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EDITORIAL

DOMESTIC JURISDICTION AND INTERNATIONAL CONCERN

The appearance of a new legal Journal devoted to the administration of justice within different countries gives rise to an important preliminary question of principle: how far are such matters the proper concern of lawyers throughout the world?

"Proper concern" is however an equivocal phrase. It may refer to the extent to which obligations arise in international law with regard to the administration of justice in individual countries. In this form the question put allows of two answers, the one fairly definite and based on the writings of eminent international lawyers, the decisions of international tribunals and the practice of States, the other more speculative but of increasing importance. In international law it has long been recognized that there is an international standard of treatment for aliens which can be invoked by the State, of which the aliens are citizens, against the State which fails to observe that standard. The International Court of Justice indicated in an Advisory Opinion¹ that this kind of responsibility on the part of States extends not only to other States with regard to the latter's nationals but also to the United Nations in respect of injuries done to its employees. What has been called "the minimum standard of civilization"² includes in particular the judicial administration, which if it does not reach an adequate standard may constitute what is technically known as a "denial of justice".³

It is much more difficult to determine the extent to which international law regulates the administration of justice within individual countries, as far as the protection of the individual as such is concerned, irrespective of his nationality. It is however the extent rather than the fact of the relevance in international law of the treatment of individuals which is in question. The Charter of the United Nations⁴ recognizes this relevance in a number of articles which assert the importance of human rights in international rela-

¹ *Reparation for Injuries suffered in Service of the United Nations*, ICJ reports 1949, p. 174.

² *Oppenheim-Lauterpacht*, Vol. I, 8th Ed., p. 350. An authoritative statement of the duty to maintain this standard *vis à vis* aliens is to be found in Max Huber's Report in *Great Britain v. Spain*, Arbitration of 1 May 1925, UN Reports of International Arbitral Awards II, p. 615.

³ See *US (Janes Claim) v. Mexico* and *US (Neer Claim) v. Mexico* (1927) Opinions of Commissioners, pp. 108 and 71.

⁴ See, e.g., Preamble, Articles 1 (3), 13 (1)b, 55c, 62 (2), 76c.

tions. Other international instruments impose on their signatories the definite obligation to observe human rights. For example, the Hungarian Peace Treaty of 1947, by Article 2, requires the parties to "take all measures necessary to secure to all persons under Hungarian jurisdiction . . . the enjoyment of human rights and of the fundamental freedoms".⁵ The European Convention on Human Rights of 1950 contains specific provisions concerned with the administration of justice; for example, Article 5 (1) guarantees freedom from arbitrary arrest or detention, Articles 5 (2) and 6 (3)a protect the right of the accused to be informed of any criminal charge preferred and Article 6 (3)b gives accused persons the right to adequate time and facilities for the preparation of their defence.

But side by side with the tendency for the topic formerly known in international law as "the responsibility of States for injuries to aliens" to be transformed into "responsibility of States for injuries to individuals",⁶ the sovereignty of States has continued to be asserted. One striking example of the conception of sovereignty is to be found in the doctrine of "domestic jurisdiction", which is recognized in Article 2 (7) of the Charter.⁷ An immense literature has debated the scope of domestic jurisdiction in international law.⁸ Its practical effect in international relations has also been considerable. The claim that matters in which other countries have expressed an interest lies within the domestic jurisdiction of a particular State has been raised on many occasions by States with varying political alignments; for example, by the Netherlands in regard to Indonesia,⁹ by the Union of South Africa in regard to the treatment of Indians in that country,¹⁰ by the United Kingdom in regard to Cyprus,¹¹

⁵ See also the Geneva Conventions, 1949. The application of the Hungarian Peace Treaty and of the Geneva Conventions to the Administration of Justice in Hungary is discussed in the Report, "The Hungarian Situation and the Rule of Law", published by the International Commission of Jurists in April 1957.

⁶ Jessup, *A Modern Law of Nations*, 1948, p. 97.

⁷ "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State, or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

⁸ See, e.g., *Bibliography in Sohn, Cases on World Law*, 1950, pp. 85-86 and *Supplement*, 1953, pp. 1-15. See also Waldock, *British Year Book of International Law*, 1954, p. 96 and 1955-6, p. 244; for a Study of the Institute of International Law see *Annuaire de l'Institut de Droit International* 43 (1950), Part I, pp. 5-47; 44 (1952), Part I, pp. 137-180; 45 (1954), Part II, pp. 108-199.

⁹ UN Security Council, *Official Records, Second Year*, No. 67, pp. 1619-20, 1639-48.

¹⁰ UN General Assembly, *Official Records of the Second Part of the First Session 1946*, Joint Committee of the First and Sixth Committees pp. 1-15 and *ibid.* 1946-7, Plenary Meetings, pp. 1006-61.

¹¹ General Assembly, *Official Records, IX, Plenary*, pp. 52-60.

and by the USSR in regard to Czechoslovakia¹² and Hungary¹³

A somewhat paradoxical situation has thus arisen in international relations. On the one hand any realistic observer must admit, as a matter of fact apart from law, that the way in which national States treat the individuals under their control is an important factor in maintaining or undermining confidence between States. On the other hand international law, although in the final analysis it draws its support from the trust which exists in international relations, cannot in the present stage of its development adequately regulate all the matters which in fact provoke distrust between States.

No doubt it is important not to over-emphasize the legal weight of the plea of domestic jurisdiction. It cannot be evoked when a State by obligations made under treaty brings within the purview of international law matters which might otherwise lie within its exclusive jurisdiction. Furthermore, as was pointed out as long ago as 1923 by the Permanent Court of International Justice in its Advisory Opinion on the *Nationality Decrees in Tunis and Morocco*,¹⁴ the scope of the plea at any given moment depends on the state of international law at that time; the expansion of international law may result, and indeed is resulting, in the restriction of the sphere within which the plea of domestic jurisdiction may operate. It should also be borne in mind that, according to the practice of the United Nations, the fact that a matter is within the domestic jurisdiction of a particular State does not preclude discussion by the United Nations of the question, although such discussion, if it does not remain completely academic, may not be easily separated from a demand for action which could constitute intervention in a domestic matter.

The "proper concern" of lawyers may however be given a wider interpretation. Even where international law has imperfectly developed obligations regarding the administration of justice in the different national jurisdictions, lawyers ought not to be restrained from expressing a professional and a moral concern with the administration of justice in all countries. Such concern is sanctioned to some extent by practice.¹⁵ Indeed, where governments are at present to some extent inhibited from dealing with matters of actual international concern in fear of a claim of domestic jurisdiction, an exchange of views across the frontiers by lawyers in their private capacity may prove helpful; such interchange, based on allegiance to common professional standards, may minimize the

¹² Security Council, *Official Records*, III, Nos. 36-51, pp. 89-111, 172-231, 254-285 and Nos. 53, 56, 63, 71 and 73.

¹³ General Assembly, *Official Records*, 582nd Plenary, p. 108 (Mr. Shepilov).

¹⁴ (1923) PCIJ, Series B, No. 4.

¹⁵ A good example is the not infrequent admission of, and even invitation to, foreign observers to attend significant trials.

national and political difficulties which often undermine the official relations of States. This may in time create a world-wide climate of opinion which will lead to a necessary narrowing of the doctrine of domestic jurisdiction and facilitate the full and unquestioned incorporation into international law of common principles underlying the administration of justice in all countries.

But the lawyers' task is a very delicate one. In the first place, it is essential that discussion and criticism should be directed to those fields in which over a wide part of the world there is, although in embryonic form, a consensus of opinion among lawyers on fundamental principles. The International Commission of Jurists believes that such common principles are to be found in the conception of the Rule of Law. By the Rule of Law the Commission means adherence to those institutions and procedures, not always indetical, but broadly similar, which experience and tradition in the different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be essential to protect the individual from arbitrary government and to enable him to enjoy the dignity of man. In the second place it is necessary to preserve a proper balance between the degree and quantum of concern shown for different parts of the world, especially at a time when judgement is only too readily distorted by political allegiances. Thirdly, and perhaps most important of all, "the moral right of a lawyer to express views on matters concerning people who live in other countries depends on the way in which he complies with the same duty in his own country and amongst his own people".¹⁶

This *Journal* in its editorial policy will be guided by these considerations and, it is hoped, may help in some measure to deepen understanding of and widen agreement on the principles of the Rule of Law in all countries.

NORMAN S. MARSH

¹⁶ It is significant that this expression of opinion was voiced by the Editor-in-chief of the Polish legal journal, *Prawo i Zycie*, Professor Bachrach, in its issue of June 30, 1957. (An open letter to Sir Hartley Shawcross, QC, MP, Member of the International Commission of Jurists).

THE QUEST OF POLISH LAWYERS FOR LEGALITY

CONSTITUTION—SEJM

"The return to legality" has recently much occupied the minds of lawyers in Poland. A number of questions were discussed in the publications of the Association of Polish Lawyers¹ and were dealt with in public statements made by members of the legal profession. For a long time, however, the need for changes in the Constitution² and for changes in the functioning of the Sejm,³ of the Council of State⁴ and of the Government was not raised.

Legality and Judicial Administration

Attention was focussed on the failure by the Judges, the Procuracy, the Administrative Authorities and particularly by the Security Police to observe legality. Until 1955 there was only guarded criticism, and violation of legality was said to have been exceptional. The break was made after the publication of an article in *Nowe Drogi*, the official organ of the Polish United Workers' Party,⁵ in February 1955. This article, reporting on the Third Plenary Session of the Central Committee of the Party, disclosed the seriousness and far reaching implications of the issues involved. "We discovered with bitterness, with burning pain and shame the brutal breaches of principles of people's legality by some units of the Security Service, and excesses which were committed. Arrests of innocent people and unlawful detention in prison have taken place. There were cases where instead of attempting to determine the truth objectively, evidence was distorted to fit false charges prepared beforehand. Cases have occurred when disgraceful and unacceptable methods were used during investigation. The harmful tendency of the Security Service to exercise supremacy over the Government was even more sharply marked, as was the unjustifiable intervention of agents of the Security Service in many fields of our life . . . which became the source of . . . demoralization. Those in charge of the Ministry

¹ On January 1, 1956 over 8,000 advocates, judges, procurators and other lawyers were members of the Association.

² The Constitution of the Polish People's Republic was passed by the Sejm on July 22, 1952 and has been in force from that date (save that Article 31(1) has been amended by the Law of September 25, 1954).

³ In the Polish parliamentary system there is only one Chamber called the Sejm (the Diet). The members of the present Sejm (called "Deputies") were elected on January 20, 1957 for a term of 4 years in accordance with the Electoral Law of October 24, 1956, passed by the former Sejm. There are 459 Deputies.

⁴ See Note 20.

⁵ This is the official name of the Polish Communist Party, referred to in this Article as "the Party".

of Public Security are responsible". A little later the then Minister of Justice H. Swiatkowski admitted that pressure has been exercised on judges and that the Ministry of Justice gave orders to them. Cases were tried in secret contrary to law and the judges in their deliberations on the cases were subjected to outside interference. Moreover, the accused were not given an opportunity to exercise their right to defence.⁶

Similarly, at the Fourth Congress of the Association of Polish Lawyers in December 1955 the President of the Association, Professor Jodlowski (who is now one of the Deputy Speakers of the Sejm) called for the strengthening of people's legality in the administration of justice and for full respect for the independence of judges. He referred to the above mentioned article of Mr. Swiatkowski and described the "distortions" in the work of the Courts, the Procuracy and of the Bar as disturbing but only sporadic.⁷ The resolutions of the Congress also drew attention to the need "to intensify the struggle for the correct ethical and political attitude and for the high standards of judges and procurators", "to enhance the standing of the Bar in the eyes of the community" and "to strengthen the rights of defence of honour and dignity of citizens against all categories of unlawful attacks". These resolutions did not, however, mention the supremacy of the Security Police nor did they condemn the violation of law and of the rights of citizens by the police, by the Courts, by the Procuracy and generally by the Authorities.

At the meeting of the Committee of the Sejm on the Administration of Justice⁸ on April 17, 1956, its Deputy Chairman Frankowski, a member of the Bar, pointed out in his report⁹ (i) that the Procuracy had failed in their duty to supervise the observance of the law by other authorities;¹⁰ (ii) that there was a practice of unlawfully arresting people and also of extending their period of detention; (iii) that many sentences to detention were un-

⁶ *Nowe Drogi*, 1955, No. 5 (May).

⁷ *Panstwo i Prawo* (the then official publication of Polish Lawyers' Association), 1956, No. 2 (February).

⁸ One of the 19 Standing Committees elected by the present Sejm.

⁹ *Zycie i Mysl*, 1956, No. 3 (March).

¹⁰ According to the Law of July 20, 1950 the Procurator General and Procurators under his control were not only charged with investigation of and prosecution for criminal offences but also with the execution of the general supervision of compliance with the law by the authorities (except by the Ministries and other Central Authorities). The Procurator General and his subordinates were also charged with the duty of ensuring that complaints of citizens against the Authorities should be given due consideration. In 1955 the number of these complaints amounted to 1,500,000 (see the report of a Committee of the Sejm reported in *Zycie Warszawy*, of August 17, 1956).

justified;¹¹ (iv) that Courts were not independent of the Ministry of Justice which, for example, instructed judges that they should not allow too many appeals from inferior Courts and that they should limit the number of cases in which sentences were suspended; (v) that the Council of Ministers turned a blind eye to the fact that orders were made by Ministers which infringed the law and the provisions of the Constitution.

Shortly afterwards during a debate of the Sejm Professor Jodlowski¹² demanded the payment of compensation for unlawful detention to former political prisoners who have been rehabilitated. He called for a purge of the Security apparatus and for the punishment of those personally responsible for breaches of legality. In particular, punishment should be meted out to all those who were guilty of improper methods of investigation and of "framing cases". Professor Jodlowski insisted on the introduction of genuine guarantees of the independence of judges and, in particular, of their irremovability. He demanded that judges who had been dismissed should be reinstated and that remuneration of judges should be increased to enhance their status and independence.¹³ He strongly criticised the Presidium of the Government for passing resolutions by which binding provisions of law were changed or repealed without any legal ground and called for the discontinuance of this unconstitutional practice.¹⁴ The superior force of Statutes, and of Decree-Laws,¹⁵ over all other legislative acts should be re-established. These demands were repeated and enlarged upon in the resolutions of the Executive Committee of the Association of Polish Lawyers held on May 13, 1956 which are referred to hereafter.¹⁶

Ineffectiveness of the Constitution

According to Mr. J. Stembrowicz, who is a Procurator, disregard for legality was also due to the fact that the Constitution

¹¹ In 1955 there were 37,709 cases in which peasants were sentenced for failing to comply with compulsory delivery quotas of corn. The Procurator's Office questioned 34% of the sentences and released 5,064 peasants from arrest (according to Frankowski, see Note 9).

¹² This speech is cited in *Prawo i Życie*, No. 1 (May 6, 1956), which became the official publication of the Association of Polish Lawyers. The monthly *Panstwo i Prawo* became the official publication of the Institute of Legal Studies of the Polish Academy of Science.

¹³ During that period the Minister of Justice dismissed a considerable number of judges, mainly for political reasons.

¹⁴ An authority which is not provided for in the Constitution. There is no law determining its membership and its powers. Nevertheless a large number of orders has been issued by the Presidium.

¹⁵ The Constitution provides that Statutes should be passed by the Sejm but in the intervals between the sessions of the Sejm the Council of State may pass "Decree-Laws". See also Note 20.

¹⁶ *Prawo i Życie*, No. 2 (May 20, 1956.)

contains a number of rules which are a dead letter or could not be applied in practice.¹⁷ For example, Article 54 provides that "the Procurator General . . . shall secure the respect for rights of citizens" and Article 73 states that "claims and complaints of citizens must be speedily and justly dealt with" and that "those who are guilty of delay or who show soulless and bureaucratic attitude to complaints and claims of citizens should be taken to task". Mr. Stembrowicz considers it obvious that neither threatening bureaucratic administrators with sanctions nor the control of the legality of orders and decisions of Administrative Authorities by the Court will secure observance of the law. The remedy lies in improving the efficiency of civil servants by raising their professional qualifications through suitable training and by bettering their moral standards. Until this is achieved the present state of affairs in which the people disregard the law knowing that it is not respected even by the administration is likely to continue. According to Professor Iserzon the lack of training of civil servants is not the source of this evil.¹⁸ It lies in conscious flouting of the law which springs from the idea now firmly established amongst the bureaucrats that "effectiveness" should prevail over strict compliance with the law. If a civil servant or a Government Department finds it difficult or impossible in law to make an order he considers necessary, legal considerations are disregarded however injurious it may be to the rights of citizens. This cult of "effectiveness" in the opinion of Professor Iserzon resulted in the functions of the Sejm¹⁹ becoming a mere fiction although it is described in Article 15 of the Constitution as "the highest instrument of authority" and "the exponent of the will of the people in the exercise of Sovereign Rights of the Nation". In fact the Sejm was to a large extent replaced in its legislative function by the Council of State.²⁰

The Council of Ministers, individual Ministers, the Presidium

¹⁷ "A provision of the Constitution does not suffice", *Nowa Kultura*, June 14, 1956.

¹⁸ "Supremacy of Provisions of Law", *Prawo i Życie*, No. 3 (June 3, 1956).

¹⁹ The Sejm's legislative powers include the passing of statutes, and the approval of long-term economic plans and the yearly budget.

²⁰ The Council of State consists of Chairman and four Deputy Chairmen, a Secretary and nine members elected by the Sejm from amongst the Deputies. The Council convenes the Sejm, and when it is not in session the Council can pass Decree-Laws which are laid before the Sejm at the next sitting for confirmation. The Council of State has the power to ratify and determinate international treaties, appoint and recall Ambassadors and Heads of Legations, and also appoint and dismiss Ministers, the Procurator General and Judges. These powers were previously vested in the President of the Republic. The Constitution of 1952 does not provide for the office of a President of the Republic, and his former powers were largely transferred to the Council of State but some of his powers are vested in the Council of Ministers.

of Government and the State Commission for Economic Planning²¹ also legislated by way of "inferior acts".²² In comparison to these authorities the Sejm was always treated as Cinderella. Over all of them the Political Bureau of the Party reigned supreme.²³

The Dumb Diet

The predecessor of the present Sejm was known as "the dumb Diet". During the period of three and a half years, said Professor Jodlowski,²⁴ it sat only on seven occasions, that is approximately twice a year. The first two sessions lasted three days each, the three following sessions two days each, the fifth one day, the last session also one day, and only the sixth session for three weeks. "Apart from three Finance Acts, which are of rather technical character, the legislative achievement of the Sejm consisted of eight Acts of Parliament during 3½ years". During the same period (1953—1956) the Council of State by reason of the very long intervals between the sessions of the Sejm passed 150 Decree-Laws²⁵ which were subsequently given automatic and blanket approval by the Sejm without discussions or any attempt to introduce amendments.

The position was no better with regard to the supervision by the Sejm (provided for in Article 15 of the Constitution) of the State Administration and other authorities. In fact there was no control. The Deputies of the Sejm did not make use of their constitutional right of questioning the Chairman of the Council of Ministers or individual Ministers although the Constitution provides that a reply must be given to the Sejm within 7 days. In the years 1953—1956 only one question was put.²⁶

The Resolution of the Central Committee of the Party (the VII Plenum) of July 1956 mentioned the need for improvement in the functioning of the Sejm and for assurances that it would exercise to the full its constitutional rights. Of the 39 pages of the Resolution only 6 lines were, however, devoted to the ways in which an improvement could be achieved.²⁷ This question was

²¹ This Commission was dissolved with effect from January 1, 1957. It was replaced by a Planning Commission attached to the Council of Ministers, but its objects and powers have been considerably curtailed.

²² "Inferior Acts" are the orders and rules which the Executive and various authorities are entitled to make in pursuance of the provisions of a Statute or a Decree-Law. In fact, however, measures of primary importance were often made in the guise of inferior acts.

²³ The Political Bureau of the Party now consists of nine members elected by the Central Committee of the Party: the last election took place on October 21, 1956.

²⁴ Article by Professor Jodlowski in the *Tygodnik Demokratyczny*, 1956, No. 15, cited in the booklet of Professor S. Ehrlich, *Legality-Sejm*, 1956, p. 56.

²⁵ Article by Frankowski in *Zycie i Myśl*, No. 3, 1956, p. 106.

²⁶ *Nowe Drogi*, 1951, No. 1 (January), p. 36.

²⁷ *Książka i Wiedza*, p. 132.

dealt with more comprehensively and pungently by Mr. Gomulka in his address to the VIII Plenum of the Central Committee during the well known events of October 1956. "To the many ills of the former period," said Mr. Gomulka, "one must also add this, that in State practice the Sejm did not perform its constitutional function . . . The Sejm should control the work of the Government and of the organs of the State in the widest measure. To achieve this certain changes in the Constitution are necessary."²⁸ The Resolution of the VIII Plenum went in the same direction, pointing out the means by which the objects of the Sejm could be achieved.²⁹

A little earlier a case for the resumption of the parliamentary functions of the Sejm was made by Professor Biskupski.³⁰ The Constitution conferred on the Sejm the right to dismiss the Council of Ministers and individual Ministers. Professor Biskupski was not, however, aware of any case when this right had been exercised. Further, in his view the Sejm, and not the Council of State, should ratify and terminate international agreements and it should have the sole right to legislate on matters relating to fundamental rights and freedoms of citizens, to administration of justice, to changes in monetary system, to decisions on economic planning, etc. The Constitution should therefore be changed in that respect, particularly in order to give definite guarantees of inviolability of the person, of the home and of secrecy of correspondence. Article 74 of the Constitution provides that "the law protects the inviolability of the home and secrecy of correspondence", but this obviously is quite insufficient. Nor does the provision of Article 71 that freedom of speech is secured by handing over the printing presses and paper supplies to the people provide adequate safeguards.

Professor Hochfeld, a deputy to the Sejm severely criticized its activities.³¹ More particularly in the years 1948—1952 the Sejm gave rubber-stamp approval to the Decree-Laws of Council of State without any discussion. Even statutes of great importance as for example the 1950 Law on the Office of Procurator General were passed in this manner. Furthermore when the Bill on the Six Year Plan was put before the Sejm not a single word of criticism was heard, notwithstanding its paramount importance to the economic life of Poland. The law on the reform of the monetary system, the significance of which need not be stressed, was passed by the Sejm on January 28, 1950 in the following circumstances: the great majority of deputies first knew of the proposed reform from infor-

²⁸ *Nowe Drogi*, 1956, No. 10 (October), p. 44.

²⁹ *Ibid.*, p. 7.

³⁰ "Remarks on the Constitution", *Prawo i Zycie*, No. 11 (September 23, 1956).

³¹ Article in *Zycie Warszawy* of September 23, 1956.

mation given by the Minister of Finance only a few minutes before he introduced the Bill. Only two deputies, who were privately forewarned of the new law, took part in the debate. These speakers read prepared speeches containing fulsome praise. The Sejm did not make a single declaration about foreign policy from the time of the outbreak of the Korean war (in 1950) until the end of its term of office. Professor Hochfeld says also that even the most significant changes in Government appointments, and resignations of Deputies to the Sejm were accepted without comment by the Sejm, as was the case with the tragic surrender of Deputies to Military Courts,³² such as Wladyslaw Gomulka³³ and Marian Spychalski.³⁴ On the day when these two Deputies were handed over without any discussion the Sejm was content to hear a number of long speeches on the transfer of libraries by the Ministry of Education to the Ministry of Culture and Art. Hochfeld insists that sessions of the Sejm and of its Committees should continue for the greater part of each year; only in this way can full control by the Sejm over the work of the Government be assured and the responsibility of the Sejm to the people fulfilled. In his view the practice of written representations is insufficient. The Government should answer questions of Deputies during open sitting at least once a week.

