys with little or no technical experience. A few attempts have been made to exclude attorneys from practice before small claim tribunals, in an effort to avoid technicalities and costs which are supposed to appertain to the legal profession. Such provisions are of doubtful constitutionality and of less practical importance.

3. Substantive Due Process

Due process is more than the right to all elements of a hearing that is fair under the circumstances; it includes minimal rights of substance such as freedom of the individual to use his faculties in all lawful ways, to earn his livelihood by any lawful calling, to pursue an avocation or occupation, to enter into all proper and necessary agreements for those ends. Deprivation of liberty or property which has been carried out or is threatened for reasons which lack this substance are unlawful, even though all procedural requirements have been met.

On the other hand, what has been taken from the citizen may be lawful as an end in the assertion of government power over the citizen, but may be unlawful for defects of procedural fairness – want of notice of reasons or charges, or of opportunity to be heard in rebuttal of a charge or in proof of a claim.*

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* Cf. the interesting discussion of both phases of due process in *Parker* v. *Lester*, 227 F. 2d 708 (Federal Court of Appeals, Ninth Circuit, 1955).

4. The Effect Of Want Of Funds To Pay Counsel

We are concerned here with the situation of the impoverished litigant, particularly the accused in a criminal prosecution. In the federal courts the impecunious accused who is genuinely without funds with which to compensate his counsel has the right to ask the court to appoint counsel for him and the court habitually does this from among the admitted practitioners of the federal bar. The same practice prevails, generally, in the states and is expressly so provided in many of their constitutions.

In all prosecutions for federal criminal offenses representation by counsel is an absolute requirement under the Sixth Amendment; and likewise in many states for felony prosecutions, as where, for example, the accused is a minor or an infirm person unable to conduct his own defense. Payment of compensation to counsel presents a serious problem. For representation in federal prosecutions there is no provision for payment by the government. Lawyers appointed by the court recognize a professional obligation to render services to the best of their ability without any compensation. Occasionally, where the trial will be unduly lengthy, funds have been provided from volunteer sources including members of the local bar at large, or counsel work is divided among several attorneys who thus mitigate the drain upon their time and efforts.

Many states have express statutory provision for payment of fees to counsel appointed by the (state) court to represent impoverished persons prosecuted for crime, the range of fees so paid being of modest order. Absence of any provision for such payment tends to make such professional work of less than the best grade, especially if counsel be appointed on the very eve of trial.

In many localities statutes create the office of "public defender", as a full-time salaried public employee with a staff of attorneys who undertake the defense of accused persons who are unable to pay for counsel. The public defender is the opposite number of the public prosecutor.

In the larger cities organized volunteer legal assistance is provided, especially for representation in criminal prosecutions, by "legal aid" societies. These are private, non-profit organizations supported by charitable contributions from lawyers and laymen. These societies employ a staff of salaried attorneys whose sole business is the representation of indigent clients. This volunteer service is also extended to such clients in civil cases. It is, however, common to insist upon the payment of a minimum fee unless the client is totally without funds.

Persons of modest means or none at all who have occasion to institute a civil action for recovery of money damages habitually enter into arrangements with counsel for representation on a contingent

fee basis. This practice is recognized by bar associations and the courts as wholly legitimate, up to a maximum limited percentage in relation to the amount actually recovered by the client.

Those who appear before administrative agencies normally have the means to pay their own counsel. In those agencies which deal with a large volume of matters involving relatively small claims affecting persons in moderate circumstances, the solution sought has usually been other than that of providing counsel at public expense. Instead, the procedure has been simplified and made of an investigatory rather than an adversary nature.

I. FRINGE AREAS OF THE RULE OF LAW COVERAGE

This text has alluded to instances in which the development of the web of assured personal rights does not seem to have met promptly or fully the impact of newer social forces or the demands of modern values of personality. What is even a partial inadequacy is not always a matter of agreement between those to whom the protection of individual interests looms foremost, and those who place greater emphasis on the demands of government or the values in existing legal customs. It would over-simplify any such issue to label proponents of the extension of individual rights as "liberals" or the opponents as "conservatives". The values at the periphery of adaptation are more relative than if we were for the first time evaluating *habeas corpus* as a new procedural right.

There follow some examples of situations in which the Rule of Law may seem to be at times ignored or its development to be tardy. There is no attempt to discuss the arguments pro and con.