Article 25, para. 2 of the Constitution states that the "Council of State in all its activities is subject to the control of the Sejm". This proved to be a dead letter because, as Professor Ehrlich pointed out, "The Council of State took over the legislative functions of the Sejm. The Council itself, however, was used as a subterfuge for the legislative monopoly of the Government. The negligible activity of the Council of State, unknown even to expert constitutional lawyers, was camouflaged by the numerous decrees supposedly passed by the Council. In fact these decrees were passed by the Government and rubber-stamped by the Council of State. The Council of State screened the lack of supervision of the Government which it should itself have carried out."³⁵ According to Professor Ehrlich the Sejm should not only have the sole legislative power, but its continuous and complete supervision over the Government should be secured. Standing or *ad hoc* Committees of the Sejm and

³² Until January 1, 1955 Military Courts tried cases where the accused were charged with political offences.

³³ He was arrested in July 1951 and surrendered by the Sejm in October 1953 but was released from prison probably towards the end of 1953 and for a considerable time kept *incommunicado*. In August 1956 he was re-admitted to the Party and in October 1956 he was elected First Secretary of the Central Committee of the Party.

³⁴ General Spychalski was arrested in 1950 and released from prison in March 1956 (*Trybuna Ludu*, November 23, 1956). He became Minister of National Defence on November 13, 1956.

³⁵ *Op. cit.*, p. 63.

the right of questioning the Government can be used to this end.³⁶ The creation of the Supreme Auditing Chamber³⁷ which would be similarly answerable to the Sejm would serve the same purpose. At the VIII Plenum of the Central Committee of the Party Mr. Gomulka stated that supervision of the Executive should be carried out by an institution directly subordinate to the Sejm, and not to the Government, as hitherto.³⁸

Professor Jodlowski³⁹ and other lawyers have also suggested that the Tribunal of State should be re-established. This Tribunal pursuant to the Constitution of 1935 had jurisdiction to try cases against the Chairman of the Council of Ministers and individual Ministers, when charged with breaches of law committed in the execution of their office, and in certain circumstances to try cases against Deputies to the Sejm. Further, a demand was voiced for the revival of the Constitutional Court which according to the Constitution of 1935 was competent to decide cases of conflict of jurisdiction between ordinary Courts and Administrative authorities. An amendment of the Constitution would be necessary to carry these suggestions into effect. The requirement was also canvassed that the Constitution should fix the minimum period for the sessions of the Sejm in each year and the maximum period for which the sessions can be adjourned. The present provisions of the Constitution⁴⁰ do not state how long each session should last. Thus it was possible to limit the duration of the session of the Sejm to a few days in a year.

³⁶ At the first sitting of the present Sejm on March 1, 1957, 19 standing committees were elected by the Sejm. The way in which the Committees are to operate is laid down by the Standing Orders of the Sejm, passed by it. Art. 21 of the Constitution provides for *ad hoc* Committees in the following manner: "The Sejm may appoint a Committee to deal with any particular matter". The Sejm, however, has not used this right even when Hochfeld, on September 6, 1956, moved the appointment of a Committee to investigate and to report on the events at Poznan in June 1956.

³⁷ According to the Law of June 3, 1921 and the Constitution of April 23, 1935 the Supreme Auditing Chamber was nominated and recalled by the President of the Republic and was independent of the Government. Its object was the financial control of the Government, the audit of Government's final accounts and presentation of its motions to the Sejm.

³⁸ In his address to the VIII Plenum of the Central Committee of the Party in October 1956. Later Mr. Rybicki the then Procurator General and the present Minister of Justice, Professor Jodlowski and the former Minister of Justice, Mrs. Wasilkowska, spoke in favour of creating a Supreme Auditing Chamber (*Prawo i Zycie*, No. 3, (January 27, 1957)). During the present session of the Sejm a Bill containing proposals for a Supreme Auditing Chamber and consequent amendments of the Constitution were introduced. This Bill is discussed in an article by Mr. Walczewski, entitled "Immunity from control" in *Prawo i Zycie*, No. 11 (May 19, 1957).

³⁹ *Prawo i Zycie*, No. 3 (January 27, 1957).

⁴⁰ Article 17 provides: "The sessions of the Sejm shall be convened by the Council of State at least twice in each year".

Proposed Changes in the Constitution

Recently there was much discussion concerning changes in the Constitution. In an article entitled "What changes should be introduced in the Constitution", Professor Rozmaryn expressed the view that only a few changes are required.⁴¹ These are: that the Sejm should pass the yearly economic plans, that it should approve the ratification of International Agreements, and that the Council of State should only make the Decree-Laws if in each particular case it is specifically authorized by the Sejm to issue a Decree-Law within a definite period of time. In his view the powers given by the Constitution to the Council of State, the Government and other institutions should be preserved, but the Sejm should have the widest and most effective supervision over all the organs of the state at all times. The debates of the Sejm should not be limited to draft bills, but the projects of the Government dealing with more important political, economic and social matters should also be laid before the Sejm. This should be done in advance and the results of the governmental action should also be reported to the Sejm and debated. In this way the Government would be informed of the reactions of public opinion to its plans, which would find expression in the debates of the Sejm and in its resolutions. Professor Rozmaryn was in favour of preserving Chapter 7 of the Constitution. "On the fundamental rights and duties of citizens", with this qualification, that statutes which should have been passed to implement the provisions of this Chapter should now be enacted. Further, Article 74 of the Constitution should be changed so that only the Courts would have the power to order the arrest of a citizen.⁴²

In an article entitled "To change or not to change?"⁴³ Professor Biskupski maintains that not only Article 74 of the Constitution should be amended as suggested by Professor Rozmaryn; but that the Constitution should determine the conditions upon which and the longest period of time during which a person may be detained in temporary arrest. Professor Biskupski commenting on the views of Professor Rozmaryn on Chapter 7 of the Constitution, says that since the basic purpose of the Constitution is to secure individual freedoms it is imperative that the rights of an individual should be defined by it with great precision. This should be done in such a manner that it would become impossible for the Sejm or the Council of State to infringe these freedoms by passing laws or decrees curtailing them. In other words the provisions of the Constitution as the basic law should be so drafted that the essential rights of citizens

⁴¹ *Trybuna Ludu* (the official daily newspaper of the Party), March 24, 1957.

⁴² At the present time procurators have also the power to order an arrest and in most cases it is they who exercise it.

⁴³ *Prawo i Zycie*, No. 8 (April 7, 1957).

could not be curtailed by the passing of ordinary Statutes or Decree-Laws.⁴⁴ Professor Biskupski gave examples of statutes passed during the period which was by then over, relating to inviolability of the person and of the home, the secrecy of correspondence and freedom of speech. He also referred to Articles 62 and 64 of the Constitution⁴⁵ to illustrate his view that the provisions of Chapter 7 were purely declaratory and had no binding legal force. For that reason the whole Chapter should be completely revised.

Professor Burda, the present Procurator General, is in favour of the middle course. In an article under a Shakespearean title "To change or not to change — that is the question",⁴⁶ he thought it wrong to demand such radical changes in the Constitution which would in effect be tantamount to complete rejection of the present Constitution. He also opposed the view that the Constitution does not require substantial changes and he did not agree with Professor Rozmaryn that all its defects can be remedied by the passing of ordinary statutes. He concurred with Professor Biskupski⁴⁷ in thinking that the provisions of the Constitution should protect the citizen against the assaults of the Legislature on civil rights. This protection can only be effective if the provisions of the Constitution are clear, precise and not contradictory. In his view the present Constitution does not satisfy this test. Therefore the changes suggested by Professor Rozmaryn are insufficient and further provisions must be incorporated in the Constitution. Like Professor Biskupski he considers that Chapter 7 should be radically revised. The success of the revision of the Constitution and its general efficacy will ultimately depend on whether the Constitution will appeal to the conscience and the sentiments of the people and whether in their eyes its authority will be restored. It will also depend on whether the dignity of law will be asserted. None of this can be instilled by mere words.

Mr. Stembrowicz considers the customs and conventions regulating the relations between the Sejm and the Government of even greater importance:⁴⁸ "The changes of the constitution, however well meant, will not remove the roots of the past evils if the proper

⁴⁴ The prevailing force of Constitutional provisions over ordinary enactments is accepted wherever a written constitution exists. The inference from such a rule is that statutes and Decree-Laws which do not conform with the provisions of the Constitution are void.

⁴⁵ Article 62 provides: citizens . . . have the right to enjoy cultural achievements and to take an active part in the development of national culture. Article 64 provides: The Polish People's Republic supports the development of literature and art, which express the needs and aims of the nation in accordance with the best progressive tradition of Polish creative expression.

⁴⁶ *Prawo i Życie*, No. 11 (May 19, 1951).

⁴⁷ *Power and the People*, 1956.

⁴⁸ *Życie Warszawy*, January 27, 1957.

modus vivendi between the Sejm and the Government through practice and custom is not established within the framework of the Constitution. In this way the basic principle of the sovereign rule of the people will find expression: the full subordination of the Government to the supreme representative body". Similarly, Mr. Sobolewski feels that only proper constitutional practice coupled with the precise and harmonized definition of main institutions expressed in basic laws will assure effective functioning of the machinery of the state.⁴⁹ Such practice depends on the relations between the parties and within the governing party itself, on the political maturity of the whole mass of the citizens and of their representatives in the Sejm and other elected bodies. The author discusses the question of corporate responsibility of the Council of Ministers which has not hitherto been observed in practice. This was evidenced by the fact that "in many instances we witnessed in Poland the dismissal of Ministers for a policy, for which they were not themselves responsible, but which was accepted by them in compliance with the general policy of the Cabinet. It is difficult to suppose that the general political line of the Ministry of Security, the Ministry of Justice or the State Commission for Economic Planning was contrary to the views of other members of the Council of Ministers." He rejects the view previously put forward in all seriousness in various publications that in the representative bodies of the bourgeois States debates degenerate into idle talk, and that therefore in parliaments of socialist States discussion should be limited. In his view "a Parliament which is supposed to operate without discussion . . . is a useless institution." He also considers the role played by political parties and the differences between them arising from variations between their programmes. He points out that even in a one party system (or in a system where many parties form "a national front") some choice should be left to voters as to different ways in which the programme can be realized.

The Party and the Sejm

The question of the relations between the Party and the Sejm necessarily came to the fore because of the special position allotted to the Party by the Communist doctrine. "The leadership of the Party in relation to the State is being realized in our country," said Mr. A. Lopatka.⁵⁰ "Generally speaking this is achieved in three ways. The first way amounts to the Party advising the whole nation . . . as to their correct objectives, determining the general

⁴⁹ *Panstwo i Prawo*, 1956, No. 12 (December).

⁵⁰ *Scientific Records of the University of A. Mickiewicz in Poznan*, 1957, No. 3.

direction of the activities of the State and giving instructions to Governmental institutions before important decisions are made by them. Secondly, the task of the Party is to ensure that the appropriate organs of the State should carry out the policy and the directives of the Party. Finally, the Party controls the activity of the State apparatus, and checks whether the policy of the party is performed." It is true that the writer further explains that the Party is not a superior body in relation to the State apparatus, and the guiding principles of the Party and its policy do not have the force of law, but this is a purely formal qualification, as he says further that "the Party as the leading force in the State takes full political and moral responsibility for the activities of the State".

The question of relations between the Party and the Sejm led to a further polemical discussion. Professor Ehrlich⁵¹ supported the view that the Sejm should play the part of expressing in legal form the policy of the Party. Professor Biskupski retorted⁵² that this conception would result in degrading the part played by the Sejm to that of an administrative office which would have the task of drafting the postulates of the Party whereas in his view "the Sejm should not only draft enactments but determine their contents". Professor Hochfeld also expressed the fear on the floor of the Sejm that Ehrlich's formula would deprive the Sejm of any practical possibility of performing its constitutional functions.⁵³ In his reply Professor Ehrlich denies that his conception would lead to degradation of the Sejm.⁵⁴ Even the highest authority of the Party should not have the exclusive right of initiating postulates which are to be expressed in the form of statutes, as Article 20, para. 1 of the Constitution confers the right of legislative initiative on Deputies. The question of how the Deputies who are members of the Party will become free to introduce legislation independently has not been answered by Professor Ehrlich.

Professor Ehrlich does not agree with those who are sceptical of the Sejm being the Supreme State Authority while the Party preserves its leadership. According to Professor Ehrlich the sceptics say: "Why so much empty talk that the Sejm will now be the highest organ of authority, when it is known that everything is decided and will be decided by the Central Committee or the Political Bureau . . ."

Is it, however, conceivable that Deputies who are members of the Party would vote against any Bill which implements resolutions

⁵¹ "Sejm, but what kind of Sejm?" *Nowa Kultura*, 1956, No. 36.

⁵² *Prawo i Zycie*, No. 13, October 21, 1956.

⁵³ Cited in *Legality-Sejm*, n. 24, *Supra*, p. 48.

⁵⁴ *Nowa Kultura* 1956, No. 47.

passed by the Party? How will all this be affected by Party discipline? This has also been the subject of lively discussion amongst Polish lawyers. Professor Ehrlich considers that the minority view can only be expressed at meetings of the Party, but in the Sejm a member must either follow the Party line, or if he disagrees, he must resign.⁵⁵ Mr. Auscaler⁵⁶ agrees that the Party is entitled to expect that its members will support the general policy of the Party⁵⁷ but he thinks that Deputies need not be prevented by Party discipline from independent action in certain matters if their "Party conscience" and knowledge of the subject justifies it. Professor Hochfeld⁵⁸ is also opposed to the principle that the Sejm should be restricted to legislation implementing "policy laid down elsewhere". In his view the remedies lie particularly in the following: (i) there should be adequately organized parliamentary "clubs"; (ii) there should be a reasonable degree of discipline within the parliamentary "clubs"; (iii) otherwise individual Deputies should have reasonable freedom of action. These measures would ensure the performance by the Sejm of its constitutional tasks, whereas plenary meetings of the Central Committee and Party Conferences would only give general directives. This leads one to the conclusion that there can be no organized opposition in the Sejm from amongst the members of the governing party.

Her Majesty's Opposition?

For this reason Professor Biskupski advocates the creation in Poland of "Her Majesty's Opposition" presumably on the English pattern.⁵⁹ He was, however, severely attacked by Professor Ehrlich⁶⁰ who maintained that such opposition would amount to the rejection of the policy line of the governing party, and might lead "in favourable circumstances and in a different alignment of political forces to the replacement of the governing party by the opposition". In his view there is no place for opposition parties and he apparently thinks that those who are in favour of creating an opposition in the Sejm "do not take into account political realities of the time and are spreading confusion".

⁵⁵ Prof. Ehrlich mentions that in the past Deputies who were members of the Party were obliged to sign blank resignation forms. This, incidentally, facilitated their arrests as a Member of Parliament cannot lawfully be arrested without a surrender by the Sejm. *op. cit.*, p. 53.

⁵⁶ *Prawo i Zycie*, No. 12 (October 7, 1956).

⁵⁷ This is in accordance with the resolution of the VIII Plenum (Part I item 2). A resolution of the IX Plenum while recognizing the need for discussions within the Party emphasizes that, once resolutions are made and thus incorporated into the policy of the Party, they are binding on all (*Zycie Warszawy*), May 17, 1957.

⁵⁸ *Zycie Warszawy*, September 23, 1956.

⁵⁹ *Prawo i Zycie*, No. 13 (October 21, 1956).

⁶⁰ *Op. cit.*, p. 55.

Finally, the views of Professor Hochfeld should be considered not only because his article appeared recently in *Nowe Drogi*⁶¹ but also because he has frequently expounded his views on the Constitution and the parliamentary system during the debates of the Sejm, in the press and also in foreign countries. He is obviously concerned to find ways "which would protect our Party and our authorities from anti-democratic degeneration" and which would ensure that "what we are building will be socialism and not a caricature of socialism". The author admits that "the lack of rights and democratic freedoms . . . demoralizes the Party and causes its degeneration, . . . destroys culture, and undermines learning; it brings incompetence . . . and laxity into economic life". One of the important factors ensuring these rights and democratic freedoms is, according to Professor Hochfeld, "the parliamentary system which is an historically tested weapon of defence against arbitrariness of rulers". He further states that "in Poland this system is a heritage of the past; the question of the Sejm was and still is an important aspect of the whole problem of democratization". The form of this system in Poland should neither comply with Soviet standards nor with the standards of bourgeois parliamentarism, which cannot be applied in specific Polish conditions. This system should be developed in such a way that the functioning of Sejm does not undermine basic economic reforms carried out in Poland, or detract from the socialist direction of activities of the State provided for in the Constitution; nor should it endanger the permanency of the political leadership of the workers movement, that is of the Polish United Workers Party, in governing the State. But in a parliamentary democratic system, says Professor Hochfeld, "maintaining political leadership by any one of the parties cannot be guaranteed. On the contrary, where in principle any group of citizens can form a political party, they endeavour to be represented in Parliament and to gain power to govern by obtaining a majority in free elections". In saying this Professor Hochfeld reaches the heart of the matter. *Hic Rhodus Hic Salta*.

Professor Hochfeld admits that in many countries the system of parliamentary democracy frequently affords an opportunity to parties representing the working classes to influence, and to exercise pressure on, governments and on the possessing classes. "Nevertheless, we say openly," he continues, "that the introduction and growth in Poland of people's parliamentarism is subject to the condition that it does not open the gates to power to any party other than the Polish United Workers Party. Consequently other parties have only the right to act as long as they recognize this leadership"

⁶¹ 1957, No. 4 (April).

The New Sejm

There is no doubt that in 1956 and 1957 considerable progress has been achieved in the functioning of the Sejm and in the relations between the Sejm on the one hand and the Government and the Council of State on the other hand. The following must be particularly mentioned: the last session of the Sejm which commenced on February 20 continued until July 13; parliamentary "clubs" ⁶² of Deputies of the Polish United Workers' Party, of the "United Peasant Party" and the "Democratic Party" and of the Roman-Catholic Deputies "*Znak*" have been formed; new far more liberal Standing Orders of the Sejm and of its Committees have been passed. ⁶³ The new Orders provide that there should be two readings of Parliamentary Bills, while previously Bills were read only once and this was purely nominal. The number of Bills before the Sejm has considerably increased ⁶⁴ and there has been much lively discussion. ⁶⁵ The representatives of the Government and of particular Government Departments answered questions of the Deputies and gave explanations to Parliamentary Committees in accordance with the new Standing Orders, which specifically deal with the duty of the Procurator General to answer questions.

Voting against Bills was exceptional but it did take place. ⁶⁶ The deliberations of the Standing Committees ⁶⁷ were vigorous, especially on the Budget. ⁶⁸ Finally the exchange of visits with foreign parliamentary delegations has commenced.

Some aspects of this transformation have been described in this article. It came about partly as the result of the pressure of public opinion. It is also due to great change in the composition of the Sejm: of 459 deputies only 82 sat in the last Sejm. The political climate is more favourable to its activities and these correspond to the aspirations of a nation which is undoubtedly con-

⁶² In the former Sejm only Regional "clubs" of deputies existed.

⁶³ See *Monitor Polski*, No. 19, item 145 of March 1, 1957, repealing the Standing Orders of November 21, 1952.

⁶⁴ For example at the sitting of the Sejm of May 28, 1957. 13 Bills were debated (*Zycie Warszawy*, May 28, 1957).

⁶⁵ The plenary Sitting of the Sejm to debate the Budget lasted 5 days and 79 speakers took the floor.

⁶⁶ For example five Roman-Catholic Deputies voted against the Abortion Bill. One Deputy voted against the Bill on cancellation of outstanding remuneration due to workers.

⁶⁷ Between February 20, 1957 to the end of April 1957 the total number of sittings of the 19 Standing Committees was 96.

⁶⁸ The Committee on Budget, Finance and Economic Planning sat in March and April 1957 on 10 occasions and considered 150 amendments to the Draft Budget which was 170 pages long, while in previous years the budgetary proposals took up only a few pages. The draft Six Year Plan was presented by the Council of Ministers to the Sejm on July 17, 1950 and became Law on July 21, 1950.

vinced of the true value of the democratic form of Government. This conviction, according to Professor Biskupski, explains why the distortions of political life were limited in extent and accounts for the fact that the number of crimes which were committed during the period of the "cult of personality" was less than it would have been otherwise.

It is an indispensable condition of the democratic system of government that there should be the right for any party or group of electors to nominate parliamentary candidates. Before the January elections Professor Biskupski expressed a not dissimilar view in saying that it is essential to give the citizen the choice between several lists of candidates and not a restricted choice between different candidates on the same list.⁶⁹ Under the Polish electoral law of October 24, 1956, candidates could be suggested by any social organization with a large membership. However, there was only one list in the elections to the Sejm on January 20, 1957, consisting of candidates approved by the "Front of National Unity" formed by the Polish United Workers' Party together with the "United Peasant Party" and the "Democratic Party".⁷⁰ No independent list of candidates emerged.

* *

It will thus be seen that, in spite of much acute and outspoken discussion by Polish lawyers of legality and the parliamentary process, the basic problem of parliamentary government still remains to be solved. This to provide, within the framework of the ideals and policy of the whole nation, for any party to present its programme to the people and lawfully to compete for power. In this sense the quest of the Polish lawyers for legality is still continuing.

⁶⁹ *Prawo i Zycie*, No. 11 (September 23, 1956).

⁷⁰ In 116 constituencies there were about 60,000 candidates nominated, out of which 723 were approved by the Front; 459 were elected.

THE RULE OF LAW UNDER THE LEGAL SYSTEM OF THAILAND

Thailand is a country approximately of the size of the British Isles with a population of over twenty millions. From time immemorial it has been an independent country. Since 1932 it has had a "Constitutional" Monarchy. The term "constitutional" is here used to indicate that there is a written constitution. It does not imply that all the features of a Western Constitutional Monarchy are in effective operation. There is however a Parliament, partly elected on universal suffrage, partly appointed by the King on the recommendation of the Government; and the Government is legally responsible to the Parliament, although in that body it necessarily exercises great influence.

For present purposes the phrase "Rule of Law" means the protection of civil liberties by means of the laws and legal institutions, procedures and traditions of a given society. As far as Thailand is concerned, an enquiry into the Rule of Law in this sense opens up a wide and unexplored field. The present study is confined to selected topics which appear to be of primary importance at the present time.

1. Historical Introduction

In order to make clear the application of the Rule of Law under the Thai legal system, it is desirable to say something of the history of the country. Unlike most of her neighbours, Thailand has always maintained her political independence and territorial integrity, surviving even the colonial expansion of Western Powers in the XVIII and XIX centuries. This uninterrupted independence has resulted in her legal system following a somewhat different path from that of neighbouring States. Its development has been slow but steady. The process of evolution has been wholly indigenous. It is not until very recently that Thailand has received some indirect impetus from the outside world.

Numerous instances may be cited to show that the Rule of Law, in as far as it implies the equal right of every citizen to civil liberties, did not operate in Thailand under the *ancien régime*. Thus, under the Evidence Act 1351, now abolished, discrimination was made against thirty-three categories of persons, who were not allowed to give evidence before the Court. Among these were dancers, musicians, beggars, vagrants, slaves, prostitutes, cobblers, fishermen and gamblers.¹

¹ See Pra Worapakpibul, *The Legal History of Thailand*, pp. 206-215.

On the other hand, those who had titles (*Bandasakdi*) were in a privileged position. No action could be brought directly against them and they were alone entitled to representation in Court. It is interesting to note that as late as 1804² there were still enactments closely resembling those of the Law of Persons of classical Roman Law. A pater-familias or a master was given something akin to the "*jus vitae necisve*" over the wives, children and slaves. Wives could be sold by their husbands, children by their father or mother, and slaves by their masters.³ Nor until the XIX century was there much understanding of the safeguards of "fair trial" or reasonable punishment. But it is fair to add that criminal justice in many Western countries at this period could be similarly criticized. Thus submersion in water and walking through fire were still accepted as the normal modes of proof.⁴ A death sentence entailed not only forfeiture of all the assets of the deceased but also the enslavement of his family. A Government official found guilty of an offence against the State was punishable, among other methods, by being ordered to feed and wash the royal elephants. In the case of disclosure of military secrets, the offender's mouth was to be cut open and a whole cocoanut inserted therein.⁵ Most of these anachronisms have been abolished.⁶ However, the problem of modernizing and adapting an archaic legal system to modern conditions cannot be solved overnight. The legal system of Thailand is still in a stage of transition. Inhuman sentences such as the execution of an expectant mother after delivery and some cruel methods of execution such as machine-gunning are still in operation.

It is worthy of notice that, in some respects, the Thai legal system was more advanced than many other systems. Thus, the general principles of the conflict of laws was known to Thai legal scholars long before Story and Savigny. The Court liberally applied foreign laws to aliens resident in Thailand. The application of the law of nationality in conflict of laws has long been firmly established. However, during the last century, Western Powers did not consider the standard of criminal justice of Thailand to be particularly high. For this reason, Thailand was, despite her political independence, subjected to a régime of capitulation along with many other Asian

² See the Law of the Three Stars enacted by King Rama I to consolidate earlier laws.

³ It is to be observed that the institution of slavery in ancient Thailand was very different from the Classical Roman conception, since every slave could be freed if redemption could be brought. In normal circumstances, slavery was therefore voluntary. In a way, it was the easiest form of employment.

⁴ See Section XI of the Law of the Three Stars.

⁵ See Pra Worapakpibul, *op. cit.*, at pp. 25-26.

⁶ It is an interesting comparison to note that the practice of trial by battle in England was not abolished until the XIX century, when duelling was still permissible in various countries such as France and the United States.

countries.⁷ Thai jurists attempted to improve criminal procedure and the administration of justice, but legal developments fell far short of convincing the Great Powers that Thai justice had reached the minimum standard set up by civilized nations. Thailand finally regained her judicial independence in 1926 only by ceding large portions of her tributary provinces to the Great Powers. It should not be forgotten by Western lawyers that in Eastern countries, the capitulation system was regarded as an encroachment on local judicial independence and to that extent hindered the development of a strong and independent judiciary.

II. The Structure of the Thai Judicial System

The legal history of Thailand is traceable back to 1283 only. This was the date of the invention of Thai alphabets. Although prior to that date no record of the law could be found, it may with reason be presumed that the law in force was tribal law. The King at the head of the tribe was the fountain of justice. Every complaint was heard before him and generally decided by the King in person in accordance with ancient customs. However, the King could not possibly administer justice in all cases. Provincial disputes had necessarily to be dealt with by the King's men who were sent to administer and rule the provinces. It soon became apparent that neither the King nor his provincial governors were in the position to handle disputes. Therefore, men of learning had to be called upon to perform the administration of justice. The learned formed what might appropriately be called the "Judiciary" to deal with disputes on the King's behalf. Hence, judgements came to be given by the Court⁸ in the name of the King. It will thus be seen that the development of the judicial system in Thailand has some interesting parallels in date and in character with the growth of the Royal Courts of Justice in England.

The modern judicial system was organized in the reign of King Chulalongkorn by the Proclamation of March 25, 1892,⁹ whereby the Ministry of Justice was founded. A major reform was introduced in 1935 by the Law of the Organization of the Courts of Justice. This law has been subject to minor amendments in 1939 and 1954.¹⁰ A

⁷ China and Japan, the only other independent Asian nations at that time, were also under the régime of capitulation, whereby foreign laws were extritorially applied by their respective Consular Courts.

⁸ The Thai equivalent of the term "Court" is *Sala*, meaning a pavilion or palace where the learned sat and administered justice.

⁹ The Proclamation was promulgated on March 25, B.E. 2434 (1892) in the year 110 of the Chakri Dynasty during the reign of King Chulalongkorn The Great, Rama V.

¹⁰ The Law was passed by Parliament and signed by the King's Regents on March 7, B.E. 2477 (1935) and promulgated on June 15, B.E. 2478 (1935) under King Rama VIII.

well-defined judicial hierarchy was established. At the top is the Supreme (*Dika*) Court of twenty-two judges presided over by a President. Its jurisdiction is mainly appellate, i.e., hearing appeals from the Court of Appeal, but it also has first-instance jurisdiction in certain cases such as disputes arising out of the general election. On the second level, there is the Court of Appeal (*Utorn Court*) presided over by a Chief Justice; it hears appeals from the Courts of First Instance. The principal Courts of First Instance are the High Courts, i.e., the Criminal Court and the Civil Court which have jurisdiction to entertain all cases without territorial limitation. In the Bangkok area, there are three District Courts having original jurisdiction in both civil and criminal matters. Cases entertained by the District Courts of Bangkok concern actions where the damages claimed are small or offences of a less serious nature, which would formerly have been dealt with by Magistrates. Outside the capital, there is a City Court in every *Changwad* (City) having jurisdiction to entertain both civil and criminal cases within the *Changwad*. The Presidents of City Courts are supervised by itinerant judges drawn from the Court of Appeal and the Supreme Court. In addition, there are to be further District Courts in every *Changwad* under the recent District Courts Act of 1956.¹¹ The scope and operation of this Act will be discussed in greater detail in connection with the administration of criminal justice in Thailand.¹²

All the judges mentioned above, with a qualification to be discussed later concerning the District Courts, are legally trained and enter the judicial service at the outset of their career, in a way similar to the practice in most countries on the Continent of Europe. A judge is disqualified from continuing his office if he ceases to be member of the Bar, or receives a political appointment or becomes a Member of Parliament either by election or by appointment.¹³ The prestige and social status of the judges is very high and it is interesting to note that their salaries compare favourably with the rewards of the civil service and even with most of the free professions. In this respect their position resembles that of the judges in the Common Law countries.

III. The Independence of the Judiciary

The independence of the Judiciary can mean three different but interconnected things. In the first place, it signifies the freedom of the national Court from intervention by foreign Governments. Secondly,

¹¹ Theoretically, this Act came into operation on the sixty-first day of its promulgation, i.e., sixty days from October 2, 1956, which falls on December 1, 1956. However, according to a Supreme Court decision (890/2499), the operative date is December 2, 1956.

¹² See V, p. 41 *infra*.

¹³ See the Judicial Service Regulations, B.E. 2497, Article 26 (1) (d), pp. 18-19.

it refers to the absence of control of the machinery of justice by the Executive or other branches of the Government. Thirdly, it implies the independence of the individual judge.

Is the administration of justice in Thailand free from intervention by foreign Governments? The answer appears to be a relative one. As has been previously pointed out,¹⁴ Thailand has only recently recovered her judicial independence from Western Powers, notably France and the United Kingdom. There is a general tendency in the writings of the English and the French constitutional lawyers to overlook this aspect of judicial independence. Even today, however, the Thai Courts are not completely independent in this sense. There is an evergrowing number of persons, relatively large in a small country with many international organizations, who are not subject to their jurisdiction on grounds of diplomatic immunity. Another class of persons who might conveniently be included in the privileged category is that of foreign visiting forces now stationed in various parts of Thailand. Whatever the arguments for upholding the principles of immunity in International Law, it is difficult to reconcile the immunity of wide categories of persons with the conception of equal justice for all before independent courts.

"Independence of the Judiciary" in its second meaning is closely connected with the theory of the Separation of Powers. Under the "Absolute Monarchy" the theory was that the King enjoyed and exercised all the powers of sovereignty, namely executive, legislative and judicial. In practice, however, the King had ceased to exercise judicial power or control over the Judiciary long before the establishment of "Constitutional Monarchy". Thus, there appears to be no danger of the Courts being controlled by the King. The independence of the Judiciary from Royal interference is implied in the following provision of the Constitution of 1932 as amended in 1952:¹⁵

"Section 9: The King exercises the judicial power through the Courts established by law."

The independence of the Judiciary is further guaranteed by Sections 99, 100, 101 and 102 of the Constitution which provide:¹⁶

"Section 99: The administration of justice shall be within the exclusive power of the Courts. The Courts shall proceed in accordance with the law and in the name of the King."

"Section 100: Courts of law may be established only by virtue of an Act of Parliament."

"Section 101: No new Court may be established *ad hoc* to hear

¹⁴ See p. 25 *supra*.

¹⁵ See the Constitution of the Kingdom of Thailand, B.E. 2475 as amended in B.E. 2495, Section 9, p. 1; see also Sections 7 and 8.

¹⁶ See *ibid.*, Part VI, Sections 99, 100, 101 and 102, pp. 25 and 26.

and determine any particular case or cases in the place of an existing competent Court."

"Section 102: The law regarding the Organization and Procedures of the Courts cannot be amended for the purpose of a particular case or cases."

On the face of these provisions, the independence of the Judiciary would appear to be firmly secured. However, Article 6 of the Law of the Organization of the Courts of Justice gives the Minister of Justice the power and discretion to recommend the creation or dissolution of the Courts of law subject to final decision being taken by His Majesty's Government.¹⁷ While the Constitution confers authority regarding the Courts on the Legislature, the latter has in turn, it would seem, transferred that power to the Executive upon the recommendation of the Minister of Justice. This power has dangerous possibilities, which fortunately at present appear fairly remote.

The independence of the individual judge in Thailand is indeed a controversial subject. Differences of opinion exist among the judges themselves as to the extent of their independence. The young and newly recruited judges enjoy complete independence in their judicial deliberations, but it should be remembered that their judgements are subject to appeal. This does not mean, however, that their decisions are necessarily without effect. On the contrary, experience has shown that in a large number of criminal cases in which the Court of First Instance decided in favour of the accused there have been no further appeals. It may be doubted whether all the older judges are entirely happy about their so-called independence. It is true that the judges are completely independent in the sense that there can be, and has been, no express or implied instruction from the political branch of the Government to decide any particular case according to the policy of the existing Government. The judges occupy a different position from that of government employees or other civil servants. They are not regarded as civil servants, and not subject to civil service rules and regulations. In other words, they are outside the jurisdiction and control of the Civil Service Commission, an essential organ of the Executive. On the other hand, Thai judges are not completely independent of the Legislature since their salaries are voted upon and treated by Parliament in the same manner and by the same procedure as those of other servants of the Crown.¹⁸ Since 1954 there has been a special Act of Parliament setting out regulations for the judicial servants of the Crown.¹⁹ The Act which in fact consolidates and amends earlier Acts of 1942, 1943, 1947 and 1949 lays down

¹⁷ See the Law of the Organization of the Courts of Justice, B.E. 2477 and Amendments, Article 6, p. 4.

¹⁸ The Budget of the Ministry of Justice is voted upon annually.

¹⁹ See the Judicial Service Regulations, B.E. 2497, October 14, 1954.

rules as to the recruitment,²⁰ appointment,²¹ promotion,²² salary grades²³ and removal of the judges.²⁴ Furthermore, the Executive, through the Minister of Justice, exercises a considerable measure of control over the individual judge by virtue of his special responsibilities concerning the appointment, training, promotion and transfer of judges. Judges are recruited annually by examination.²⁵ Successful candidates generally serve as associate-judges or assistant-judges for the minimum period of one year. If they prove, to the satisfaction of the Ministry of Justice,²⁶ that they are worthy of promotion, they will then become full judges. If after two years, the results of the training are not satisfactory, the Minister of Justice has the power to dismiss such puisne judges. The examination is conducted by a Supervisory Judicial Committee which is discussed below, and the appointment is made by the King upon the recommendation of the Minister of Justice,²⁷ in certain cases without examination,²⁸ in consultation with the Committee. The promotion and transfer of judges are also effected by the joint decision of the Minister of Justice and the Supervisory Judicial Committee.

The Minister of Justice is *ex officio* Chairman of the Supervisory Judicial Committee. Other members include the President and Vice-President of the Supreme Court, the Chief Justice of the Court of Appeal, the Under-Secretary of State for Justice and the Chief Justices of the Civil and Criminal Courts. In addition, the King, on the advice of the Government, appoints five other members with the approval of Parliament.²⁹ The composition of the Supervisory Judicial Committee endowed with wide power over the individual judges gives grounds for grave doubts as to the independence of the judges, and for this reason it has been criticized in Thailand. The key positions appear to have been held by those whose political sympathy appeals strongly to the Government. In practice, the Minister of Justice, a politician, has great influence in all activities of the Committee. He is in a position to wield considerable influence over the

²⁰ See *ibid.*, Part II, Articles 20 (Examination), 21 (Qualifications), 22 and 23 (Conditions).

²¹ See *ibid.*, Part I, Articles 11, 12, 13 and 14.

²² See *ibid.*, Part I, Article 15; for transfer see Articles 16 and 17.

²³ See *ibid.*, Article 12 and Appendix, p. 41.

²⁴ See *ibid.*, Part III, Article 24 (4) release, (5) discharge and (6) dismissal.

²⁵ Owing to the increasing number of District Courts, there is a great demand for judges. They are now appointed for life and the examination takes place as from 1957 twice a year.

²⁶ See the Judicial Service Regulations, *op. cit.*, Article 14, paras. 2 and 3, pp. 9-10.

²⁷ Section 105 of the Constitution reserves the prerogative of appointment, transfer and removal of judges for the King, but the matter will only be submitted to the King after it has been approved by the Minister of Justice and the Supervisory Judicial Committee.

²⁸ See the Judicial Service Regulations, *op. cit.*, Article 13, pp. 8 and 9.

²⁹ See *ibid.*, Part III, Articles 29-35, pp. 20-22.

judges in regard to political offences and actions against a Government Department.

On the other hand, the judges have been collectively strong in their opposition against any form of control by the Executive. While individually they might have taken a different stand, the judges have often found an excuse to refer a case to a general session and to pass a collective decision. This technique has frequently been utilized in cases where an individual brought an action against a State Department. In the majority of such cases, the individual has been successful.³⁰ Perhaps the most encouraging fact about the Judiciary in Thailand is the fact that, although there are provisions for the removal of judges,³¹ as far as is known no judge has in fact been removed since the institution of the modern judicial system in 1892. Indeed recent legislation has abolished any retiring age for judges, who now sit for life or until they choose to resign.

IV. Constitutional Guarantees of Civil Liberties

The word *Thai* means free, and "Thailand" the land of the free. Written guarantees of civil liberties have been found as early as the XIII century. King Khun Ram Kamhaeng valued fundamental freedoms so highly that he had his declaration of the rights of man carved in stone. Unlike some Powers that have voted in favour of the Universal Declaration of Human Rights, Thailand has, at any rate, endeavoured to implement some of the principles of the Declaration.³²

"Equality before the law" is guaranteed by Section 24 of the Constitution which provides: "Subject to the provisions of the present Constitution, persons shall be equal before the law. Titles, whether hereditary, bestowed or otherwise acquired do not give rise to any privilege whatsoever."³³ This is subject to the exception of Section 36 which runs:³⁴

"Members of the Armed Forces, Police officers, Government and municipal officials have the same rights and liberties under the Constitution as ordinary citizens, except where such rights and liberties are restricted by law, and in so far only as politics, efficiency and discipline are concerned."

³⁰ In connection with the protection of private property, see *infra* at p. 31.

³¹ See the Judicial Service Regulations, *op. cit.*, Part III, Articles 24, 25, 26, 27 and 28, and Part VIII, Articles 44-56.

³² Recently, Thailand has passed a number of laws giving effect to some of the rights specified in the Declaration of 1948. In fact, early in 1957, the Minister of Education was sued directly for violations of Article 26 (1) of the Declaration. See *infra* p. 33.

³³ See the Constitution of the Kingdom of Thailand, December 10, 1932, as amended on March 12, 1952, Part II, Section 24, p. 6. Cf. Equal Protection Clause of the US Constitution.

³⁴ See *ibid.*, Part II, Section 36, p. 9.

Under the Constitution, there is no privileged class. Those who are concurrently subject to special discipline can hardly be said to have any privilege. Enough has been said with regard to members of foreign visiting forces, and diplomats whose immunities constitute true exceptions to equality before the law. Equality before the law is however an ideal thing which is difficult to realize in practice. Only equals in social and political status are equal before the law. Experience shows, for instance, that it is sometimes impossible to serve a writ of summons on a person holding a high political appointment or an influential Government official.

"Freedom of religion" is sacred under Section 25. A person cannot be deprived of rights or benefits by the State on the grounds of religious belief or practice. The right of worship must, however, be exercised in a manner not inconsistent with civic duties, nor contrary to public order or good morals.³⁵ The national religion of Thailand is Buddhism. While his subjects have absolute freedom of religion, the King himself must be a Buddhist.³⁶ As Buddhism is highly liberal, it can be assumed that freedom of religion is sympathetically regarded in Buddhist countries.

A number of rights are protected under Section 26, which places emphasis on the State recognition of private property, freedom of speech, opinion, writing and press, freedom of association, the right of public meeting and assembly and the right to form political parties. These rights can only be exercised in conformity with the provisions of existing law.³⁷ The latter important qualification means in effect that, as in countries such as England which have no written constitution, the rights comprised in Section 26 are residual, i.e., unlimited except in so far as restricted by specific laws. Freedom of writing, speech, press and publication has fluctuated considerably in the past twenty-five years. The Criminal Code contains a large number of sweeping provisions concerning defamation, insult, disturbing the King's peace, disclosure of official secrets, incitement to riots and seditious libel.³⁸ Such rules appear to be reasonably common in the practice of other States. It is reported, however, that prosecutions are also frequent. Recently, for political motives, the Ministry of culture issued a Ministerial Order under a general enabling Act prohibiting the use of certain vituperations. It was believed that these words might have an innuendo leading to the

³⁵ See the Constitution of the Kingdom of Thailand, *op. cit.*, Part II, p. 7. The phrases "civic duties, public order and good morals" are standard phrases which appear in several branches of Thai law.

³⁶ See *ibid.*, Section 4, p. 1. Section 1 (2) reads: "Citizens of Thailand, irrespective of birth or religion, are equally under the protection of this Constitution."

³⁷ See *ibid.*, Part II, Section 26, p. 7.

³⁸ See V, p. 35 *infra*.

disrupture of national security and social order.³⁹ Freedom of the press has been suspended during various periods of political crisis such as prior to a general election. The imposition of censorship is very effective especially when it is followed by arrest, detention and prosecution of a number of journalists, many of whom have disappeared with little or no trace. It is not easy to say exactly whether there is freedom of opinion with intermittent imposition of censorship, or that there is no freedom of opinion except during the periodic absence of censorship. Whenever freedom of opinion has been allowed, it has been extensively exercised. It is worthy of observation that practically all the newspapers, except one or two which are either Government-owned or subsidized by the State, have strongly criticized the Government in its activities. This may be disturbing for the Government, but it is an indication of a lively and healthy democratic spirit.

Freedom of association and the right of public assembly have had a similar chequered career. Public meetings are allowed in so far as they do not violate any provisions of the Criminal Code or other laws.⁴⁰ The enjoyment of these rights is subject to two serious limitations. In the first place, a form of censorship is effectively enforced owing to the fact that secret police have been frequently employed to watch over public meetings. Indeed, entry cannot be refused to police officers. A speech which appears likely, in the judgement of the police officers, to lead to a riot or to disturb the peace is liable to be stopped and the speaker arrested without warrant. Moreover, the Government may proclaim a state of emergency with the operation of Martial Law and has done so on several occasions. The most recent proclamation of a state of emergency was preceded by riots at various polling stations on Election Day, February 26, 1957.⁴¹ Thousands of university students assembled and marched in protest against the declared results of the election. However, no form of demonstration was allowed. In fact, public discussion on the election and the meeting of more than three persons were forbidden. To ensure this, military authorities assumed full control of the State. Armed soldiers, reinforced by tanks and armoured cars, were employed to restore peace and order. There were, however, no reported cases of arrest or detention and none of the students was badly injured.

³⁹ Instances are words conveying the idea of "once and for all", and "now or never". It was feared that these words might incite an uprising to overthrow the Government.

⁴⁰ See, for instance, the provisions regarding unlawful assembly in the recent Criminal Code which came into operation on January 1, 1957, together with the laws regarding the meetings of an association or corporation.

⁴¹ It was believed that the ballot boxes were already filled before the election really started. This is not entirely unprecedented in other countries.

The right to form political parties is clearly laid down in Section 6 of the Constitution, subject to anti-Communist legislation,⁴² introduced in the thirties (later suspended but now reimposed) which bans Communism and makes it a criminal offence to adhere to or participate in a Communist party, or even to hold Communist opinions. The definition of Communism in the Act is very wide and has never received judicial interpretation. The danger to civil liberties of such widely defined prohibitions is evident from the experience of other countries, such as South Africa in the treason trial now proceeding.

The right to education is also guaranteed by the same Section. This probably means the right to choose the form of education or training. This was not strictly observed during and after World War II as the Chinese minorities had no access to schools teaching Chinese. The Government has now taken a more liberal policy with the result that freedom of education, in a wider sense, has been generally enjoyed. There is, of course, still room for improvement. The Court in a recent action brought against the Minister of Education took a favourable attitude to this freedom. It was prepared to allow an action based on Article 26 of the Universal Declaration of Human Rights although it held that in the particular facts of the case there was not sufficient evidence of the alleged violation of the Declaration.⁴³

It is remarkable that the right to free elections, or freedom of election, is nowhere specifically mentioned in the Constitution. It is regulated by electoral laws. Even if such a freedom was specifically prescribed, the present practice of appointing a considerable number of Members of Parliament limits the importance of elections.

Personal security is endorsed in various provisions of the Constitution. Section 27 forbids arrest, detention or search of a person except in accordance with the provisions of the law.⁴⁴ Section 28 prohibits the imposition of forced labour without due process of law.⁴⁵ Sections 30 and 31 secure freedom of choice as to the place of residence within the Kingdom as well as freedom of occupation and trade.⁴⁶ While Thai nationals may not under the Constitution be expelled or deported from the country or refused entry therein, they sometimes have difficulties in attempting to leave the country. In the first place, a passport is only granted for the maximum period of two years; and, secondly, an applicant for a passport may have to wait months for the Police Department to make the investi-

⁴² See the Anti-Communist Activities Act, 1952.

⁴³ The Court appears to have taken the view that the Declaration is binding.

⁴⁴ See *The Constitution of the Kingdom of Thailand*, Part II, p. 7.

⁴⁵ See *ibid.*, Section 28, p. 7.

⁴⁶ See *ibid.*, Sections 30 and 31, p. 8.

gations which are the necessary preliminary to its recommendation.

Family rights are protected by the Constitution.⁴⁷ Freedom of marriage⁴⁸ is guaranteed, although cases of abuse of parental right to withhold consent are not infrequent. By the general laws of the Preamble of the Constitution, women enjoy equal rights with men and, as far as divorce is concerned, this is illustrated by the recognition of divorce by consent at the suit of either party.⁴⁹

While the right to private ownership is recognized by Section 26, and with regard to immovables by Section 30,⁵⁰ Section 29 takes away absolute ownership by conferring upon the State wide power to requisition or expropriate private property in three circumstances: (1) for the purpose of public utility, (2) for the defence of the realm in case of extreme necessity and (3) for the purpose of acquisition of natural resources. In addition, the State may expropriate for "other interests of the State".⁵¹ This phrase is indeed unduly sweeping. The State has an almost unlimited power of expropriation of private property. There are however two important limitations. First, the same Section provides for a fair compensation in all cases of expropriation. This is to be paid to the owner or other persons having the right to compensation. "Fair" compensation is generally a matter of negotiation or arbitration. In actual practice, it is difficult to get adequate compensation. The second limitation is one provided by the Expropriation Act 1934,⁵² whereby the owner is enabled to recover the property expropriated if that property has not been used at all for the purpose for which it was expropriated within five years of expropriation. This is a development which may have some interest in other countries. The jurisprudence of the Supreme Court has been well established in favour of landowners whose property has been requisitioned. Thus in *Chamnongburanapat v. Ministry of Defence* (1952),⁵³ the Court allowed recovery of land expropriated for the defence of the country. It was held that the land in question must be returned to the appellant although it was expropriated along with other parcels of land. Parcels of land which have not been used were ordered to be returned to the owners in toto, while the unused portions of other parcels were also restored.⁵⁴

⁴⁷ See *ibid.*, Section 33, p. 9.