We insist that there is a mature body of law accepted and generally applied, and that we have no call to feel that there is any substantial degree of failure in concept or institutions. To record instances of relative lag in practical application does no more than recognize that human beings at times fall short in performance and that demands for legal protection and satisfaction in any system outrun the capacity for instant fulfilment.

1. Use Of Police Powers

As indicated under Topic E, cases come to light from time to time of a confession of guilt alleged to have been extracted by threats, physical abuse, questioning by police officers in relays or at the end of an unreasonable period of detention. The courts are quick to give careful scrutiny to all surrounding circumstances and to set aside convictions in which a forced confession has been thus obtained, but judges cannot act as the direct controlling authority. They can act only when the facts are proved in the course of a litigated remedial judicial proceeding.

To say that there are such instances does not imply that they are of constant occurrence. We do not believe that senior prosecuting attorneys connive. The due process rule of strict prohibition is clear. The elimination of these occurrences will follow the tightening of responsible executive control and acceptance by the police itself, under instructions, of the duty to avoid all abuse of power as an affirmative duty equal in importance to the maintenance of law and order.

Another form of police over-zealousness is the occasional rounding up by arrest and orders to "leave town" of persons against whom there is no evidence of complicity in present crime but who have already served a sentence for some prior offense or who associate with known criminals. "Vagrants", persons without visible means of support but otherwise inoffensive, are also at times subjected to arrest or forced departure.

Mention has been made of wire-tapping and other methods of eavesdropping by police officers without sanction of a court order even where local statutes authorize such orders – and they are then readily given. The hope is that the disclosure unwittingly made to the concealed unauthorized listener will lead to evidence upon which an arrest can be made and a trial held in which that other evidence can be offered and received by the court without revealing how the trial was first opened. At this writing an intensive study is being made by a responsible legal group and is nearing completion. There is solid ground for belief that it will lay bare the extent of this suspected but frequently denied practice. Argument will be thereby heightened over the opposing contentions for preservation of the right of privacy as against the necessity for use of modern methods of detection. There will also be room for the very different argument that the means must be found to protect privacy from invasion by private non-governmental interests – in contested divorce proceedings, business rivalries, labor unions struggles for internal power, etc.

2. Shadows Cast By The Growth Of Administrative Law Agencies And Powers

This subject has engaged the attention of a score of scholars and given rise to almost countless court decisions. It would be presumptuous to attempt to add anything new and impossible to summarize here what has been written and argued.

Administrative law is with us to stay. We had better accept its distinguishing characteristics while striving to bring all agencies within the domain of reasonably objective and precise standards, the fair hearing elements of due process and a tradition of consistent expertise. We may note certain characteristics which, if not necessarily dominant, are sufficiently aberrant from the stream of traditional law to give cause for concern.

(*a*) *Absence in the Legislative Mandate of Reasonably Definite Standards*

A statute entrusts the power to license, renew or revoke by application of the standard of "public convenience, interest or necessity". A license – to operate a radio or television station – is the key that opens the door, for only a few, to millions of dollars in lawful

profits. Latitude here for the exercise of "discretion" in determination of facts need not alarm us, but the failure of the legislature to provide any more precise standard seems an abdication of function which prompts the inquiry into how this invitation to law-making is used in practice by a law body. Should discretion extend beyond the sifting of masses of conflicting facts into the realm of the making of policy?

(*b*) *"Arbitrary" Determination of Causes*

The basis for such legitimate criticism as exists lies in the absence of objective and fairly precise standards attributable either to the legislature or to the agency, and to the unwillingness or inability of the administrators for a variety of reasons to be predictably consistent. In courts of law we expect to and do generally find a more certain body of known tradition upon which substantial reliance can be placed.

(*c*) *External Pressures*

Legislators, office holders and political leaders too often feel free to bring influence to bear upon agency administrators in order to shape the rules or to induce a favourable decision in a given matter on behalf of some group, class or individuals in interest. This is more prevalent at the lower levels of municipal agencies, but such attempts are not unknown in the federal agency circles. Many administrators reject all such attempts, yet the attempt itself is not repulsed as a „contempt of court".

(*d*) *The Calibre of Administrative Personnel*

There is substantial ground for dissatisfaction over appointments to an agency board which are made as reward for political party hack work or as acts of personal favoritism, without regard for mature experience or other qualifications of effective public service. While purely technical experience may be a handicap, the absence of matured judgment may be disastrous to the public or to the individuals whose legitimate interests are at stake in quasi-judicial proceedings.