⁴⁸ This freedom of marriage is sometimes expressed in terms of the right to found a family.

⁴⁹ See Section 65 of the Family Law of 1461 and compare Section 1498 of the Civil Code (1935), Volume V. See also Section 1 (2) of the Constitution cited in note 36, p. 31 *supra*, and Section 24 cited in full at p. 30 *supra*.

⁵⁰ See The Constitution of the Kingdom of Thailand, *op. cit.*, p. 8.

⁵¹ See The Constitution of the Kingdom of Thailand, *op. cit.*, p. 8.

⁵² See Articles 32 and 33 of the Expropriation Act., B.E. 2477.

⁵³ Supreme Court Decision, No. 1525/2495, December 17, 1952, Supreme Court Report, (1952) 2495, Vol. IV, pp. 1147-1152.

⁵⁴ See however an earlier case, 1600/2494, where the Court ordered the owner to leave the premise although his recovery action was pending in another Court.

The Supreme Court gave judgement in favour of landowners in seven subsequent cases which were brought at the same time against (1) the Ministry of Defence, and (2) the Minister of Defence, then Marshal Pibul Songgram (1953).⁵⁵ In these cases, the Court ordered restoration of expropriated land although the delay beyond the statutory period of five years had been due to the failure on the part of the arbitrators to reach a satisfactory agreement on the amount of compensation. These cases are significant in more than one respect. They serve to illustrate the principle laid down in the Constitution that, although, as is discussed below, the Government as such cannot be sued, an action can be brought against a Government Department or even against the responsible Minister in his official capacity. Further, they provide a strong evidence of the independence of the Judiciary. These cases would have been of far greater effect had it not been for the fact that the Ministry of Defence was bold enough to respond to the Court order by issuing a second requisition decree expropriating the land in question on the day after judgement was delivered.

It is worthy of notice that the Government of Thailand cannot be sued before a Thai Court, not because of any principle of sovereign immunity, but for the somewhat curious technical reason that the Government as such lacks juristic personality.⁵⁶ Since by virtue of the Constitution⁵⁷ the Government can annul or amend contracts made by its Ministers, in spite of the legal responsibility of the latter according to the ordinary principles of private law,⁵⁸ a litigant in such a case may be without effective remedy.

V. The Administration of Criminal Justice

The rules governing the administration of criminal justice can be found principally in the Code of Criminal Procedure 1935, as amended in 1956,⁵⁹ the Laws of Evidence 1883-1884⁶⁰ and the Act establishing District Courts and Criminal Procedure 1956.⁶¹ There is some division of labour between the Ministry of the Interior

⁵⁵ Supreme Court Decisions, Nos. 984-990/2496, September 10, 1953, Supreme Court Report, (1953) 2496, Vol. III, pp. 1098-1104.

⁵⁶ See the leading case of *Phya Freeda Narubate v. H.M. Government*, 724/2490 (1947). The Court said: "Although the word 'Government' may refer to the central organ of the State or a group of persons, it is not a juristic person under the Civil Code or any other law, and is not, therefore, a proper party before the Court."

⁵⁷ This may be achieved by way of a Royal Ordinance, or Royal Decree, or Ministerial Regulation or Order. See Sections 88, 89 and 90 of the Constitution, pp. 23-24.

⁵⁸ See Section 34 of the Constitution of the Kingdom of Thailand, p. 9.

⁵⁹ The Code of Criminal Procedure, B.E. 2477, March 7, 1935, came into operation on October 1, 1935. The sixth amendment came into force on February 9, 1956.

⁶⁰ The Laws of Evidence, 1883-1884, Ratanakosin (Bangkok) Era 113.

⁶¹ The Act is published in the Royal Gazette, Vol. 73, Part 78, October 2, 1956.

and the Ministry of Justice in the administration of penal law. The Ministry of the Interior has two separate Departments dealing with crimes. The Police Department is primarily responsible for the detection and investigation of crimes,⁶² collection of facts and evidence relevant to the crimes charged and for bringing the accused before the Court.⁶³ The Department of Public Prosecution is responsible for conducting the prosecution. It represents the State in criminal proceedings.

The first stage in the administration of criminal justice is the "criminal investigation". This is carried on by the Police either on its own initiative or upon complaints made or information supplied by private individuals.⁶⁴ It may be necessary at this point to search a house or a person in order to establish proof of the crime believed to have been committed and to identify probable suspects. The power to issue a search warrant can be exercised (1) by the Court, and (2) by an official of the Department of the Interior or a Senior Police Officer.⁶⁵ The safeguards of civil liberties in this connection are embodied in Section 60 of the Code of Criminal Procedure, which requires, *inter alia*, specification of the following points: (1) the reason for issuing the warrant⁶⁶ (2) the place, name or identity of the person to be searched or the identity of the object to be searched for, the time and date of the search together with the name and position of the officer executing the search;⁶⁷ and (3) the nature of the offence charged.⁶⁸

Once sufficient evidence has been collected, the next step is to produce the suspect in order to examine him on the offence charged. It will be recalled that under the Constitution no person can be detained, arrested or searched except in accordance with the provisions of the law. The Code of Criminal Procedure has some provisions on arrest. Generally, persons are arrested by Police officers with a warrant of arrest. Like a search warrant, a warrant of arrest may be issued by the Court, or by officials of the Department of the Interior or by Senior Police Officers. It must specify, *inter alia*, the reason of the arrest, the name and identity of the person to be arrested, and the nature of the offence charged. A general warrant is invalid, but a warrant of arrest of an unknown person may be

⁶² See Section II (10) of the Code of Criminal Procedure, p. 4: "Criminal Investigation" (*karn subsuan*).

⁶³ See *ibid.*, Section II (11), p. 4: "Inquisition" or "Preliminary Examination" (*karn sobsuan*).

⁶⁴ The term "Police" here includes, *inter alia*, prison wardens, customs officers, port authorities and immigration officers, Section II (16), *ibid.*, pp. 5-6.

⁶⁵ This includes also, *inter alia*, governors, marshalls, sheriffs, and police inspectors, Section II (17), *ibid.*, p. 6.

⁶⁶ See Section 60 (3), *ibid.*, p. 22.

⁶⁷ See Section 60 (4), *ibid.*, p. 23.

⁶⁸ See Section 60 (5), *ibid.*, p. 23.

issued provided that he is sufficiently identified.⁶⁹ The reasons that can be invoked in support of an arrest warrant are (1) that the suspect or the accused has no definite place of abode; or (2) that the maximum punishment of the offence in question exceeds imprisonment for a term of three years; or (3) that the suspect or the accused has failed to appear as appointed or has escaped or may reasonably be believed to have escaped; or (4) that the accused who has been released on bail has by fraud failed to provide the requisite security.⁷⁰ The disturbing fact is that the Court does not have the monopoly of the power to issue warrants of arrest and that in practice it is difficult to bring an action for wrongful arrest based on the inadequacy of a warrant issued by an administrative authority. As will appear below, steps have now been taken to remedy this situation by giving greater control to the Courts.⁷¹

There are also a number of circumstances in which arrest may be effected without warrant, viz., (1) where the person arrested is in the course of perpetrating a crime;⁷² (2) where a person is caught attempting to commit a crime or may reasonably be suspected to be committing a crime, such as, carrying an instrument, weapon, or other object normally used for the commission of a crime; (3) where there are reasons to believe that a person has committed a crime and is trying to escape⁷³ and (4) where there has been a request to arrest a person in which it is alleged that the latter has committed a crime and where the informer has duly submitted his complaint.⁷⁴ An ordinary citizen may also arrest another person without warrant when a crime of a serious nature is being committed in his presence.⁷⁵ He must do so if his assistance is requested by a Police officer.⁷⁶

A citizen is further protected in regard to his personal security by the legal requirement that certain action must be taken immediately upon arrest. The accused must be brought forthwith to the police station, and if there is a warrant of arrest, it must be read and explained to him.⁷⁷ The accused may then be kept in custody or released on bail. An application may be made to the Court for the release of a person who is being illegally detained or unlawfully

⁶⁹ See Section 67, *ibid.*, p. 24.

⁷⁰ See Section 66, *ibid.*, p. 24.

⁷¹ See the discussion of the effect of the District Courts Act 1956 at p. 41 *infra*.

⁷² For an explanation of "course of perpetrating a crime" see Section 80 of the Code of Criminal Procedure, *op. cit.*, p. 28. Compare the Roman *furtum manifestum*.

⁷³ In the case of attempted escape, a private person may also effect the arrest if he is the guarantor of the accused or has gone surety for him, Section 117, *ibid.*

⁷⁴ See Section 78, *ibid.*, p. 28: "power of arrest".

⁷⁵ See Section 79, *ibid.*, p. 28.

⁷⁶ See Section 82, *ibid.*, p. 29.

⁷⁷ See Section 83 *ibid.*, p. 29.

remanded in custody. The person detained, his or her spouse, relatives or interested persons, or the Attorney-General, or the warden of a prison may make the application.⁷⁸ Freedom of the accused from arbitrary detention receives further although rather vague protection by the statutory requirement that "no person shall be detained longer than is necessary according to the circumstances of each case".⁷⁹ In the case of petty crimes (*lahootose*) the period of detention cannot exceed the time necessary for identification and enquiry as to residence. The maximum limit is forty-eight hours. Detention may be extended for another seven days, if the nature of the enquiry so demands. If, however, it is necessary to detain him further in order to complete the inquisition, the detainee must be sent to the Court and application made for putting him in the Court's custody during enquiry. The Court may make successive orders of custody for a period not exceeding seven or twelve days each time, depending on the nature of the crime. It is to be observed that the sixth amendment to the Code of Criminal Procedure abolished the requirement that "the Court must order a release upon the expiration of a period of custody, unless otherwise requested by the Attorney-General or the officers conducting the enquiry".⁸⁰ In any circumstances, the total amount of custody must not exceed forty-eight or eighty-four days according to the seriousness of the offence.

The enquiry in the case of ordinary crimes is at present conducted by a police officer or an official of the Department of the Interior. No person can be prosecuted without prior enquiry held by an enquiring officer.⁸¹ In the case of private criminal offences — referred to as "compromisable crimes" under the new Criminal Code 1957 — the Police cannot proceed with the enquiry without a proper complaint in writing.⁸² The enquiring officer will in future be an examining justice of the District Court,⁸³ and this should provide a greater safeguard of the principle that every prosecution must be supported by *prima facie* evidence. Ordinarily, the first part of the enquiry consists in bringing the accused before the enquiring officer,

⁷⁸ See Section 90, *ibid.*, pp. 31-32.

⁷⁹ See Section 87, *ibid.*, p. 30, as amended in 1956 by Article 4, p. 3.

⁸⁰ See Article 4 of the amendment of 1956, p. 5. The practice of the Court appears to have been firmly established that release will be automatically ordered upon the termination of the Court's order of custody. Even when the Attorney-General or the responsible Police officer requests a further period of custody, the Court retains the power to grant or refuse that request.

⁸¹ See Section 120 of the Code of Criminal Procedure, *op. cit.*, p. 39.

⁸² See Section 121, *ibid.*, p. 39. A complaint is generally made in writing; an oral complaint will be taken down in writing by the enquiring officer. The written oral complaint so recorded must be signed by the enquiring officer and counter-signed by the complainant. See Section 123, *ibid.*, at p. 40.

⁸³ See p. 41 *infra*.

questioning him as to such matters as his name, nationality and age and informing him of the proposed charge about which the enquiry is being held. It must be stated beforehand that any statement given by the accused may be used as evidence against him at the trial.⁸⁴ No deception, threat or promise may be used in order to induce the accused to make a statement against his own free will.⁸⁵ The enquiry must be commenced without undue delay. The enquiry can, however, proceed in secret. It is also the duty of the enquiring officer to examine witnesses, which can take place without the presence of the accused, unless he so requests. The material collected by the enquiring officer at this stage is not admissible at the final trial under the general rule of non-admissibility of "hearsay evidence". But, since it forms the basis upon which the prosecution builds up its case and decides whether to prefer or discontinue a charge, it is not without significance. The accused, it is true, has the right of access to his legal advisers from the time of his arrest, and he has the right to refuse to answer questions or to postpone the answer pending consultation with his lawyer. But until a comparatively late stage⁸⁶ the defence counsel will be handicapped by lack of knowledge of the evidence available to the prosecution.

The initiation of the trial may take place at the instance of (1) the Public Prosecutor or Attorney-General, or (2) a private person. In the second place, the trial court itself must conduct a preliminary enquiry, but in practice private prosecutions are rare. In all cases, the Court must first consider whether there is a *prima facie* case for the prosecution.⁸⁷ The accused must be brought before the Court. A copy of the indictment is handed to him or his counsel, if any. It is then read and explained to the accused when properly identified. The Court then asks whether he will plead guilty or not guilty, and how he is to defend himself.⁸⁸ The accused has no right, at this stage, to produce his evidence. The prosecution may or may not be called upon to explain its case. The Court then decides whether to proceed with or to dismiss the case. If the case proceeds trial is by the Court and not by a jury.⁸⁹

⁸⁴ See Section 134 of the Code of Criminal Procedure, *op cit.*, p. 43.

⁸⁵ See Section 135, *ibid.*, p. 43; compare Section 133, para. 3, *ibid.*, p. 43.

⁸⁶ In theory, the defence counsel has no knowledge of the names of witnesses for the prosecution until the trial itself, but in practice the prosecution generally submits in advance a list of witnesses it wishes to call in support of its case. Documentary evidence must be submitted to the Court. It is open to inspection by either party, and a copy must be made available to the other party. See Section 240, *ibid.*, p. 67.

⁸⁷ See Section 167 *ibid.*, p. 52. This is an order which is subject to appeal by either party.

⁸⁸ This process of interrogation by the Court is called *Taisuan Moonfong*.

⁸⁹ A system of jurors closely resembling the jury system in common law countries was in use in the XIX century.

In all criminal proceedings, the accused is entitled to the following rights. Trial must normally be in open court.⁹⁰ In the case of crime of a serious nature, or where the accused is a child or a minor,⁹¹ the Court must ask whether the accused has counsel; if not and he wishes to be represented, the Court will appoint a lawyer before commencing the trial.⁹² It will be realized, however in the light of the foregoing account of the preliminary enquiry, that the postponement of legal aid until this stage is at present a substantial disadvantage to an impecunious defendant. The accused enjoys the inalienable right to be present at all proceedings and the right to be heard.⁹³ Judgement must also be read in his presence.⁹⁴ He is entitled to the presumption of innocence which means that the prosecution must discharge the burden of proving the guilt of the accused beyond any reasonable shadow of doubt.⁹⁵ This is illustrated by the requirement that such proof must be established at all events in regard to crimes of a more serious character,⁹⁶ even if the accused pleads guilty or has made an earlier confession. The accused has the right either himself or by his counsel to cross-examine the witnesses for the prosecution and to re-examine his defence witnesses, and the right of appeal against the verdict or sentence.⁹⁷ It is to be noted that the Appellate Courts cannot increase the sentence if the appeal has been brought by the accused against sentence.⁹⁸ Apart from these rights, the accused enjoys the benefit of the fundamental principle of criminal law of *nullum crimen, nulla poena sine lege*. This principle was applied on a memorable occasion when Marshal Pibul Songgram was tried on a war crime charge immediately after World War II. The principle has received constitutional endorsement.⁹⁹

The application of the maxim *ne bis in idem*, or what is called in the United States "the rule against double jeopardy" is not without interest. It certainly applies when the case has reached its final stage where no appeal lies.¹⁰⁰ The practice of the Supreme Court

⁹⁰ Trial may be held in secret if public order, good morals, or national security so demands. See Section 172 (1) and Section 177 of the Code of Criminal Procedure *op. cit.*, pp. 52-53.

⁹¹ "Children and minors" under Sections 56, 57 and 58 of the old Criminal Code.

⁹² See Section 173 of the Code of Criminal Procedure, *op. cit.*, p. 52.

⁹³ Examination of witnesses must also be made in his presence, Section 174 (3), *ibid.*, p. 53.

⁹⁴ See Section 182 (2), (3) and (4), *ibid.*, p. 55.

⁹⁵ See Section 227, *ibid.*, pp. 64-65, endorsing the maxim; *in dubio pro reo*.

⁹⁶ See Section 176, *ibid.*, p. 53.

⁹⁷ For the law regarding appeal, see Part IV, *ibid.*, pp. 57-64.

⁹⁸ See Section 212, *ibid.*, p. 62. Cf. Section 192, p. 57. Contrast Section 219, p. 65, imposing restrictions on the right of the prosecution to appeal.

⁹⁹ *Ex post facto* penal legislation is unconstitutional. Compare Section 28 of the Constitution and Section 2 of the Criminal Code 1957.

¹⁰⁰ Compare the plea of *autrefois acquit* and *autrefois convict* in the English system.

is clearly settled on this point.¹⁰¹ The principle is even applied where a preliminary enquiry has been concluded in favour of the accused, so as to prevent a later indictment.¹⁰²

Last, but by far the most important, is the rule in the law of evidence that the accused is not bound to answer any question or give any evidence which tends to incriminate himself.¹⁰³ Similarly, a witness is not bound to answer any question which may lead to a criminal prosecution against himself. The Court is obliged to warn the witness in the event of such a question.¹⁰⁴

The present study will not be complete without a brief examination of the law of 1956 establishing District Courts.¹⁰⁵ The effects of this law may be thus summarized. The Act was designed to introduce speedy trial by simplifying criminal procedure, for example, by allowing oral accusation and indictment in the courts of summary jurisdiction.¹⁰⁶ It limits the permissible length of detention for offences triable summarily and favours speedy prosecution.¹⁰⁷ Within the territorial jurisdiction of the new District Courts, the Act restricts the power of the police to arrest without warrant. The warrant of arrest can only be issued by the District Court. There can be no prosecution in any Court without prior investigation by the examining justices of the District Courts whether or not¹⁰⁸ they are competent to try the crimes in question if not, the examining justices will decide whether there is a *prima facie* case to go for trial. This is an interesting innovation. The majority of prosecutions have, as explained above, been preceded by a secret preliminary enquiry conducted by the police or administrative authorities. In future, the preliminary enquiry will be conducted by a judge in open court. Later the District Court judge will be assisted by a lay associate elected directly by the residents of the jurisdiction concerned.¹⁰⁹

¹⁰¹ See, e.g., decisions Nos. 715/89, 737/90, 84/91, and 1086/96; distinguish 495/97.

¹⁰² See Section 147 of the Code of Criminal Procedure, *op. cit.*, p. 47: "No further enquiry is permissible save in the event of newly discovered evidence which is likely to lead to the defendant's conviction." See also Section 126 (2), p. 41.

¹⁰³ Thus, Section 232, *ibid.*, p. 66, provides that the prosecution cannot call the accused to give evidence in its favour. This rule has received judicial endorsement in Common Law countries; in the US it is embodied in the well-known Fifth Amendment.

¹⁰⁴ See Sections 233 and 234, *ibid.*, p. 66. This is the right of the witness, not of the accused.

¹⁰⁵ See an instructive comment by Professor Sanya Dharmasakti, *Tammasart Review*, 1956, Appendix, p.a.

¹⁰⁶ See Section VII of the Act of 1956 establishing District Courts, *op. cit.* and the Sections on procedure, particularly Section XIX.

¹⁰⁷ See Section IX *ibid.*

¹⁰⁸ See Section XIV, *ibid.* This does not duplicate the functions of the City Courts or the Criminal Court. In fact, both Courts will be relieved from the task of conducting preliminary enquiries, as they are already over-worked.

¹⁰⁹ See Section XXIV, *ibid.*

VI. Conclusion

The foregoing study is necessarily fragmentary; but it is sufficient to show that the Rule of Law, inasmuch as it implies the protection of civil liberties through the legal process, is not only generally understood but is also applied in Thailand. There are, of course, certain dangers and shortcomings, some of which have been indicated in this article. The feature most encouraging to the Rule of Law in the sense used in this article has been the strength and independence of the Judiciary. The greatest weakness lies in the precariousness of the basic liberties, such as freedom of speech, assembly and association, which require not merely legal machinery, or constitutional guarantees, but also the political will to secure their enforcement.

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THE SOUTH AFRICAN TREASON TRIAL*

In December 1956 I visited South Africa on behalf of Christian Action, the General Council of the Bar of England and Wales and in cooperation with the International Commission of Jurists. My visit was made in connection with the opening of the preliminary proceedings of the "treason trial" in Johannesburg. The present article is intended primarily as a report on what I saw in South Africa. Much has happened, however, since my visit; in particular the pattern of the case for the prosecution in the trial has become known and emphasizes the importance of the trial to lawyers of all countries and to the much wider body of informed public opinion. I have therefore included in this article information about the progress of the trial which I have obtained from South African sources. For reason which will appear, this trial is unique in legal history.

I. The Country and its People

I think that it will be of some assistance to my readers if by way of a brief introduction I give some information about South Africa and its peoples, to provide a picture of the background against which this trial is being conducted.

The Union of South Africa consists of 4 provinces, the Transvaal, the Orange Free State, the Cape and Natal. There is also the Mandated territory of South West Africa. Johannesburg is the main city of the Transvaal, and Pretoria, also situated in the Transvaal, is the political capital of the Union of South Africa. There are in South Africa about 2,900,000 persons of European descent and 9,000,000 Africans. There are 1,250,000 coloureds, or persons of mixed descent, and about 250,000—500,000 Indians. The Europeans are about equally divided between English speaking and Afrikaans speaking, but many of them speak both languages; between those two groups there is unhappily a good deal of ill feeling. The English-speaking Europeans come in the main from the British Commonwealth, while the Afrikaners are descendants of the Boers. The Afrikaans-speaking Europeans by and large live in the country and are the farmers, and the English-speaking Europeans are in the main the commercial section of the community and live in the towns.

* A revision, with added material of a later date, of a speech in London made shortly after the author's return from South Africa.

In the talks I had with South African friends they always pointed out to me that unless one has lived in South Africa for years it is difficult to understand its problems. The reason for this is that in most other parts of the world, where there is a majority of non-Europeans and a minority of Europeans, the latter are expected eventually to return to their country of origin. In these countries they expect to do so when the non-Europeans are sufficiently educated and responsible to run their own country. South Africa, however, is different. The European South Africans have been there for generations; South Africa is as much their home as that of the non-Europeans and, at least in the case of the Afrikaans-speaking South Africans, they have no home to go to. Even their language "Afrikaans" is not identical with Dutch, which they can only understand if it is spoken slowly. The Afrikaans-speaking South Africans I spoke to explained to me that they would be no more at home in Holland than anywhere else and that South Africa is as much their home as it is the home of the non-Europeans. What is even more important is their view that white civilization is superior to a non-white civilization and that it is their duty to stay in South Africa permanently, in order to ensure this supremacy of white civilization. This view is expressed with much sincerity and deserves respect, as do all views different from our own but sincerely believed in. This belief in the supremacy of the white civilization is also supported by the Dutch Reformed Church of South Africa, which takes the view that it is the Christian duty of the Europeans of South Africa to maintain white supremacy and to restrict the non-European community to that station of life into which it has pleased God to call them. That is not a view which has commended itself to any other section of Christendom, or even to the Dutch Reformed Church in Holland, and indeed it has been condemned by the World Council of Churches.

II. The Political Scene

To complete the picture some reference must be made to political conditions in South Africa. In the elections of 1948 and 1953 the Nationalist Party was victorious and their Government introduced, and proceeded to carry out, their policy of Apartheid, i.e. the separation of Europeans and Non-Europeans. One of the first statutes introduced by the Nationalist Government was the Separate Representation of Voters Act which was designed to deal with that section of non-Europeans who were entitled to vote for Parliament. This Act provided a very limited form of indirect representation for Africans who could elect three European members to the House of Assembly. These persons of mixed descent, called "coloureds", thus had their political rights substantially curtailed.

The introduction of the Separate Representation of Voters Act led to a long constitutional struggle. In the first place the Act was declared invalid as being unconstitutional, and so another Act was passed to deal with the situation. Thereupon the Nationalist Government appointed additional judges. Those appointments were made after Dr. Donges, the present Minister of the Interior, had said: "Unless Parliament can be assured that its acts cannot be declared invalid, it will be compelled to use the American expedient to appoint judges who share its views". These appointments were characterized at the time by the leader of the Opposition in this way: "The new judges have been appointed in a manner which will result in making them the focal point of political controversy, and this will undermine the respect in which the judiciary has always been held". These appointments were also made in the face of a Resolution by a majority of the members of the Bar of Johannesburg in these terms: "We are forced to conclude that the Government is moved solely by the hope that it will obtain the decision it desires on the constitutional question from the new 11-Judge Court. This conclusion is confirmed by the fact that there are several Judges whose eminence, ability, and experience are such that it is incredible that all of them should be passed over in any genuine attempt to strengthen the Appeal Court. Political considerations alone can account for their exclusion".

The legislation which they then proceeded to enact was upon the basis of an existing system of "pass laws" under which almost every non-European had to have a pass to be wherever he might be at the time. They also proceeded to pass a succession of Group Areas Acts by which they declared certain zones to be either exclusively European, or exclusively non-European. This meant, for example, that areas which were then occupied by non-Europeans, such as certain suburbs of Johannesburg, were declared to be European areas, in consequence of which the non-Europeans were forced to move. The best-known suburb of this kind is Sophiatown, where Father Huddleston had his church. It was one of the few areas in South Africa, outside the native reserves, where the non-Europeans could hold the freehold of their houses. But they are being removed from that area. No non-European will now be entitled to own any freehold property anywhere outside the native Reserves. Parliament then passed other Acts, one of which, the Public Safety Act, included the power to make Regulations in effect overruling any Act of Parliament, and power to confiscate any money which was intended to be used to support any resistance movement. They also passed the Prohibition of Mixed Marriages Act which made illegal any marriage between a European and a non-European and the Immorality Act, which forbids any intercourse between Europeans and non-Europeans, including the fathers and

mothers whose marriages have been declared illegal under the Prohibition of Mixed Marriages Act. This legislation was passed against a background of general racial discrimination. An example is the amount of the annual pensions granted to the blind: £36 for Europeans; £24 for coloured people; £15 for Indians; £12 for Africans. The Government also proceeded to withdraw the grants for all cultural activities which cater for both Europeans and non-Europeans, for example, the Institute of Citizenship, the Repertory Theatre, the Christian Education Movement, and the South African Section of the International Society for Contemporary Music. I should also refer to the Criminal Law Amendment Act, which imposes a punishment of up to three years imprisonment or whipping, or both, for offences "committed by way of protest or in support of any campaign against any law or in support of any campaign for the repeal or modification of any law". There were also the Bantu Education Acts. Most of the schools in South Africa have always been Church Schools, supported by grants from the Government. Under these Acts the Government proposed to withdraw grants unless the Churches agreed to restrict the education which they provided in their schools for non-Europeans to a standard of education which the Government considered fit for non-Europeans. The Christian community was split upon this question. The Anglican Diocese of Johannesburg refused to accept the terms, and closed its schools. Other Churches accepted the terms. The Roman Catholic Church refused to accept the terms, but raised sufficient money from its members to continue running its own schools.

III. The National Liberation Campaign

In about 1950 in a campaign, conducted for the most part out of Parliament and known as the National Liberation Campaign, demands were made for the abolition of all discriminatory legislation.

In June 1955 a significant demonstration was organized. It was the Congress of the People held at Kliptown near Johannesburg. Some 3,000 representatives from all over the country adopted a 1,500-word document called the Freedom Charter. Its preamble reads:

"We, the people of South Africa, declare for all our country and the world to know: that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people;

"That our people have been robbed of their birthright to land, liberty and peace by a form of government founded on injustice and inequality; that our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities; that only a democratic state, based on the will of all the

people, can secure to all their birthright without distinction of colour, race, sex or belief;

"And therefore we, the People of South Africa, black and white together — equals, countrymen and brothers — adopt this Freedom Charter. And we pledge ourselves to strive together, sparing neither strength nor courage, until the democratic changes here set out have been won."

Then followed the detailed aims, listed under the following headings: The people shall govern. All national groups shall have equal rights. The people shall share in the country's wealth. The land shall be shared among those who work it. All shall be equal before the law. All shall enjoy equal human rights. There shall be work and security. The doors of learning and culture shall be opened. There shall be houses, security and comfort. There shall be peace and friendship.

The Freedom Charter ended: "Let all who love their people and their country now say, as we say here: These freedoms we will fight for, side by side, throughout our lives, until we have won our liberty".

IV. The Arrests

In December of last year it was known in South Africa that mass arrests were to take place. As long ago as May 1956 the Minister of Justice, Mr. Swart, announced in Parliament that the charges of treason were being prepared against some 200 persons. This was followed by an intensified series of Security Police raids which had been taking place on a less intensified scale during the previous two or three years. On December 5, 1956, 140 persons of all races were arrested in different parts of the country. The arrests were coupled with searches and seizure of documents in a series of simultaneous raids which commenced at 4 a.m. and included the homes of a number of persons not arrested. Prisoners were flown from all parts of the country to Johannesburg by military aircraft on the same day. Eleven more were arrested 8 days later. The latter were, according to the police, the direct results of fresh evidence and information obtained from the first raids.

Some further arrests were made afterwards, in one case at a protest meeting concerning the arrests, and another later outside the court. The final total of persons arrested was 156: 105 Africans, 23 Europeans, 21 Indians and seven Coloureds; 138 men and 18 women. They represented a wide cross-section of the population; they included doctors, lawyers, journalists, teachers, students, ministers of religion, factory workers, trade unionists and labourers. Their views, as publicly professed in the past, ranged from "Christian", "pacifist" and "moderate" to "extreme left". Persons of note among them included Chief A. J. Luthuli, the Christian president-

general of the African National Congress; Professor Z. K. Matthews, an African, acting head of Fort Hare University College; South Africa's two leading African attorneys and one of the country's two African members of the Bar. Also included in that number were prominent members of the Christian Community in South Africa, among them a Methodist minister.

V. The Law of Treason and Cognate Offences

The provisions of the law principally involved in the treason trial must now be explained, and first of all treason. In England by treason is meant, without giving a textual definition, either compassing the death of the Sovereign, or making war against the Sovereign within or without the realm, or aiding the King's enemies. But high treason in South Africa means something quite different. It is a Roman-Dutch common law offence. It is defined in the leading South African textbook by Gardiner and Lansdown as follows: "High Treason is committed by those who with a hostile intention disturb, impair or endanger the independence or safety of the state, or attempt or actively prepare to do so." Treason is punishable with death. Sedition, which is not a capital offence, is constituted of the same elements, except that there is no need to prove the hostile intention. High treason may also be committed by suppressing information. The South African definition of high treason is therefore very much wider than the definition of treason in England.

The other acts which I must refer to are the Riotous Assemblies Act 1914 and the Suppression of Communism Act of 1950. The Riotous Assemblies Act provides that any action "calculated to cause hostility between the white section of the population on the one hand and any other section on the other hand is an offence". The Suppression of Communism Act deserves fuller quotation. First of all I think it necessary to cite the definition of communism in that act in full:

"'Communism' means the doctrine of Marxian Socialism as expounded by Lenin or Trotsky, the third Communist International (the Comintern) or the Communist Information Bureau (the Cominform) or any related form of that doctrine expounded or advocated in the Union for the promotion of the fundamental principles of that doctrine and includes, in particular, any doctrine or scheme — (a) which aims at the establishment of a despotic system of government based on the dictatorship of the proletariat under which one political organization only is recognized and all other political organizations are suppressed or eliminated; or (b) which aims at bringing about any political, industrial, social or economic change within the Union by the promotion of disturbance or disorder, by unlawful acts or omissions or by threats of such acts or omissions or by means

which include the promotion of disturbances or disorder, or such acts or omissions or threats; or (c) which aims at bringing about any political, industrial, social or economic change within the Union in accordance with the direction or under the guidance of or in co-operation with any foreign government or any foreign or international institution whose purpose or one of whose purposes (professed or otherwise) is to promote the establishment within the Union of any political, industrial, social or economic system identical with or similar to any system in operation in any country which has adopted a system of government such as is described in paragraph (a); or (d) which aims at the encouragement of feelings of hostility between the European and non-European races of the Union the consequences of which are calculated to further the achievement of any object referred to in paragraph (a) or (b)."

It is not inappropriate to comment that if the Government passes a law which discriminates against non-Europeans, and therefore causes a feeling of hostility between Europeans and non-Europeans, that is not "communism", but if anybody protests against that law in a manner which causes disorder, that is "communism".

The original definition of "communist" in the Suppression of Communism Act of 1950 was replaced by the following definition in 1954:

"A 'Communist' means a person who professes or has at any time before or after the commencement of this Act professed to be a Communist or who, after having been given a reasonable opportunity of making such representation as he may consider necessary, is deemed by the Governor-General or, in the case of an inhabitant of the territory of South West Africa, by the Administrator of the said territory, to be a Communist on the ground that he is advocating, advising, defending, or encouraging or has at any time before or after the commencement of this Act whether within or outside the Union, advocated, advised, defended or encouraged the achievement of any of the objects of Communism or any act or omission which is calculated to further the achievement of any such object or that he has at any time before or after the commencement of this Act been a member or active supporter of any organization outside the Union which professed, by its name or otherwise, to be an organization for propagating the principles or promoting the spread of Communism, or which engaged in activities which were calculated to further the achievement of any of the objects of Communism."

So if you were a Communist forty years ago, you are a Communist today. And, whether you are a Communist or not, you are a Communist if the Governor-General says that you are. The Governor-General is the ex-Minister of Native Affairs of the party in power.

Offences under the Suppression of Communism Act are punishable by ten years imprisonment.

Finally, in a case such as the present, it should be noted that there is power to order trial, without a jury, by a special court, composed of three judges appointed by the Government.

V. The First Days of the Preliminary Proceeding

I attended the opening days of the preliminary proceedings. There was no Court big enough to accommodate the accused, so the preliminary stages of the trial were held in a large drill hall. At one end sat the magistrate who had been specially brought in from Bloemfontein to take the case. I was much impressed with his handling of the case which was in every way as fair and impartial as would have been the case with any magistrate taking preliminary proceedings in England. At right angles to him were the prosecuting counsel. I call them "counsel" but they are not members of the Bar; they are civil servants. On the other side of the magistrate sat the Press and opposite the magistrate counsel and solicitors. Behind them on chairs, divided, of course, into European and non-European, sat the accused. Behind them there was a large empty space intended for the public, to which few, however, had been admitted. On the first day, as the proceedings started, it became apparent that the accused could hear nothing of what was being said; and the proceedings were thereupon adjourned for loudspeakers to be installed. When we reassembled after the mid-day adjournment it had not been found possible to install the loudspeakers, so the proceedings were again adjourned until the next morning. But it was then still the case that while the accused could hear, none of the public could do so. The accused had on this day been put into a large cage of tubular scaffolding and wire netting on which some of the accused had already hung notices saying "Do not Feed". Counsel for the defence protested at the cage and because they had not been allowed to speak to the accused; they all said that they would withdraw from the case unless such permission was given them and the cage removed. There was a conference in the magistrate's room, as a result of which a compromise agreement was made. The accused remained in the cage for the rest of the day, but the following morning it was to be replaced by a simple rail and some wire at the back. Subsequently, during a long recess in June, the wire was removed altogether and a number of other improvements carried out so as to make the hall more comfortable.

In the afternoon I attended the application for bail in the High Court. The prosecution did not oppose bail, but they suggested that bail should be given in recognizances of £1,000 for each European, and £500 for each non-European. It would have been impossible to provide such recognizances from the Defence Fund,

because the total would have come to about £86,000. Ultimately the court granted bail, fixing the recognizances at £250 for the Europeans, £100 for the Indians and £50 for the Africans. And thereupon the chief magistrate from Johannesburg and ten other magistrates sat till a late hour taking these cognizances. They did everything they could to smoothe things over, and it was solely owing to them that in fact all the accused were released on bail that night. The bail conditions include a ban on attending gatherings other than those of a social, religious, educational, sporting or recreational nature, and on addressing any gathering whatsoever. Exempted from the latter condition were L. B. Lee—Warden, Natives' Representative in Parliament, who was allowed to attend and address the House of Assembly, and the Rev. Douglas Thompson, Methodist minister and Peace Council leader, who was permitted to deliver sermons in his church provided they were first approved by the Police Security Branch. A similar relaxation also applied to Ben Turok, who was elected while on trial in Johannesburg as Native Representative on the Cape Provincial Council. Later in the proceedings several of the accused who are trade unionists successfully applied to the Supreme Court for variation of their bail conditions to allow them to attend certain meetings in the course of their duties. In several cases, however, they were immediately served with banning orders from the Minister of Justice prohibiting their attendance at any gatherings in terms of the Suppression of Communism Act, thus rendering the court orders nugatory.

In the early days of the trial there were demonstrations and large crowds outside the court, leading to repeated baton charges by the police and on one occasion shooting. Only limited numbers of the public were allowed in to the hearing, the others remaining congregated outside. Once the case was under way, however, interest slackened considerably and ever since the public accommodation has been more than adequate. Eventually the guard of 500 police around the hall was considerably reduced.

VII. The Case for the Prosecution

The present proceedings are of a preliminary nature and technically no charges have yet been laid against the accused. At their conclusion the prosecution will ask the magistrate to commit the accused for trial in the Supreme Court either for treason or lesser offences, such as sedition or contraventions of the Suppression of Communism or Riotous Assemblies Acts. Should they be committed it is thought probable that the Minister of Justice will, as he is entitled to do, set up a special criminal court of three judges to try the case without a jury. The charges of treason, if formulated, will be the first laid in South Africa other than in time of war or rebellion, and by far the largest number of such charges the country has

ever known. In recent years, the only precedent of any relevance is a sedition trial held in 1948. Nine leaders of the then legal Communist Party (three of them defendants in the present case) were charged after a strike of African mineworkers. A Special Criminal Court quashed the indictments as being embarrassing and eventually the charges were withdrawn.

In his opening address Mr. J. C. van Niekerk, chief Crown Prosecutor, said that the basis of the high treason charge would be incitement by the accused to overthrow the existing State in South Africa by revolutionary methods. It would be alleged that the accused formed part of a conspiracy to establish a "peoples' democracy" on the lines of those in the Soviet Union, China and their satellite countries. At meetings all over the country, culminating in the Congress of the People, they advocated and propagated a Marxist-Leninist account of history and contemporary politics, using the methods and tactics of Communism. Because the objects of the defendants could not be achieved through Parliament they advocated extra-Parliamentary and unconstitutional action, seeking guidance and assistance from overseas countries. In advocating a new form of government they encouraged hostility between the white and non-white races of South Africa. Mr. van Niekerk said that the various organizations constituting the National Liberation movement decided jointly to associate themselves in convening a congress to adopt and thereafter implement a Charter for South Africa, making provision for a new form of Government and State apparatus. Speeches, resolutions and propaganda in preparation for this Congress indicated that the change in the form of government envisaged in the Freedom Charter would be brought about by violent revolutionary methods.

Asked by the defence and the Bench whether it was alleged that the terms of the Freedom Charter were treasonable, the Prosecutor stated: "The Crown is not in a position at this stage to say what allegations are going to be made at the end of the preparatory examination." On this point the defence pointed out that the Freedom Charter had been widely circulated, in tens of thousands, since 1954; if it had been treasonable one would have expected action to be taken earlier than this. It would be strenuously repudiated that its terms were treasonable or criminal.

The defence have from the first attacked not only the charges but the whole basis of the prosecution itself. In his opening address Mr. V. C. Berrangé, one of the defence counsel, said it would be contended that they arose out of a "political plot" reminiscent of the period of the Inquisition or the Reichstag Fire Trial. The accused would assert that they were the "victims of political kite flying on the part of those responsible for these prosecutions . . . a testing of the political breezes in order to ascertain how far the

originators can go in their endeavours to stifle free speech . . . We will endeavour to show that what is on trial here are not just 156 individuals but the ideas which they and thousands of others in our land have openly espoused and expressed."

The advocacy of extra-parliamentary methods, Mr. Berrangé continued, did not involve violence and subversion if any statements advocating these were proved to have been made by any of the accused or by others then they were not indicative of the policy of the organizations concerned and could not criminally implicate the accused who did not associate themselves with such statements. The political activities of the accused and the ideas they held were matters of public record, and no attempt had ever been made to conceal them. The allegations of seeking aid from outside countries would be shown to be false, as also that of encouraging hostility between the black and white races — "my clients have one and all adopted and advanced a policy of racial unity in a struggle for democratic rights and freedoms. The text of the Freedom Charter is in itself sufficient corroboration of this statement."

"This is no ordinary trial," Mr. Berrangé concluded, "if one has regard to the crude and jackboot manner in which the arrests were effected. That this is no ordinary trial can be gathered from the fact that the accused are in themselves no ordinary persons . . . And evidence will be led to show that this is no ordinary trial by reason of the manner in which it has been set in motion . . . A battle of ideas has indeed been started in our country; a battle in which on the one side — the accused will allege — are poised those ideas which seek equal opportunities for, and freedom of thought and expression by, all persons of all races and creeds; and on the other side those which deny to all but a few the riches of life, both material and spiritual, which the accused aver should be common to all . . ."

The prosecution evidence thus far falls into three main categories. First, some 10,000 documents of many different kinds, allegedly seized from the accused and their organizations, were handed in. The volume of this evidence is so vast — it totals some 100,000 typewritten pages — that complete copies are not yet, at the time of writing, even available to the defence. Though the eventual outcome of the trial may in the end depend more on the documentary than the oral evidence, it would be impossible even to attempt to summarize here the contents of these exhibits. They include pamphlets, lectures, articles, speakers' notes, books, minutes of meetings, circulars, membership cards, letters, newspaper cuttings. Their range is from standard text-books on Communism to cheque-book counterfoils, from banners and posters to lengthy analyses of the economic-historical situation in South Africa. It must suffice to say that the bulk of the docu-

ments seem to bear on the Congress of the People and have evidently been put in with the purpose of linking the accused with the Freedom Charter. It must be rare indeed for a case not to be capable of proof without 10,000 documents.

The next and lengthiest part of the Crown case has consisted of evidence by detectives on meetings of the various organizations over the past four years in many different parts of the country. Here again, hundreds of meetings and several thousand individual speeches are involved. A number of the speeches are attributed to persons not on trial. The defence impression of the Crown case appears to be that it is largely in effect the organizations themselves which are being charged, and that the guilt of particular persons is to be established through the conduct of fellow members of these organizations as well as by their own.

The notes of the speeches were made generally in longhand. The defence has indicated that it regards much of this material as *innocuous and much*, again, as incoherent and valueless. One detective's notes put in as evidence contained sentences like the following: "Afrikaners consist just of police stations and railways . . . We have no ambulances to arrest the people . . . Politicians are selfish men please to get money . . . diet of blood. Dirty *sogenoemde* Christians . . . flying squad, police . . ." The defence has made repeated protests about such "nonsensical gibberish" being put in evidence. There have also been protests about evidence of such statements as (at the adjournment of a trade union meeting): "Comrades, I want to tell you that we serve two sandwiches and a cold drink for sixpence." Pointing out the hardships being suffered by the accused, the defence have alleged an apparent disregard for wasted time in the presentation of the Crown case. At their instance the magistrate has made several requests to the prosecution to shorten their evidence as far as possible. The prosecution has consistently declined to elaborate on the relevance of particular evidence, maintaining that all unnecessary material has already been eliminated from their case and that the relevance will appear in due course.

Certain passages of the prosecution evidence have received more serious attention in cross-examination. Among them are speeches allegedly calling for "a violent rebellion and militant action" and "money to buy machine guns for self defence". Another African National Congress leader was reported to have said: "Let us demand our country by force. If instructions are given to the volunteers to kill then they must kill . . ."

The cross-examination has been mainly on the lines of the fluency of the witnesses in the languages in which the speeches were made or in which they took their notes, and whether the longhand notes can reflect more than a small portion of what was said at the meetings. Many of the detectives have conceded that at the meetings

they attended speakers generally stressed that the struggle was to be conducted without violence and without hatred for the white inhabitants of the country. The defence have also dwelt wherever possible on the methods used by the police Security Branch to get their evidence. They have asked why, on various occasions, it was necessary for peaceful meetings to be "invaded" by large bodies of armed police; they allege intimidating "terror" tactics and a general overstepping of lawful bounds on the part of the police. Under cross-examination one police shorthand writer told the court that he had spent a whole day hidden behind a cupboard in order to get his notes of a trade union meeting; shortly before that, detectives had been ejected, on an urgent Supreme Court order, from a meeting in the same hall which they had no warrant to attend.

To link the various aspects of their case together the prosecution brought expert evidence on Communism from a specialist in political theory. He is Professor A. H. Murray, professor of philosophy at Cape Town University. After an exposition of aims, doctrines and methods, he was asked to give his opinion on the "Communist content" of some of the documents seized from the accused. These he described variously as showing "Communist tendencies", "Marxist thinking", "Communist propaganda", "out-and-out Communism", and so on. Among the phraseology the professor picked out as Communist stock-in-trade were words such as "Fascist", "oppression", "people's democratic state" and "uncompromising democratic policy". The text of the Freedom Charter, Professor Murray said, showed little direct Communism; but when read together with the speeches which introduced it at the Congress of the People, it was clear at least some sections were intended to be interpreted in Communist terms. At the time of writing Professor Murray had not yet been cross-examined by the defence.

The duration of the preparatory examination has gone far beyond original expectations. At the beginning of the hearing the Prosecution stated that its case would be concluded within two months. But now, apart from recesses totalling some six weeks, the case has been proceeding continuously since January, the court sitting five days a week and about five hours a day; it is considered unlikely that the Crown case will be completed before September. Throughout the preparatory examination, most of the objections raised by the defence have tended to spring from the nature of the evidence which is dragging out the proceedings to such length. There have been comparatively few complaints about the actual conduct of the hearing. The recurring question of the relevance of Crown evidence has been the cause of most of the occasional heated exchanges that have taken place in Court. The magistrate, an official of many years' experience, has tried to smooth over all disagreements with fairness to both sides.

The protracted strain and tedium of daily attendance at Court has been one of the major personal hardships to the accused. During the earlier part of the hearing the magistrate had occasion several times to warn them against reading or falling asleep in the dock. Subsequently however he has allowed a good deal of latitude in these respects. Generally the accused are excused from attendance only on certified medical grounds; but with the concurrence of the prosecution the magistrate has also allowed leave of absence in certain other cases, such as for visiting a seriously ill relative, attending civil proceedings elsewhere and writing a professional examination.