3. Equal Protection Of The Laws

Any comment on this topic (which must be addressed to the rights of racial or religious minorities) runs the risk of attack from one quarter or another. The factors of long-established social customs, political partisanship, regional pride and sensitivity cut across the stream of constitutional development.

The Fourteenth and Fifteenth Amendments to the Constitution provide expressly for the equal protection of the laws and forbid denial or abridgement of the rights of citizens to vote "on account of race, color or previous conditions of servitude". Acceptance in the

southern states of the Supreme Court decision in 1954 that enforced separation of whites and Negroes in public tax-supported schools violates the equal protection rights is slow and "integration" is being opposed in many localities. The opposition or delay is based in part upon the contention, to which allusion has been made earlier in this text, that the Supreme Court exceeded its constitutional powers in the 1954 decision. Positive legal steps are, however, being taken by the lower federal courts in approving or disapproving specific local areas school integration plans presented in litigious form. The issue in each instance is whether the plan meets the constitutional minima of the Supreme Court decree which left implementation to the lower courts. There is, however, a definite trend toward slow acceptance – in the universities, and at the lower school age levels in the border states where there is a lower proportion of Negro residents.

Under the Fifteenth Amendment the constitutional and legal issues are in appreciable degree less confused. The right of all adult citizens to vote, subject to reasonable educational minimum standards and proof of residence, is not seriously contested. Yet the proportion of adult Negroes who are accepted for the voting lists is much lower in many southern states than that of the whites. This proportion of recognized Negro voters is in recent years being increased slowly. As the educational level of Negroes, especially in the rural areas, is raised, there will be a progressive reduction of the present disparity.

4. Legislative Investigation Procedures

This is an area in which the recognition of private right has not kept pace with the growth of legislative committee activities discussed under Topic D. Witnesses before a committee have no right to a hearing other than which the committee chooses to accord, no right to participation by counsel as distinguished from advice, no right to any review of public castigation by the committee or to injunctive relief. The courts have been understandably hesitant to interpose between the witness and the committee, to rule on whether a specific line of inquiry was genuinely in aid of the legislative function or was for purposes of mere exposure. Determination of the extent of inquiry powers delegated to a particular committee is, of course, less difficult.

It has been noted that the courts are now somewhat more receptive to pleas of the witness on later trial for criminal contempt of the committee by refusal to answer and legislatures themselves are moving to restrain their committees. Witnesses stand nakedly alone. The fairness of the hearing procedure will always depend more on legislative acceptance of self-restraint in exercise of conceded powers than on the possible after-the-fact correction by a court which can never undo the damage to reputation wrought by unfair and much publicized committee questioning, comment or report. The instances of marked

lack of fair legislative procedure have more recently declined in frequency.

There is one remaining source of legitimate concern as a by-product of this period of much publicized legislative investigations. It has been a common occurrence for witnesses before legislative committees investigating criminal and conspiratorial groups to "plead the Fifth Amendment", i.e., to refuse to testify on the ground that their answers might tend to incriminate them. The courts had held that this ancient privilege is available in legislative as well as in judicial and administrative hearings. The public tends to conclude that he who thus shields himself from inquiry is "guilty" of something, and that irrespective of actual guilt or innocence he should, solely by reason of the claim of privilege, at least be discharged from his employment position, public or private. Some who have been the victims of this popular belief have been able to obtain judicial review of the lawfulness of discharge. The courts have repeatedly held that no imputation of guilt may be drawn from the plea of possible self-incrimination as a constitutional privilege available to the innocent and the guilty alike. This has long been a commonplace occurrence in ordinary criminal trials without exciting criticism of the courts for separating the fact of the plea from imputation of guilt before the jury.

5. Private Non-Governmental Pressures

Historically the scope of the Rule of Law has been viewed as that of the legal relations between the citizen and his government. Whether the Rule is deemed also to extend to some of the legal relations between citizen and citizen is a matter of definition and premise. It is arguable that the concept and practice of the Rule are not so limited as to exclude all private, non-governmental relationships of conflicting interests and that therefore abuses of power in some of those relationships do fall within the ambit. The right of private suit to penalize monopolies by recovery of exemplary damages or to enjoin continuance of a so-called secondary boycott and unfair competition illustrates the recognition by the law that the citizen has a juridical interest in preserving economic elbow-room. The individual is recognized to have a judicially enforced right to a fair hearing in disciplinary proceedings against him undertaken by private bodies of which he is a member, such as a church, a fraternal order, a labor union or a professional organization.