On two occasions the defence has asked the Court to act on contempts allegedly committed by way of outside comment on the case. The first case concerned remarks by a Cabinet Minister soon after the arrests, the second a comment by an Afrikaans-language newspaper. In both instances the magistrate ruled that he could not allow the Court to be burdened with contempt matters not occurring within the Court. In the second case the newspaper had published a photograph of one of the exhibits seized from the South African Peace Council, a map of the world illustrating the scope of the world peace movement. The photograph was headlined by the newspapers as "Map of Moscow's Octopus Tentacles". Defence counsel protested that this comment unjustly identified the Peace Council with international Communism; whether this was true or not was one of the issues to be decided by the Court. After the magistrate had declined to take action, one of the accused applied to the Supreme Court to impose such penalties as it might determine on the newspaper. A judge found that there had been contempt, but not of a serious kind, and imposed no penalty.

One other court proceeding is worthy of note. Concurrently with the treason trial, three of the accused were charged in the Supreme Court with causing public violence. These prosecutions arose from rioting which accompanied the bus boycott at Evaton, a non-white township near Johannesburg, during 1955—56: they arose from a similar set of circumstances to that apparently linking these individuals with the treason trial. The three men were acquitted, together with the other leaders of the boycott.

VIII. Problems of the Defence

The 156 accused have suffered increasing financial and other hardships from the time of the arrests. The majority are separated from their families in other parts of the country. In two cases both husband and wife were arrested, leaving young children to be cared for by others. The financial plight of the African accused has been particularly severe. Most lost their employment and have since

had to depend on whatever part-time work they could do, and on the assistance of sympathizers.

Soon after the arrests sympathizers formed the Treason Trials Defence Fund¹ with prominent citizens such as Members of Parliament, bishops and former judges among its sponsors. The Defence Fund has been assisting the accused and their dependants (estimated to total over 600) with regular grants as well as paying legal costs. The Fund has had considerable support from Britain and America. So far, however, it has raised less than a quarter of the £ 150,000 which, it is estimated, will eventually be needed. Demands for assistance are increasing constantly as the trial wears on and the accused come to the end of their private resources. If the case is to go to the Supreme Court for trial it may be more than a year before any of the defendants are able to lead normal lives again.

IX. Conclusion

In the last quarter of a century we have seen Communism and Fascism at work in different countries, and we are well aware of the factors which are common to totalitarian rule. If we believe in the Rule of Law we cannot watch without anxiety the increase of many of these factors in South Africa today. While it is often unwise to express a view on legal trends in other countries, there comes a point where it may be wrong to remain disinterested.

In totalitarian countries the Bar has not infrequently been among the last bulwarks of civil liberties. For reasons which it may not be politic to go into, the Bar of South Africa, with many of whom I discussed their problems, are in an increasingly difficult position. The Government have, for example, power to withhold passports at their discretion. Thus, the Chairman of the South African Labour Party was recently denied a passport to enable her to attend the Labour Commonwealth Conference in London. Similarly, a member of the Bar told me that he had recently applied for a passport, only to be told "Of course, if you are going to appear for the defence in the Treason Trial, you can forget about your application".

It may be that those who support the Rule of Law should be aware of what is happening in South Africa, should continue to take an interest in it and, if they feel so inclined, should support the

¹ A meeting held in Durban the day after the arrests to set up a defence fund led to the prosecution of Alan Paton, the author, and five others including a professor of Natal University. Persons of various races attended the meeting. The charge was of holding a meeting of Nations without notifying the Mayor of the city 72 hours in advance - a regulation seldom enforced. Four of the accused were fined £5, the other two £3. An appeal is pending.

Treason Trial Defence Fund, which will at least enable the accused to obtain adequate support and legal assistance in a trial unique in the number of the accused, in the weight of the documents, in the length of the proceedings and, not least, in the extraordinary width of the laws applicable.

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THE SOVIET PROCURACY AND THE RIGHTS OF THE INDIVIDUAL AGAINST THE STATE

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INTRODUCTION

It is generally recognized that the individual has certain rights vis-à-vis the State. Though the scope of these rights may be in dispute there is general agreement that the most essential rights — those protecting life, freedom, family and property of the individual — are inalienable. This is true of Soviet and non-Soviet constitutional theory. There are, however, basic differences in the machinery created and the procedures applied to ensure observance of these rights, in particular as regards the question who decides whether the rights of an individual are encroached by the State and if so, who has the right and duty to see that the violated rights are re-established.

Three types of machinery are possible: firstly, the power is granted to the individual, secondly, it is exercised by the State itself or, lastly, it is entrusted to a third independent body. The first possibility would amount to individualist anarchy; the issue lies between the two latter possibilities. Generally a third independent body — the Court — is considered to be the proper organ to solve such issues. A different approach is made in countries of the Soviet type. It is based on the belief that there can be no "independent" organ in a society unless it is classless. Every organ, be it the State or another body, exercising sovereign power will inevitably serve, it is argued, the interests of one class or another. It makes, therefore, essentially no difference, according to Soviet theory, whether the body entrusted with the protection of individual rights is the State or a third organ like a Court. In all cases it will serve the interests of the ruling class and act to the detriment of the suppressed classes. Which organ is entrusted with the protection of the rights of the individual is therefore, it follows, a question not of principle but of expediency.

I. PROCEDURES FOR THE PROTECTION OF THE RIGHTS OF THE INDIVIDUAL AGAINST THE STATE

Under the Soviet system there are four channels open to the individual to seek protection of his rights vis-à-vis the State:

the Court channel,
the administrative channel,
the Party channel,
the Procuracy.

1. Protection by Courts

The task of Courts includes in Soviet law the protection from infringement of the "political, personal, and property rights and interests of the citizens of the USSR, those rights pertaining to labour and housing, and such other rights as are guaranteed by the USSR Constitution and the constitutions of the constituent and autonomous republics".¹ Two procedures are established for protecting these rights and interests: civil and criminal.

The *civil* procedure is open to a citizen who seeks redress from the State for violations of his rights committed by State officials in performing official duties.² This possibility, however, does not extend to all such violations but only those expressly enumerated in the law, e.g., for embezzlement of deposited moneys.³ The number of these cases is "relatively small".⁴ There is moreover a procedural prerequisite for bringing a lawsuit against the State before the Court. The fact that a violation of official duties has occurred must be established beforehand by a Court or an administrative organ, e.g., in a sentence or disciplinary decision. In practice it is not easy for an individual to establish such a breach of law since he has no legal means to initiate proceedings and no right to participate in them once they have begun. If, for instance, an investigator has violated the rights of an arrested person criminal proceedings against the investigator may be initiated only with the consent of the Procurator-General of the USSR or of the Procurator of the competent

¹ Act of the Judiciary of the USSR of 1938, Article 2b. English translation: Vladimir Gsovski *Soviet Civil Law* (Ann Arbor, 1949), Vol. II, pp. 501-502.

² Civil Code of the RSFSR, Art. 407 (English translation: Gsovski, *ibid.*, pp. 210-211) and corresponding articles in the Codes of the other Union Republics. Henceforth references will be made only to the Codes of the RSFSR.

³ Civil Code of the RSFSR, Art. 407a (English translation: *ibid.*, p. 211.) Cf. Code of Criminal Procedure of the RSFSR of 1923, Arts. 21-22.

⁴ *Sovetskoe grazhdanskoe pravo* (Soviet Civil Law), publ. by the All-Union Institute of Juridical Science of the Ministry of Justice of the USSR, Vol. II (Moscow, 1951), ed. by S. N. Bratus (Moscow, 1951), p. 307 (German edition [Berlin, 1953] p. 361). Cf. the enumeration of cases on pp. 307-308 (German edition: pp. 361-362).

Union Republic,⁵ i.e., one of the two highest officials in the hierarchy of the Procuracy.⁶ Protection by the Courts against violation of laws committed in execution of executive power is, it may be concluded, of doubtful practical value.

The situation is not basically different even in case of rehabilitation, as the rehabilitations before and after the XX Party Congress have shown. The rehabilitation consists of a revision of the Court judgement passed or the decision reached by the "Special Board" of the Ministry of Internal Affairs.⁷ It is usually followed, where applicable, by a restoration of the Party rights which the rehabilitated person may have enjoyed.⁸ But rehabilitation does not necessarily carry with it compensation for the material loss suffered, such as loss of income, damage to health, etc. The rehabilitated person is merely credited with the years during which he has been unjustly deprived of freedom as far as his years of service are concerned.⁹

Of a more real nature is the protection in civil procedure against violation of individual rights committed by State officials in the economic field as officials of State enterprises. Here the aggrieved person may claim damages from the State organization in question in accordance with the ordinary principles of liability of a juridical person.¹⁰ One field of practical application is, for instance, labour relations.¹¹

⁵ *Sovetsky ugolovny protsess* (Soviet Criminal Procedure), publ. by the Moscow Juridical Institute, ed. by D. S. Karev (Moscow, 1953), p. 170.

⁶ For a chart of the organization of the Procuracy see *infra* pp. 72-73.

⁷ The "Special Board" of the Ministry of Internal Affairs of the USSR was an administrative tribunal set up by a law of 1934. Text: *Sobranie zakonov SSSR* (Collection of Laws of the USSR) (hereafter cited: *Sob. zak. SSSR*) (Moscow, 1935), No. 11, Art. 84. It was empowered to exile "socially dangerous persons" by an administrative (i.e., non-judicial) procedure to correctional labour camps. It is said to have been abolished in 1953.

⁸ See Shvernink in a speech of July 6, 1957 in Leningrad: "Putting right the violations of revolutionary legality committed by Malenkov, Kaganovich and Molotov during the period of mass repressions, the Party Control Committee in 1957 examined a large number of personal cases of former members of the Party who had been rehabilitated by judicial bodies. The Party Control Committee has readmitted the majority of them to the Party." (*Pravda*, July 7, 1957, p. 2; English translation: *BBC Summary of World Broadcasts* [London], Part I, July 10, 1957, Suppl., p. 17).

⁹ Ordinance of the Council of Ministers of the USSR, *Sobranie postanovleniy SSSR* (Collection of Ordinances of the USSR) (Moscow), 1957, No. 2, p. 82, republished in *Sotsialisticheskaya zakonnost* (Socialist Legality) (Moscow), 1957, No. 5, p. 82. See also the suggestion of M. S. Strogovich to change existing legislation to the effect that compensation is paid to illegally convicted persons in case of rehabilitation. This suggestion was made in the leading Soviet law journal, *Sovetskoe gosudarstvo i pravo* (Soviet State and Law), organ of the A. J. Vyshinsky Law Institute of the Academy of Sciences of the USSR and the All-Union Institute of Juridical Science (Moscow), 1956, No. 4, p. 25, cf. *infra*, p. 104 and note 275.

¹⁰ Civil Code of the RSFSR, Arts. 404, 413, 414 (English translation: Gsovski, *op. cit.* [note 1], pp. 208, 213, 217); *Sovetskoe grazhdanskoe pravo*, *op. cit.* (note 4), pp. 303-305 (German edition, pp. 357-359).

¹¹ The procedure for settling labour disputes was recently regulated in a Statute of

In a number of cases specifically envisaged by law a recourse to the Courts is possible also for the purpose of reviewing decisions of administrative authorities. To this extent the Court may be said to perform the duty of an *administrative* Court though this term is not used in Soviet legal science which rejects the theory of a separation of powers. A case in point usually cited in Soviet literature in this context is the judicial review of the refusal of local soviets to include a citizen in the list of electors.¹² Against this decision appeal may be made to the People's Court.¹³ Appeal can also be made to a Court in respect of complaints against entries made or omitted by the registration authorities¹⁴ and against the refusal of local soviets to reserve apartments for a person who leaves to work in areas of special importance.¹⁵ Of considerable practical importance are the functions of Courts in reviewing decisions of administrative authorities in the field of taxes, obligatory deliveries and fines. Enforcement of taxes, obligatory deliveries and fines can take place only by order of the Court which is required to review the legality of the assessment.¹⁶

Criminal procedure is only of limited avail to the citizen seeking protection against illegal acts of State officials. This is because a number of functions envisaged to protect the right of the individual against the State are assigned to the Procuracy and not to the criminal Court. Thus it is the Procuracy and not the Court which has the right to permit an extension of the maximum period of investigation established by law.¹⁷ Investigators of the Procuracy may furthermore order and execute searches¹⁸ whereas sanctioning arrests is a right both of the Procuracy and of the Court.¹⁹ Complaints against investigators are to be filed with the Procuracy, but against their decisions appeal may be made to the next higher Court.²⁰

January 31, 1957, *Vedomosti Verkhovnogo Soveta SSSR* (Gazette of the Supreme Soviet of the USSR) (hereafter cited: *Vedomosti*) (Moscow), 1957, No. 4, Art. 58.

¹² S. S. Studenikin, V. A. Vlasov, I. I. Evtikhiev, *Sovetskoe administrativnoe pravo* (Soviet Administrative Law), publ. by the All-Union Institute of Juridical Science of the Ministry of Justice of the USSR (Moscow, 1950), p. 213 (German edition [Berlin, 1954], p. 266).

¹³ The "People's Court" is the lowest court in the Soviet Court system. An appeal to this Court is envisaged, e.g., in the Statute on Elections to the Supreme Soviet of the USSR of 1950, Art. 23, but the Statute on the Election of People's Courts of the RSFSR of 1951 provides only for an appeal to the next higher soviet (Art. 13).

¹⁴ Code of Laws on Marriage, Family, and Guardianship of the RSFSR of 1926, Art. 116 (English translation: Gsovski, *op. cit.* [note 1], p. 283).

¹⁵ *Sovetskoe administrativnoe pravo*, *op. cit.* (note 12), p. 385.

¹⁶ *Ibid.*, pp. 213-219, 359 (German edition, pp. 266-237).

¹⁷ Code of Criminal Procedure of the RSFSR of 1923, Arts. 105, 116.

¹⁸ *Ibid.*, Art. 175.

¹⁹ Constitution of the USSR of 1936, Arts. 127; RSFSR Code of Criminal Procedure, Arts. 104, 146.

²⁰ Code of Criminal Procedure of the RSFSR, Arts. 212-220, 226; cf *infra* pp. 83-84 and notes 171-174.

Once a trial has started it is the Court to whom the accused has to turn in order to see that his rights are observed, e.g., by demanding the calling of witnesses, by appealing against the judgement, etc. After the judgement becomes final, it is again the Procuracy which is competent to ensure that the rights of the convicted are observed. Thus, the Procuracy is obliged to supervise the execution of the judgement.²¹ Applications for a re-opening of the trial (as distinguished from an ordinary appeal against a judgement which is not yet final) have to be addressed to the Procuracy and not to the Court.²² If the Procuracy objects to a re-opening of the trial no remedies are given to the convicted except an informal complaint to the next higher Procuracy. Abuse of office and crimes committed in course of duty may serve as a ground for a re-trial only if they have been established by criminal proceedings against the wrong-doer.²³

Apart from the possibilities summarized above, the State is immune from lawsuits by individuals and enjoys the *privilegium de non evocando et de non appellando*.

2. Protection through Administrative Channels

The means for ensuring protection of the individual through Administrative Channels is the right of complaint. It is a characteristic of Soviet administration that individuals may file complaints not only against violations of law but also against inexpedient acts and unsatisfactory working practices of administrative authorities. The law does not require that the complainant is personally affected by the illegal or inexpedient act of the State.²⁴ The number of instances through which the complaint may be pursued is also not restricted and the final instance is as a rule the Council of Ministers of the USSR.

The examination of complaints is made the duty of the organ to which complaints are addressed and definite time limits are established for this purpose.²⁵ Sometimes the channels and pro-

²¹ *Ibid.*, Art. 455.

²² *Ibid.*, Arts. 377, 446. A different procedure is followed in civil cases. Here applications for a re-opening of the case are addressed to the Court (Code of Civil Procedure of the RSFSR of 1923, Art. 252; English translation: Gsovski, *op. cit.* [note 1], pp. 553 *et seq.*).

²³ *Ibid.*, Art. 375.

²⁴ *Sovetskoe administrativnoe pravo, op. cit.* (note 12), p. 222 (German edition, p. 277).

²⁵ Ordinance of December 14, 1935, *Sob. zak. SSSR* 1936, No. 31, Art. 274, republished in: *Sovetskaya prokuratura v vazhneyshikh dokumentakh* (The Soviet Procuracy in Important Documents) (hereafter cited: *Sovetskaya prokuratura*) compiled by V. G. Lebedinsky and D. I. Orlov (Moscow, 1956), pp. 416-418.

cedures to be followed for a given grievance are regulated by the respective administrative organ, e.g., for complaints in matters of trade and sanitary inspection, etc. But no rights are given to the complainant to enforce these rules; with the exceptions mentioned above²⁶ the procedure for complaints does not provide for a final recourse to the Court.

3. Protection through Party Channels

Protection of the rights of the individual against the State through Party channels is possible, although it is not specifically provided for in the Party Statutes or in procedural regulations of the State. Members of the Communist Party in the Soviet Union are called upon "to inform leading Party bodies, up to and including the Central Committee, of shortcomings in work, irrespective of person"²⁷ and "to carry out the Party policy among the non-Party people, . . . to combat bureaucracy, and to verify fulfilment of Party and Soviet directives".²⁸ The Party has, however, no formal duty or right to intervene in individual cases of injustice, e.g., by setting aside decisions of State organs which violate the rights of an individual. It may merely "recommend" measures to be taken, and there can be little doubt that the State organ in question will at least very carefully consider this recommendation. A different situation exists on the other hand with respect to infringements of rights of Party members committed by Party organs. Here the Party is obliged to intervene and the Party member is given the right to appeal in a formal procedure against a Party decision infringing his rights. The highest organ of the Party for protecting the rights of individual Party members is the Party Control Committee.²⁹

In summary it appears that existing judicial and Party procedures for protection of the individual against infringement of his rights by the State and other official authorities cover only a limited number of cases. Judicial protection is reserved for strictly defined cases, whereas Party channels are open merely to Party members. The only means of protection of an unlimited nature is the right of complaint through administrative channels. This right, however, is not enforceable by the individual. The protection of the individual assigned to the Procuracy is therefore of particular importance. An examination of the scope, nature, and effectiveness of this protection by the Procuracy is the object of this study.

²⁶ *Supra* pp. 63-64 and note 20.

²⁷ Statute of the Communist Party of the Soviet Union, Art. 3h.

²⁸ *Ibid.*, Art. 67.

²⁹ *Ibid.*, Art. 35b; cf. the speech of Shvernik quoted *supra* note 8.

II. SOURCES AND METHOD OF STUDY

In order to present as objective a picture as possible of the legal situation only Soviet sources are used. A list of selected items of Western literature on the Soviet Procuracy is attached in an appendix to this paper. None of them is principally devoted to the specific problem posed and analysed in this paper — that of the protection of the individual against the State by the Procuracy.

The Soviet materials used consist mainly of the pertinent laws on the Procuracy, its rights and duties and its organization. They were recently republished in a convenient collection of laws on the Procuracy.³⁰ More difficult is a study of the way these laws are applied in practice. What would appear to be the best source — the orders of the Procuracy — are not readily available outside the offices of the Procurators in an up to date publication. The latest edition accessible to the author is a collection of orders of 1936.³¹ This gap is made up partially by a number of monographic studies on various aspects of the work of the Procuracy,³² usually written by jurists working in the Procuracy itself.³³

Another important source is the organ of the Procuracy of the USSR, *Sotsialisticheskaya zakonnost* (Socialist Legality), a monthly law journal.³⁴ It was banned from export for most of the post-war-

³⁰ *Sovetskaya prokuratura* (quoted *supra* note 25), 508 pp.; other collections are, e.g., *Spravochnik po zakonodatelstvu dlya sudebno-prokurorskiikh rabotnikov* (Reference Book on Legislation for Judicial and Procuratorial Personnel) (hereafter quoted: *Spravochnik*), compiled by M. Y. Raginsky, V. G. Lebedinsky, D. I. Orlov and V. S. Tadesvovyan, edited by G. N. Safonov, Procurator-General of the USSR (Moscow, 1949), 3 Vols.; *Istoriya zakonodatelstva SSSR i RSFSR po ugolovnomu protsessu i organizatsii suda i prokuratury 1917-1954 gg. Sbornik dokumentov* (History of the Legislation of the USSR and RSFSR on Criminal Procedure and the Organisation of the Court and the Procuracy, 1917-1954; A Collection of Documents) (hereafter quoted: *Istoriya zakonodatelstva*), compiled by L. N. Gusev, edited by S. A. Golunsky (Moscow, 1955), 635 pp.

³¹ *Sbornik tsirkulyarov i razyasnenij Prokuratury Soyuza SSR* (Collection of Circulars and Explanations of the Procuracy of the USSR) (hereafter cited: *Sbornik tsirkulyarov*), compiled by B. I. Solers and D. I. Orlov, edited by A. Y. Vyshinsky, Procurator of the USSR (Moscow, 1936), 168 pp. Another edition is known to have been published in 1939.

³² V. G. Lebedinsky *Organizatsiya raboty Sovetskoy prokuratury* (Organization of the Work of the Soviet Procuracy) (Moscow, 1953), 187 pp.; P. D. Albitsky *Voprosy obshchego nadzora v praktike Sovetskoy prokuratury* (Question of General Supervision in the Practice of the Soviet Procuracy), edited by V. A. Boldyrev, Deputy Procurator-General of the USSR (Moscow, 1956), 140 pp.; S. G. Berezovskaya *Prokurorsky nadzor v Sovetskom gosudarstvennom upravlenii* (Procuratorial Supervision in Soviet State Administration) (Moscow, 1954), 107 pp.; V. S. Tadevosyan, *Prokurorsky nadzor v SSSR* (Procuratorial Supervision in the USSR) (Moscow, 1956), 297 pp.

³³ Lebedinsky is State Councillor of Justice, 3rd Class; Albitsky, who died in 1957, was Senior Assistant of the Procurator-General of the USSR.

³⁴ Published in Moscow since 1923; title and frequency of publication vary. Before 1957 it was published in conjunction with the Ministry of Justice of the USSR and the Supreme Court of the USSR.

period, but starting with 1956 subscriptions were accepted again and a few copies reached the West. From a practical point of view a collection of forms and precedents of the Procuracy is also helpful³⁵.

From these sources it will be attempted to give a picture of the law and practice of the Soviet Procuracy early in 1957. Historical developments have not been dealt with unless a direct reference seemed imperative.

After a general description of the organization of the Procuracy, this study is divided into two main parts: the Procuracy as a guardian of law *ex officio* and on the basis of complaints by citizens. The characteristic features of the protection accorded by the Procuracy to the individual are analysed in a concluding summary.

III. ORGANIZATION OF THE PROCURACY

Detailed regulation of the duties, rights and organization of the Procuracy is contained in the "Statute on Supervision by the Procuracy in the USSR", issued May 24, 1955, hereafter called "Statute".³⁶ This Statute replaces earlier codifications of the laws on the Procuracy of 1922, 1923, 1929 and 1933. It is supplemented by an Ordinance of the Presidium of the Supreme Soviet of the USSR "On the Structure of the Central Apparatus of the Procuracy of the USSR" of April 7, 1956.³⁷

The organs of the Procuracy of the USSR constitute "one centralized organization", headed by the Procurator-General of the USSR, with subordination of Procurators of lower rank to those of a higher rank.³⁸ The Procurator-General directs the activities of the organs of the Procuracy and exercises control over their work.³⁹ His orders and directives are binding.⁴⁰

³⁵ V. G. Lebedinsky, *Obraztsy osnovnykh prokurorsko-sledstvennykh aktov* (Forms of the Main Investigating and Procuratorial Precedents) (hereafter cited: Lebedinsky *Obraztsy*), publ. by the Methodological Council of the Procuracy of the USSR, edited by R. A. Rudenko, Procurator-General of the USSR, 3rd ed. (Moscow, 1954), 263 pp.