Here we touch upon an area of economic pressures, intellectual or religious conformity or personal rivalries in ambition. The individual cannot hold his own against the oppressive forces of mass power. A private body threatens a book-seller with an organized boycott unless he withdraws from his shelves books claimed to be obscene. The threat is not infrequently effective. A "patriotic" organization

brings pressure against a college to discharge a faculty member suspected of "disloyal" proclivities. Fear of possible discharge and absence of a right of action may stifle otherwise normal and entirely lawful freedom of expression and association.

The officers of a labor union wield enormous power over the jobs, wages and working conditions of their members. When, as in some but by no means the majority of unions, its elections are held only at long intervals and these officers suppress intra-union competition for office by threats or fraudulently conducted elections, the individual member is denied opportunity to voice his economic needs, to have effective representation. He dares not complain lest his membership be cancelled; he suffers an oppression as real as if, when working for the government, his employment is terminated for a purely arbitrary reason or for no reason at all or without a hearing on known charges. The imbalance works a denial of equal opportunity for which in more settled relationships and situations a remedial right has been recognized, either by statutory innovation or by judicial adaptation. There is a persuasive analogy between the accepted subjection of government to law and the needed subjection to law of non-governmental forces which abuse economic or social power to the detriment of the individual.

In 1890, aware of the growing power of economic monopolies, Congress passed the Sherman Antitrust Act, the initial step in the broad and still-developing growth of government regulation of business. Since the days of the frontier, Americans have strongly believed that opportunity for market access and encouragement of market rivalry are the keystones of sound economic philosophy, and from the first, promotion of economic competition in open markets has been the clear goal of the antitrust laws. Both Congress and the courts have frequently reiterated this goal. Both political parties have proclaimed its essentials. Such legislation has become a distinctive American means for stimulating continuous growth, for releasing the energies and ideas essential to maximum industrial productivity and technological development. While on the one hand antitrust laws protect small business and new ventures from the power of established industry, on the other they provide a check on any tendency to extreme economic fluctuation. As the basis of controlled competition, such laws foster a sound economic foundation for representative government, the bulwark of political and social freedom under law. They afford an important illustration of legislative extension of the protection of the individual, not against government but by government against encroachment by other individuals and private bodies.

The function of the Rule of Law in the western tradition has been to create a legal framework which protects the individual in his exercise of freedom of choice for the full expression and development of his personality against encroachment by government. The concepts

and institutions and procedures of that framework must be sufficiently flexible to permit positive legal implications of new situations and relationships to be recognized and brought within that cover. The American system is happily not so rigid as to exclude this receptivity. By extension of the Bill of Rights and Fourteenth Amendment guarantees, and of the commerce clause control power of the federal Constitution, the role of the federal government in the development of the Rule of Law has become the dominant force.

AMERICAN BAR ASSOCIATION COMMITTEE TO COOPERATE WITH THE INTERNATIONAL COMMISSION OF JURISTS

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CONTRIBUTORS OF MATERIAL TO THE STATEMENT OF THE RULE OF LAW IN THE UNITED STATES (1957)

Atlanta, Georgia
WM. B. SPANN, JR., 1220 Citizens & Southern Natl. Bank Bldg.
HARRY S. BAXTER, 1945 Hurt Bldg.

Boston, Mass.
LAURENCE M. LOMBARD, 73 Tremont Street
HENRY B. CABOT, 140 Federal Street
JOHN A. CANAVAN, U.S. District Court
FREDERICK T. DOYLE, 53 State Street
CHARLES M. EWING, 73 Tremont Street
PROF. LIVINGSTON HALL, Harvard Law School, Cambridge, Mass.
PROF. LOUIS L. JAFFE, Harvard Law School Cambridge, Mass.
HON. STANLEY E. QUA, Supreme Judicial Court
HON. JOHN F. SPALDING, Supreme Judicial Court
JOHN M. WOOLSEY, JR., 294 Washington Street

Cincinnati, Ohio
ROBERT TAFT, JR., 603 Dixie Terminal Bldg.
HON. POTTER STEWART, U.S. Court of Appeals
HON. GILBERT BETTMAN, Municipal Court
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