³⁶ *Vedomosti* 1955, No. 9, Art. 222; English translation: *Highlights of Current Legislation and Activities in Mid-Europe* (Washington, D.C.), March 1956, pp. 83-98 and *Anglo-Soviet Journal* (London), Vol. XVII, No. 2 (Summer 1956), pp. 5-14.

³⁷ *Vedomosti*, 1956, No. 8, Art. 186. English translation: *Soviet Legal Information Bulletin* (London), publ. by the Society for Cultural Relations with the USSR, Vol. IV, No. 2 (April 1957), pp. 1-2 [reprinted from: *Soviet News*, 1956, No. 3387]. In circulating this Ordinance the General-Procurator of the USSR issued an Order on April 10, 1956 containing administrative decisions in connection with the reorganization of the Procuracy. The order is reprinted in *Sovetskaya prokuratura* (*op. cit.*), note 25 pp, 496-498.

³⁸ Statute, Art. 5.

³⁹ *Ibid.*, Art. 39.

⁴⁰ *Ibid.*, Art. 8.

1. Subordination to the Supreme Soviet of the USSR

The Procurator-General is in his turn responsible and accountable to the Supreme Soviet of the USSR and, in interim periods between sessions of the Supreme Soviet of the USSR, to the Presidium of the Supreme Soviet of the USSR.⁴¹ The Supreme Soviet is the "highest organ of State power in the USSR".⁴²

The Presidium of the Supreme Soviet of the USSR may set aside orders and directives of the Procurator-General of the USSR "in cases where they are not in conformity with the law".⁴³ This function of the Presidium resembles that of the Procuracy. The Presidium of the Supreme Soviet may thus be considered to be an extension upwards of the Procuracy. The granting of this power to the Supreme Soviet which exercises "exclusively" the legislative power of the USSR⁴⁴ is not an anomaly, since the doctrine of separation of powers is rejected by Soviet constitutional theory. The Supreme Soviet is endowed also with judicial functions. Its Presidium gives, for instance, "interpretations of the laws of the USSR in operation"⁴⁵ and "annuls decisions and orders of the Council of Ministers of the USSR and of the Councils of Ministers of the Union Republics if they do not conform to law".⁴⁶ A similar situation exists in the Republics and at lower levels. Unlawful decisions of Councils of Ministers of autonomous Republics or by local soviets may be set aside by the Presidium of the Supreme Soviet of the competent Republic.⁴⁷

2. Central Apparatus

The Procuracy of the USSR consists of a "Central Apparatus" in Moscow and of a vast network of offices throughout the country. The structure of the "Central Apparatus of the Procuracy of the USSR" has to be approved by the Presidium of the Supreme Soviet of the USSR.⁴⁸ It is based on a functional approach and broken down into Bureaus and Departments.⁴⁹ There is firstly of all

⁴¹ *Ibid.*, Art. 7.

⁴² Constitution of the USSR, Art. 30.

⁴³ Statute, Art. 8. It is also empowered to act if decisions of the Plenum (plenary session of all justices) of the Supreme Court of the USSR do not – in the opinion of the Procurator-General – comply with the law (Statute, Art. 29). The Statute fails to state what specific action the Presidium may take. The Statute of the Supreme Court of the USSR (*Vedomosti* 1957, No. 4, Art. 85) is also silent on this point.

⁴⁴ Constitution of the USSR, Art. 32.

⁴⁵ *Ibid.*, Art. 49c.

⁴⁶ *Ibid.*, Art. 49f.

⁴⁷ Constitution of the RSFSR, Art. 33; cf. Art. 82; see Berezovskaya, *op. cit.* (note 32), p. 53.

⁴⁸ Statute, Art. 42. Approved by a Decree of April 7, 1956 (*Vedomosti*, 1956, No. 8, Art. 186).

⁴⁹ Statute, Art. 41.

the Department for General Supervision which is assigned the task to ensure an observance of the law by administrative organs and citizens. Supervision is also carried out by several specialized departments:

over the work of investigating authorities:

- 1) Bureau of Investigation;⁵⁰ this Bureau is responsible for supervising enquiries conducted by the police⁵¹ and the "investigators" attached to the Procuracy.⁵²
- 2) Department for Supervision of Investigations Conducted by Organs of State Security.

over the work of Courts:

- 3) Department for the Supervision of the Trial by Courts of Criminal Cases.
- 4) Department for the Supervision of the Trial by Courts of Civil Cases.

over places of confinement:

- 5) Department for the Supervision of Places of Confinement.

A special department exists for cases of minors. Other departments of the central apparatus are concerned with research and evaluation (Department for Systematization of Legislation, Statistical Department), control (Department of Control and Inspection), and administrative matters (such as Bureau of Personnel, Economic and Financial Bureau). Attached are the Methodological Council,⁵³ the Institute of Criminology, and an editorial office of the journal of the Procuracy.

The Procuracy of the USSR also includes the Supreme Military Procuracy and the Supreme Transport Procuracy.⁵⁴

3. Subordinate Offices throughout the Country

The organization of offices of the Procuracy in the country follows the administrative division of the USSR. It starts with the *rayon* (district)⁵⁵ and cities⁵⁶ at the lowest level. They are controlled by offices of the Procuracy at the next level — that of

⁵⁰ In Russian: *sledstvennoe upravlenie*.

⁵¹ In Russian: *militiya*. Art. 1 of the Order of the Procurator-General of the USSR of April 10, 1956, reprinted in *Sovetskaya prokuratura* (*op. cit.*, note 25), pp. 496-498.

⁵² Lebedinsky, *op. cit.* (note 32), p. 111.

⁵³ The task of this Council is to study and improve the methods of the work in the Procuracy. It published for example the Forms and Precedents quoted *supra* in note 35.

⁵⁴ Statute, Art. 41; Decree of April 7, 1956 (see note 48). The abolition of "Transport Courts" by Law of February 12, 1957 (*Vedomosti*, 1957, No. 4, Art. 86) may have had some influence on the organization of the Transport Procuracy, but no act has been published so far to this effect.

⁵⁵ In Russian: *rayon*. On the same level there are also ethnic districts (in Russian: *okrug*).

⁵⁶ In Russian: *gorod*.

regions⁵⁷ which in turn are supervised by the Procurators of the Union Republics.⁵⁸

The organization of offices at the level of regions and Republics is patterned on the structure of the central apparatus, i.e., with departments of general supervision and of supervision of investigating authorities, courts and places of confinement. At the *rayon* level these functions are usually divided between the various procurators personally.⁵⁹ The distribution of offices of the Military Procuracy is adapted to the organizational pattern of the armed forces.⁶⁰

The organizational structure and positions, ranks and classes of the personnel and the powers of appointment, promotion and dismissal are regulated in detail in numerous decrees and administrative orders. A table may illustrate the existing framework (see pp. 72—73).

4. Personnel

For an understanding of the work of the Procuracy it seems essential to outline also, at least in summary, the basic principles governing the personnel policy of the Procuracy. Only persons with higher legal education, i.e., those who have graduated from a law school with university rank, are qualified for positions of Procurators and investigators. Exceptions to this rule require the approval of the Procurator-General of the USSR.⁶¹ Before entering service with a Procuracy law graduates are obliged to complete a candidate's stage of six months and after this to do practical work as an investigator for at least one year. Only then may they be entrusted with procuratorial work. As a rule they will first be appointed to the post of an assistant to the *rayon* Procurator.⁶²

The performance of work of the personnel is graded every year by "Certifying Commissions"⁶³ created at Republican and regional level. The certificates issued play an important role in appointments, transfers and promotion of personnel.⁶⁴ The work of the individual officials is judged also in the course of inspections which are carried out at regular intervals.⁶⁵ Among the factors considered are "political qualification" and "devotion to the

⁵⁷ In Russian: *oblast*. On the same level there are also autonomous regions and provinces (in Russian: *krai*).

⁵⁸ Statute, Art. 43.

⁵⁹ Lebedinsky, *op. cit.* (note 32), p. 183.

⁶⁰ Military areas (in Russian: *voenny okrug*), units and garrisons (Statute, Art. 44; cf. Act of the Judiciary of the USSR, Art. 57 [for English translation see note 1]). There are at present about 23 military areas.

⁶¹ Statute, Art. 52.

⁶² Lebedinsky, *op. cit.* (note 32), pp. 22–23.

⁶³ In Russian: *attestatsionnye komissii*.

⁶⁴ Lebedinsky, *op. cit.* (note 32), pp. 24–25.

⁶⁵ *Ibid.*, pp. 57, 59, 63.

Party".⁸⁷ For correct and honest work "measures of incentive"⁸⁸ are provided.⁸⁹ For shortcomings in the work officials of the Procuracy bear disciplinary responsibility.⁸⁹

To round off the picture, it may be added that Procurators and investigators are required, while on duty, to wear a uniform and the insignia of their rank.⁹⁰

IV. THE PROCURACY AS GUARDIAN OF THE LAW *EX OFFICIO*

The functions of the Soviet Procuracy go far beyond the tasks of a Public Prosecutor in the traditional sense. The Soviet Procuracy cannot, therefore, be compared with the Procurator in a continental legal system (*Ministère Public*, *Staatsanwalt*) or with an Attorney-General in the common law countries. Its task is to ensure the strict observance of the law. To this end it is entrusted with supervisory powers over all State organs — central and local — as well as cooperatives, public organizations and also individual citizens.

The legal basis for the work of the Procuracy is the Constitution of the USSR of 1936. It provides in Article 113 that:

"Supreme supervisory power to ensure the strict observance of the law by all Ministries and institutions subordinated to them, as well as by officials and citizens of the USSR generally, is vested in the Procurator-General of the USSR".

The Constitution regulates also the power to appoint Procurators on all levels and establishes the principle that Procurators should be independent of local organs.⁹¹

1. Duties of the Procuracy

The duties of the Procuracy may be divided into two distinct functions: general supervision and special supervision.

a. General Supervision⁹²

General supervision by the Procuracy is exercised over the observance of law by

⁸⁷ *Ibid.*, pp. 23, 59.

⁸⁸ In Russian: *myer pooshchreniya*. Such measures consist of: notice of gratitude (to be entered in the labour book), cash premium and promotion.

⁸⁹ Order of the Procurator of the USSR of October 17, 1942, No. 613 on the Disciplinary Responsibility of Procuratorial-Investigating Personnel (summarized by Karev, *op. cit.* [note 77a], p. 154 and Lebedinsky, *op. cit.* [note 32], p. 25). The date of the Order is given by Lebedinsky as October 17, 1952, probably a misprint.

⁹⁰ Statute, Art. 57.

⁹¹ Constitution of the USSR, Art. 114-117.

⁹² For literature on general supervision see the works of Albitsky and Berezovskaya (quoted in note 32) as well as V. G. Lebedinsky *Sovetskaya prokuratura i yeyo deyatel'nost' v oblasti obshchevo nadzora* (The Soviet Procuracy and its Work in the Field of General Supervision) (Moscow, 1954). All three books were reviewed by G. Toropov (Head of the Department of General Supervision of the Procuracy of the USSR) in *Sotsialisticheskaya zakonnost*, 1957, No. 4, pp. 82-87.

| Title and Position | No. of Admin. Units in Question ⁷⁶ | Power of Appointment and Dismissal |
|---|---|--|
| tor-General of the USSR ⁶¹ ties ⁶² r Assistants (Dept. Heads) ⁶³ tants (Dept. Heads) ⁶³ rators (Deputy Dept. Heads) rators (within Depts.) tigators for particularly important cases ⁶⁴ Military Procurator ⁶⁵ Transport Procurator ⁶⁵ | 1 | Supreme Soviet of the USSR ⁶¹ Presidium of the Supreme Soviet of the USSR on recommendation of Procurator-General of the USSR ⁶² [Procurator-General of the USSR?] [Procurator-General of the USSR?] [Procurator-General of the USSR?] [Procurator-General of the USSR?] Procurator-General of the USSR? ^{77a} |
| ator of REPUBLIC ⁶⁶ ities ⁶⁷ or Assistants (Dept. Heads) ⁶⁷ stants (Dept. Heads) ⁶⁷ urators tigators for particularly important cases ⁶⁴ | 15 | Procurator-General of the USSR ⁶⁶ [Procurator-General of the USSR?] Procurator-General of the USSR ⁷⁸ Procurator-General of the USSR ⁷⁸ Procurator of Republic ⁷⁸ Procurator-General of the USSR ⁷⁸ |
| ator of REGION ⁶⁸ (and other units on bonding level) ⁶⁹ as well as Moscow and rad ⁷⁰ uties ⁷¹ or Assistants (Dept. Heads) ⁷¹ stants (Dept. Heads) ⁷¹ urators or Investigators ⁶⁴ | appr. 160 | Procurator-General of the USSR ⁶⁶ [Procurator-General of the USSR?] ⁷⁹ Procurator of Republic ⁷⁸ Procurator of Republic ⁷⁸ Procurator of Region ⁷⁸ Procurator of Region ⁷⁸ |
| ator of RAYON ⁷² (and cities ⁷³ and ther units on corresponding level ⁷⁴) uties ⁷⁵ istants ⁷⁵ ior and People's Investigators ⁶⁴ | appr. 6400 ⁷⁷ | Procurator of Republic (confirmation by Procurator-General of the USSR) ⁷² [Procurator of Republic?] Procurator of Region ⁷⁸ Procurator of Region ⁷⁸ |

⁶¹ Constitution of the USSR, Art. 114; Statute, Art. 38.

⁶² Statute, Art. 40.

⁶³ *Ibid.*, Art. 41.

⁶⁴ *Ibid.*, Art. 50; Decree of April 7, 1956 (see note 48).

⁶⁵ Statute, Art. 41.

⁶⁶ Constitution of the USSR, Art. 115; Statute, Arts. 46-48.

⁶⁷ Statute, Art. 46.

⁶⁸ In smaller Republics (Estonian, Latvian, Lithuanian, Moldavian, Armenian, Georgian and Azerbeidzhanian SSR) there is no division into regions.

⁶⁹ Such as autonomous Republics (in the RSFSR, Uzbek, Georgian and Azerbeidzhanian SSR), autonomous regions (in the RSFSR, Tadzhik, Georgian and Azerbeidzhanian SSR) and provinces (only in the RSFSR; the administrative division of provinces follows a different pattern).

⁷⁰ Lebedinsky, *op. cit.* (note 32), p. 180.

⁷¹ Statute, Arts. 47-48.

⁷² Constitution of the USSR, Art. 116; Statute, Art. 49.

⁷³ Cities, if directly subordinated to regions. Major cities are themselves subdivided into *rayons*. In these cases there is one more chain of subordination.

⁷⁴ Such as ethnic districts (only in the RSFSR).

⁷⁵ Statute, Art. 49.

⁷⁶ On the basis of data in: *SSSR administrativno-territoriyalnoe delenie Soyuznykh Respublik na 1 marta 1954 goda* (SSSR Administrative-territorial Division of the Union Republics as per March 1, 1954), 7th ed. (Moscow, 1954), p. V; *RSFSR administrativno-territoriyalnoe delenie na 1 yanvarya 1955 goda* (RSFSR Administra-

| Period of Appointment | Appropriate Rank ⁸⁰ | Class | Corresponds to Rank in Army and State Security Organs ⁸¹ |
|-----------------------|---|-----------|---|
| 7 years ⁸¹ | Senior State Councillor of Justice | 1 | Army General |
| | State Councillor of Justice 1st Class | 2 | Colonel-General |
| | State Councillor of Justice 2nd Class | 3 | Lieutenant-General |
| | State Councillor of Justice 2nd Class | 3 | Lieutenant-General |
| | State Councillor of Justice 3rd Class | 4 | Major-General |
| | Senior Councillor of Justice | 5 | Colonel |
| | Senior Councillor of Justice | 5 | Colonel |
| | State Councillor of Justice 2nd Class | 3 | Lieutenant-General |
| 5 years ⁸⁶ | State Councillor of Justice 2nd Class | 3 | Lieutenant-General (?) |
| | State Councillor of Justice 3rd Class | 4 | Major-General |
| | Senior Councillor of Justice | 5 | Colonel |
| | Senior Councillor of Justice | 5 | Colonel |
| | Councillor of Justice | 6 | Lieutenant-Colonel |
| | Councillor of Justice | 6 | Lieutenant-Colonel |
| | State Councillor of Justice 2nd or 3rd Class | 3/4 | Lieutenant/Major-General |
| | State Councillor of Justice 3rd Class | 4 | Major-General |
| 5 years ⁸⁸ | Senior Councillor of Justice | 5 | Colonel |
| | Senior Councillor of Justice | 5 | Colonel |
| | Councillor of Justice | 6 | Lieutenant-Colonel |
| | Councillor of Justice | 6 | Lieutenant-Colonel |
| | Junior Councillor of Justice | 7 | Major |
| | Councillor of Justice or Junior Councillor of Justice | 6/7 | Lieutenant-Colonel/Major |
| | State Councillor of Justice 3rd Class or Senior Councillor of Justice | 4/5 | Major-General/Colonel |
| | Senior Councillor of Justice or Councillor of Justice | 5/6 | Colonel/Lieutenant-Colonel |
| 5 years ⁷² | Councillor of Justice | 6 | Lieutenant-Colonel |
| | Councillor of Justice | 6 | Lieutenant-Colonel |
| | Junior Councillor of Justice | 7 | Major |
| | Councillor of Justice or Junior Councillor of Justice | 6/7 | Lieutenant-Colonel/Major |
| | Councillor of Justice, Junior Councillor of Justice or Jurist 1st Class | 6/7/8 | Lieutenant-Colonel/Major/Captain |
| | Jurist 1st or 2nd Class | 8/9 | Captain/Senior Lieutenant |
| | Jurist 2nd or 3rd Class | 9/10 | Senior Lieutenant/Lieutenant |
| | Jurist 1st, 2nd or 3rd Class or Junior Jurist | 8/9/10/11 | Captain/Senior Lieutenant/Lieutenant/Junior Lieutenant |

tive territorial Division as per January 1, 1955) (Moscow, 1955), p. III.

⁷⁷ It has to be borne in mind, however, that by decision of the Procurator-General, a single Procurator's Office may be established to cover several *rayons* (Statute, Art. 43).

^{77a} D. S. Karev, *Sovetskoe sudoustroistvo* (Soviet Judicial System), 2nd ed. (Moscow, 1951), p. 156.

⁷⁸ "The Procurator-General of the USSR shall establish the procedure for appointment and dismissal of employees to the posts of Procurators and investigators except for those employees who are appointed in accordance with the procedure laid down in Arts. 40, 46, 47, 48, and 49" (Statute, Art. 54). The Procurator-General has laid down the procedure for the appointment and dismissal in an Order dated August 27, 1953, No. 218, summarized in Lebedinsky, *op. cit.* (note 32), p. 21. Cf. Karev, *op. cit.* (note 77a), pp. 152, 156.

⁷⁹ Cf. Decree of July 20, 1934, *Sobranie zakonov RSFSR* (Collection of Laws of the RSFSR) (hereafter cited: *Sob. uzak. RSFSR*) (Moscow), 1934, No. 30, Art. 175, reprinted in: *Sovetskaya prokuratura* (*op. cit.*, note 25), p. 413.

⁸⁰ Decree of September 16, 1943 (*Vedomosti*, 1943, No. 39, reprinted in: *Sovetskaya prokuratura* (*op. cit.*, note 25), pp. 446-453) as amended by Decree of July 15, 1955 (*Vedomosti*, 1955, No. 14, Art. 288); Statute, Art. 56.

⁸¹ The ranks given have no official bearing and are given only for orientation. For ranks in State security organs see Decree of July 6, 1945, *Vedomosti*, 1945, No. 39, reprinted in: *Sbornik zakonov i ukazov Prezidiuma Verkhovnogo Soveta SSSR, 1945-1946 gg.* (Collection of Laws and Decrees of the Presidium of the Supreme Soviet of the USSR, 1945-1946) (Moscow, 1947), p. 143.

Ministries, Departments and their subordinate agencies and enterprises,

Law enforcement and executive agencies of local soviets,

Cooperatives and other public organizations,

Officials and citizens.⁹³

The Statute does not specify any further the scope of organs and organizations subject to the supervision of the Procuracy. A clarification on this point is, however, important, in particular in view of the structure and character of the Soviet State. The supreme power in the Soviet Union is exercised by the Supreme Soviet of the USSR as far as the State hierarchy is concerned⁹⁴ and by the Central Committee of the Communist Party of the Soviet Union with regard to the Party hierarchy.⁹⁵

The supervision of legality by the Procuracy does not extend to the supreme organs of the State. This follows from what has already been explained above, namely that the Procuracy is itself answerable to the Supreme Soviet of the USSR.⁹⁶ Furthermore the Statute mentions expressly only supervision of certain organs of "local soviets". The Constitutions of the USSR⁹⁷ and of the Union Republic⁹⁸ define as "local organs of State power" the soviets of territories,⁹⁹ regions, autonomous regions,¹⁰⁰ ethnic districts, *rayons*, cities and rural localities. It follows that the soviets on all higher levels — Autonomous Republics, Union Republics and USSR — are not subject to supervision by the Procuracy. This is in accordance with the terminology used in the Constitutions. They consistently refer to the soviets at these higher levels as "Supreme Soviet".¹⁰¹

The control over individual Ministries extends to the Ministries on all levels, including those of the USSR. There is no qualification on this point in the Statute. The Procuracy is also entitled to supervise the legality of the work of the Ministry of State Control,¹⁰² but it is not clear whether the Procuracy may check the legality of acts issued by Councils of Ministers¹⁰³ of the USSR and of Union

⁹³ Statute, Art. 3¹, 10.

⁹⁴ See *supra* p. 68 and note 42.

⁹⁵ Statute of the Communist Party of the Soviet Union, Art. 36; cf. Constitution of the USSR, Art. 126 (quoted *supra* p. 65, note 26).

⁹⁶ See *supra* p. 68.

⁹⁷ Constitution of the USSR, Art. 94.

⁹⁸ E.g., Constitution of the RSFSR, Art. 77.

⁹⁹ For the Russian expression of this and the following administrative units see *supra* notes 55-57.

¹⁰⁰ The Constitution of the RSFSR does not list — in contrast to the Constitution of the USSR (Art. 94) — the Soviet of an autonomous region as a "local organ" (Art. 77), but calls it merely an "organ" of State power (Art. 73).

¹⁰¹ Constitution of the USSR, Art. 30, 57, 89; Constitution of the RSFSR, Art. 22, 56.

¹⁰² Berezovskaya, *op. cit.* (note 32), p. 50.

¹⁰³ Comparable to a Cabinet.

and Autonomous Republics. The Statute directs the Procuracy to supervise the conformity of acts "with . . . [among other things] the resolutions of the Council of Ministers" of the USSR and of Union and Autonomous Republics.¹⁰⁴ The fact that these resolutions are to be used as a basis for a check seems to indicate that the legality of the resolutions of Councils of Ministers cannot themselves be challenged. A Soviet writer, nevertheless, maintains that acts of the Councils of Ministers of Union and Autonomous Republics (not those of the USSR) are subject to procuratorial supervision.¹⁰⁵ but the problem apparently has only theoretical importance since no cases of a conflict over competence are known to have arisen.

Of particular importance is, on the other hand, the question whether the *Communist Party* can be considered a "public organization"¹⁰⁶ over which the Procuracy exercises the power of supervision. The answer has to be in the negative. The Communist Party is not merely one of the public organizations but the "leading core of all organizations of the working people, both public and State".¹⁰⁷ Apart from this textual interpretation, the power structure of the Soviet Union excludes the possibility of an administrative organ exercising supervisory powers over the Communist Party, which claims to be the leading force in the country. This conclusion is confirmed by a statement of the Deputy Procurator-General of the USSR made in 1955:

"The tasks which face the organs of the Procuracy can only be fulfilled on condition that the work of the Procuracy is carried out under the constant control and direction of the Party organizations . . . Constant Party control is particularly necessary in the work of the Soviet Procuracy which is a strictly centralized organ and a powerful weapon in the hands of the State . . ." ¹⁰⁸

The observance of law by individual officials and citizens is another duty of the Procuracy. It is mainly performed within the framework of "special supervision" (considered below), i.e., in the field of investigation and public prosecution. A duty of general supervision is, however, to receive and examine complaints by individuals with a view to protect their rights and interests.¹⁰⁹ The complaints fulfil in addition another function; they often lead to

¹⁰⁴ Statute, Art. 10¹.

¹⁰⁵ Berezovskaya, *op. cit.* (note 32), pp. 52-53.

¹⁰⁶ In Russian: *obshchestvennaya organizatsiya* (Statute, Art. 3¹ and 10¹).

¹⁰⁷ Constitution of the USSR, Art. 126.

¹⁰⁸ Article of A. N. Mishutin, Deputy Procurator-General of the USSR and Y. A. Kalenov, State Councillor of Justice 2nd Class, in *Sovetskoe gosudarstvennoye pravo*, 1955, No. 3, pp. 40-41.

¹⁰⁹ Statute, Art. 14.

an exposure of illegal practices in organs which are under the general supervision of the Procuracy.

The supervision of the Procuracy extends only over questions of legality, not those of expediency. An intervention into purely administrative or organizational matters is beyond the competence of the Procuracy. But if legality is at stake, the Procuracy may take action, irrespective of whether it is a matter of form or substance, an act or an omission, an administrative order or a formal law.

A vital question is whether the power to take action implies a legal duty to do so. The Statute is not explicit on this point. In describing the functions of the Procuracy it uses in some cases the word "duty"¹¹⁰, in others not.¹¹¹ It seems that this has to be explained by considerations of style and not of substance since the functions mentioned without using the word "duty" are of no less importance than the others. A reasonable interpretation would be that the Procuracy has a legal duty to detect and examine violations of law¹¹² but that it may use its discretion in deciding whether to take the matter up or not.¹¹³ This is confirmed by Soviet writers who emphasize that considerations like practical inadvisability, insignificance of the matter or impossibility to restore legality (e.g., by reason of time elapsed) are a sufficient justification for the Procuracy not to intervene.¹¹⁴ The principle governing the work of the Procuracy can thus be characterized as one of expediency rather than legality.

b. Special Supervision

Special supervision^{114a} extends to the work of judicial organs in the broadest sense, viz.:

investigating authorities (police, investigators, State security organs);

Courts (civil, criminal, military) of all levels;
administration of places of confinement.

It lies within the competence of the Procuracy to see that legality is observed by these organs, e.g., that nobody is illegally arrested or detained, that no illegal methods are employed in investigations and that sentences are well-founded.

The supervision by the Procuracy takes various forms, such

¹¹⁰ Statute, Arts. 4, 14, 17, 21, 22, 29, 32, 34, 36.

¹¹¹ Statute, Arts. 2, 10, 13, 15, 23, 31.

¹¹² Cf. Code of Criminal Procedure of the RSFSR, Arts. 7 and 9.

¹¹³ The "Instruction on General Supervision", confirmed by the Procuracy of the USSR on February 27, 1946 expressly forbids Procurators to lodge protests against violations of law which have no practical significance whatsoever (quoted from Berezovskaya, *op. cit.* [note 32], p. 61).

¹¹⁴ Berezovskaya, *op. cit.* (note 32), pp. 60-61; Lebedinsky, *op. cit.* (note 32), p. 96.

^{114a} The Statute does not use the term "special supervision". It is introduced here for the sake of brevity and clarity.

as sanctioning arrests,¹¹⁵ confirming bills of indictment,¹¹⁶ visiting places of preliminary detention¹¹⁷ where persons under investigation are held,¹¹⁸ and controlling cases under investigation. Internal rules fix the intervals at which the Procuracy is expected to carry out these controls, e.g., ten days for visiting places of preliminary detention¹¹⁹ and one month for controlling cases under investigation by the Militia¹²⁰ and investigators.¹²¹ No information is available as to how often cases of the security organs are to be controlled.

2. Rights of the Procuracy

In order to carry out its duties the Procuracy is entrusted with a wide range of rights. These rights may best be grouped in accordance with the two fields of supervision: general and special. Within each two stages of the Procurator's activity may be distinguished: measures to detect violations of law and measures to rectify violations of law once they are detected.

a. General Supervision

Measures of general supervision which the Procuracy may take to detect violations of law are numerous. As far as the observance of law by individual officials and citizens is concerned they are left to a certain extent to its initiative. Usually they will consist of examining complaints and personal explanations of officials and citizens and other information concerning violations of the law which reaches the Procuracy. The Procuracy may make a personal check regarding the observance of law.¹²²

Measures to detect violations of law committed in organs of the State and in public organizations are laid down in greater detail in the Statute. In addition to collecting data of the kind mentioned above the Procuracy is entitled to:

- obtain orders, directives, decisions, resolutions, and other pronouncements for ascertaining that they conform to law;
- demand presentation of necessary documents, information and personal explanation;
- demand that the heads of the organs conduct examinations in their subordinate agencies.¹²³

¹¹⁵ See note 19.

¹¹⁶ Code of Criminal Procedure of the RSFSR, Arts. 208, 221.

¹¹⁷ In Russian: *kamera predvaritelnogo zaklyucheniya* (KPZ).

¹¹⁸ Orders of the Procuracy require the supervising Procurator to control the legality of the detention (observance of procedural requirements) as well as the observance of the "Statute on Places of Preliminary Detentions", e.g., with respect to the maximum number of persons per room (Lebedinsky, *op. cit.* [note 32], pp. 50-51).

¹¹⁹ Lebedinsky, *op. cit.* [note 32], pp. 32, 150.

¹²⁰ Order of the Procurator of the USSR of April 21, 1939, No. 76-3 (quoted from Lebedinsky, *op. cit.* [note 32], p. 147).

¹²¹ Order of the Procurator of the USSR of July 31, 1942, No. 304 (quoted from Lebedinsky, *op. cit.* [note 32], pp. 102, 109, 111).

¹²² Statute, Art. 11.

¹²³ *Ibid.*

The officials are obliged to furnish this information.¹²⁴ Procurators have also the right to attend sessions of the local soviets.¹²⁵

Once the Procuracy has established a violation of law it has three forms of action to choose for rectifying the same. These are: "protest", "proposal" and initiation of criminal, civil, administrative or disciplinary proceedings against the offender.

Protest. The protest is the main form of action of the Procuracy in following up violations of law in the work of administrative organs and public organizations. The protest is filed with the authority whose action gave rise to the protest or with its superior organ.¹²⁶ It raises several questions.

The first question is whether or not there is a fixed time limit for filing protests. There are rules regulating the period of time within which a protest has to be examined by the organ to which it was addressed, but no rules are established in the Statute as to the time within which a protest has to be lodged after an illegal decision is taken. From the silence of the law it may be concluded that a protest may be made — at least in theory — as long as the illegal act is not officially repudiated.¹²⁷

The protest has a dilatory effect,¹²⁸ i.e., the action under protest produces no legal effect if and so long as the protest is not decided upon. The problems arising from this are not elaborated in administrative rules and juridical literature.¹²⁹ In practice it is moreover often not possible to re-establish the previous situation if the act has been carried out before it was protested, e.g., in case of eviction, distribution of personal farming plots in *kolkhozes*, etc.

Another question is what actions are envisaged if the protest is not examined in time, or if it is rejected. In both cases the Procurator who filed the protest will apply to the next higher Procuracy and suggest that the matter be pursued, in the first case by approaching the higher organ to set the protested act aside,¹³⁰ in the second case by a protest against the decision rejecting the original protest.¹³¹

¹²⁴ *Ibid.*, Art. 12.

¹²⁵ Statute on Local Soviets of the RSFSR of April 6, 1928, *Sob. uzak. RSFSR*, 1928, No. 70, Art. 503.

¹²⁶ Statute, Art. 13. *Rayon* Procurators are instructed to submit a copy of each protest they filed to the next higher Procuracy (Order of the General-Procurator of the USSR of June 17, 1946, quoted from Lebedinsky, *op. cit.* [note 32], p. 95).

¹²⁷ Protests against obligatory decisions of local soviets must be lodged within 15 days but this time limit is only a guide and has no binding force (Berezovskaya, *op. cit.* [note 32], p. 75).

¹²⁸ Statute, Art. 13.

¹²⁹ Berezovskaya, *op. cit.* (note 32), pp. 76-77.

¹³⁰ Cf. Form No. 82 in Lebedinsky, *Obraztsy* (*op. cit.*, note 35), p. 154.

¹³¹ Cf. Form No. 83 in Lebedinsky, *Obraztsy* (*op. cit.* note 35), pp. 155-156.

Proposal. The proposal¹³² is a less formal action of the Procuracy for rectifying violations of law and eliminating the causes encouraging the violation. The number of proposals as compared with protests amounted to 41 % in 1941.¹³³ They play an important role in the practical work of the Procuracy. Nevertheless the proposal is "almost not analysed in legal literature".¹³⁴

The main juridical difference between a protest and a proposal lies first in the extent of the legal effect these actions produce. A proposal has — in contrast to a protest — no dilatory effect. A further difference is to be found in the scope of application. A proposal can be made not only against actual violations of law but also against factors encouraging such violations. In practice however it must be difficult to draw the line between proposals to eliminate such causes and an intervention into purely administrative fields, e.g., into economic and organizational activities of the organ in question. Inexpediency of a measure as distinct from its legality is, as it is generally recognized, outside the competence of the Procuracy. Such problems have to be settled through administrative channels.

Despite these differences the procedure for dealing with protests and proposals is similar. Both must be examined within a fixed period of time (a protest within ten days, a proposal within a month) and in both cases examination is a legal duty of the organ to which it was addressed.¹³⁵

Proceedings. The Prosecutor can initiate criminal, civil, administrative and disciplinary proceedings¹³⁶ against officials or citizens who have violated the law. Administrative and disciplinary proceedings are characteristic measures of general supervision. In both cases the Procurator is, as a matter of law, merely *proposing* the institution of such proceedings. The decision whether proceedings should actually be started or not is made by the organ endowed with disciplinary jurisdiction. But these organs are obliged by law to examine the proposals of the Procuracy for initiating such proceedings. There is no time limit fixed for the examination.

b. Special Supervision

The rights granted to the Procuracy for detecting and recti-

¹³² In Russian: *predstavlenie*.

¹³³ Berezovskaya, *op. cit.* (note 32), p. 70.

¹³⁴ *Ibid.*, p. 21.

¹³⁵ The language used to describe this legal duty differs: a protest "must be examined" (in Russian: *podlezhit rassmotreniyu*), whereas examining a proposal is made the "duty" (in Russian: *obyazany rassmotretj*) of the organ in question (Statute, Arts. 13 and 16).

¹³⁶ Statute, Art. 15; Code of Criminal Procedure of the RSFSR, Arts. 8, 222.

fying violations of law in the field of special supervision are more varied and detailed than those in the domain of general supervision though basically the same patterns of action are used, viz.: protest, proposal and initiation of proceedings.

Investigating Authorities. The Procurator has to supervise the investigation of each individual case.¹³⁷ He may issue directives to the agencies conducting police examination and pre-trial investigation,¹³⁸ e.g., for additional investigation and for individual acts of investigation.¹³⁹ He may demand the files and other data on crimes committed.¹⁴⁰ He is also entitled personally to conduct investigations¹⁴¹ and to transfer a case from one agency to another "in order to secure the most complete and objective investigation of the case".¹⁴² These rights enable the Procuracy to inspect and to transfer even cases in which the State security organs have initiated an investigation (an innovation introduced by the Statute of 1955). The Procuracy may furthermore remove an investigator or a person conducting a police examination (but not an official of the State security organs) if he has allowed a violation of the law to occur during the investigation.¹⁴³ The Procuracy is entitled to set aside illegal and unfounded decisions of investigating authorities,¹⁴⁴ e.g., release unlawfully arrested persons¹⁴⁵ or reverse a decision to discontinue proceedings. This right goes beyond that of a protest which merely contains the demand for cancelling a decision. All directives of the Procuracy are of an obligatory nature.¹⁴⁶

Considering these broad powers of the Procuracy it must be borne in mind that investigators are administratively subordinated to the Procuracy.¹⁴⁷ This, however, is not true with respect to the police and State security organs, which are administratively independent from the Procuracy.

¹³⁷ Code of Criminal Procedure of the RSFSR, Arts. 101, 107, 118; see also Art. 219; Cf. the dissertation for the degree of a candidate of juridical sciences by V. M. Savitsky *Prokurorsky nadzor za soblyudeniem zakonnosti v deyatelnosti organov doznaniya i predvaritelnogo sledstviya* (Procuratorial Supervision of the Observance of Legality in the Work of the Organs of Police Examination and Pre-trial Investigation) (Moscow, 1957). A summarized review of the dissertation, prepared by the candidate himself, was published by the Law Institute of the Academy of Sciences of the USSR (17 pp.) (not available to this author); see also *Sovetskoe gosudarstvo i pravo*, 1957, No. 5, pp. 106-113.

¹³⁸ Statute, Art. 19¹.

¹³⁹ *Ibid.*, Art. 19⁴.

¹⁴⁰ *Ibid.*, Art. 19².

¹⁴¹ *Ibid.*, Art. 19³; Code of Criminal Procedure of the RSFSR, Art. 108.

¹⁴² Statute, Art. 19⁷; Code of Criminal Procedure of the RSFSR, Art. 108.

¹⁴³ Statute, Art. 19⁶.

¹⁴⁴ *Ibid.*, Art. 19⁵; Code of Criminal Procedure of the RSFSR; Art. 102.

¹⁴⁵ Statute, Arts. 17², 18, 19¹; Code of Criminal Procedure of the RSFSR, Art. 6.

¹⁴⁶ Statute, Art. 20.

¹⁴⁷ Statute, Art. 54 (re investigators); Lebedinsky, *op. cit.* (note 32), pp. 21, 101, 153.

Courts. The most important right of the Procuracy vis-à-vis the Court is the power "to demand any civil or criminal case from any judicial agency for the *ex officio* revision" of the case.¹⁴⁸ This applies also to cases where the judgement has become final.

The Procuracy may lodge "protests against illegal and unfounded sentences, judgements [and] decisions".¹⁴⁹ Such a protest fulfils a similar function as an appeal by a party to the case: the case is re-tried by the higher Court. But there is a fundamental difference between an appeal and a protest. While an appeal is a means to achieve a re-trial of cases not yet closed, a protest is lodged against final judgements and sentences. This power of protest is a basic and characteristic feature of the supervision of the Procuracy over Courts. The right to lodge a protest is reserved to Procurators of regions and their superiors.¹⁵⁰ Procurators of lower levels are instructed to submit "proposals" for a protest with their higher organs.¹⁵¹ During the time in which the protest is being examined the Procurator of the USSR and of the Union Republics may order the suspension of the protested decision.¹⁵²

Apart from this the Procuracy performs duties in the judicial field which are more familiar to lawyers in other countries. The Procurator participates in the trial of criminal and civil cases and renders opinions on legal questions arising during the trial.¹⁵³ He upholds the public interest in criminal trials¹⁵⁴ and may institute civil claims and argue them in Court when State or public interests or the rights of unprotected citizens are involved.¹⁵⁵ He may appeal against the decisions reached in the same way as a private party in a civil case or a convicted person in a criminal trial.¹⁵⁶

In addition, however, the Procuracy is entrusted with certain rights and functions which other parties to a case do not enjoy. They are, in fact, of a judicial nature, such as the right to decide on applications for the re-opening of a case, or the power to supervise the execution of judgements.¹⁵⁷

¹⁴⁸ Statute, Art. 24; Act of the Judiciary of the USSR, Art. 16 (for English translation see note 1); cf. Code of Criminal Procedure of the RSFSR, Arts. 427, 440 and Code of Civil Procedure of the RSFSR, Arts. 254, 254a.

¹⁴⁹ Statute, Art. 23⁵.

¹⁵⁰ *Ibid.*, Art. 25.

¹⁵¹ Lebedinsky, *op. cit.* (note 32), p. 139.

¹⁵² Statute, Art. 27.

¹⁵³ Cf. Code of Criminal Procedure of the RSFSR, Arts. 236, 410; Code of Civil Procedure of the RSFSR, Art. 244.

¹⁵⁴ Statute, Art. 23³; Code of Criminal Procedure of the RSFSR, Arts. 8, 50, 304.

¹⁵⁵ Statute, Art. 23⁴; Code of Civil Procedure of the RSFSR, Arts. 2, 2a, 11, 12, cf. Art. 172 (duty of the Court to inform the Procuracy of such cases).

¹⁵⁶ Code of Criminal Procedure of the RSFSR, Arts. 344, 400; Code of Civil Procedure of the RSFSR, Art. 235.

¹⁵⁷ See *supra* note 21 and 22.

Apart from protests, proposals may be made regarding the work of the Courts. The Procuracy may file a proposal, if it finds that

- a) an order of the Plenum of the Supreme Court of the USSR does not correspond to the law (the proposal is to be submitted to the Presidium of the Supreme Soviet of the USSR);¹⁵⁸
- b) the Plenum of the Supreme Court ought to issue directives to judicial agencies on questions of judicial practice.¹⁵⁹

Places of Confinement. Procurators are required to visit systematically those places of confinement which are located in their area of jurisdiction.¹⁶⁰ The rights of the Procuracy seem, however, to be relatively limited vis-à-vis the administration of places of confinement. The Prosecutor has the right to inspect all documents on the basis of which the persons have been confined, to release illegally detained persons, to conduct personal interrogations of prisoners and to check the orders setting forth the rules for treatment of prisoners.¹⁶¹ He may lodge protests "in accordance with prescribed procedure" against orders and regulations of the administration when they are contrary to law.¹⁶² The Statute does not reveal the kind of procedure. Some indication is to be found in the laws on the regime in places of correctional labour.¹⁶³ The last known Statute on Correctional Labour Camps of the USSR was enacted in 1930.¹⁶⁴ Part IV of this Statute deals with the "Supervision of camps by the Procurator".¹⁶⁵ It does not provide for a protest. It mentions instead the right of the Prosecutor to make "recommendations", to stop the execution of illegal decisions and to see that the rules of the Statute are carried out.

Apart from protests the administration of places of confinement "must carry out"¹⁶⁶ "recommendations"¹⁶⁷ of the Procurator concerning the observance of rules established by law for the confinement of prisoners.¹⁶⁸ These recommendations are apparently not identical with "proposals". But the text of the Statute does not reveal in which points they legally differ.

¹⁵⁸ Statute, Art. 29.

¹⁵⁹ *Ibid.*, Art. 30.

¹⁶⁰ This function is usually entrusted to Procurators on regional levels. Inspections have to be made at least once a month (Lebedinsky, *op. cit.* [note 32], p. 157, 159).

¹⁶¹ Statute, Art. 34, 35.

¹⁶² *Ibid.*, Art. 33.

¹⁶³ It is reported that the system of correctional labour is undergoing at present a basic reorganization.

¹⁶⁴ *Sob. zak. SSSR*, 1930, No. 22, Art. 248.

¹⁶⁵ Art. 52-54.

¹⁶⁶ In Russian: *obyazana vypolnyatj*.

¹⁶⁷ In Russian: *predlozheniya*.

¹⁶⁸ Statute, Art. 37.

V. THE PROCURACY AS GUARDIAN OF THE LAW ON COMPLAINTS BY INDIVIDUALS

How can the individual avail himself of an organization like the Procuracy with such a wide range of duties and rights if he believes that his rights are violated or infringed by the State? The only channel open to the individual is the "complaint" or personal statement to the Procuracy.¹⁶⁹ In order to see whether or not — and if so to which extent — the right of complaint to the Procuracy is an effective means for the protection of the rights of the individual it is necessary to examine in some detail: —

- 1) the substantive and procedural aspects of this right of complaint and
- 2) the internal rules of the Procuracy for handling such complaints.

After this examination it will be possible to determine the legal nature and practical effectiveness of the right of complaint to the Procuracy.

1. The right of the Individual to Complain to the Procuracy

The right of the individual to complain to the Procuracy even in matters which do not directly concern him personally is very broad, both with respect to procedure and to substance.

There are with one notable exception no procedural requirements for filing complaints with the Procuracy. They may be filed with any Procurator's office (most conveniently, of course, with the locally competent office) and in any form, written or oral.¹⁷⁰ There is no time limit fixed within which a complaint has to be made after the alleged violation or infringement of the rights of the individual occurred.

Only for complaints against action or inaction of investigators a special procedure is laid down in the codes of criminal procedure. The complaint has to be filed with the Procurator to whom the investigator in question is attached.¹⁷¹ If the complaint is submitted to the investigator he has to sign in receipt for it.¹⁷² The complaint may be written or oral, in the latter case a formal document has to be drawn up.¹⁷³ The time limit is seven days after the action complained of occurred; but there is no time limit if the complaint is

¹⁶⁹ See *supra* p. 75 and note 109.

¹⁷⁰ If an orally presented complaint concerns "particularly serious" violations of law, Procurators are advised in certain cases to draft a written complaint for the complainant (Lebedinsky *op. cit.* [note 32], p. 162).

¹⁷¹ Code of Criminal Procedure of the RSFSR, Art. 212; once the case has been transferred to the Court complaints against investigating authorities and the Procurator are filed directly with the Court (*ibid.*, Art. 226). Cf. Statute, Art. 21.

¹⁷² *Ibid.*, Art. 213.

¹⁷³ *Ibid.*, Art. 214.

directed against an unlawful action or against a failure to take action within a required time.¹⁷⁴

Complaints of citizens to the Procuracy against decisions taken in criminal or civil procedure, even if they are final, require on the other hand no form. The same holds true for complaints against the administration of places of confinement.¹⁷⁵

As far as the substance of the complaint is concerned no limitations are expressly fixed. But it may be safely assumed that the right to complaint extends only to those matters which are within the jurisdiction of the Procuracy. Decisions taken by the Communist Party of the Soviet Union or laws passed by the Supreme Soviets¹⁷⁶ can therefore not be challenged by way of complaint to the Procuracy. The question whether such a complaint, if nevertheless filed, would be refused on grounds of lack of jurisdiction or on the merits seems to be academic since it is not likely to occur in practice.

The majority of complaints of individuals to the Procuracy are concerned with matters where interests of a material nature are at stake. There is first of all the vast field of taxes and obligatory deliveries.¹⁷⁷ For the rural population — still about half of the Soviet people — questions of their rights under the *kolkhoz*-Statute are also of vital interest. A frequent source of infringements of individual rights are furthermore "obligatory decisions" (ordinances)¹⁷⁸ of Ministries and local soviets. These organs are empowered by law¹⁷⁹ to impose legal duties, such as observance of sanitary and transport regulations, on the population under their jurisdiction. They may order administrative sanctions in case of non-compliance. Naturally this power gives rise to complaints. The Procuracy is called upon to review systematically and carefully the legality of obligatory decisions. Housing, a problem sharply felt in cities, is also bound to create disputes.¹⁸⁰ Another field where the individual may seek protection through the Procuracy concerns questions of social security and labour law, for instance the imposition of a fine on a *kolkhoz* member who did not appear for work, application of disciplinary sanctions by a non-competent organ, and withholding part of salary. Other examples are complaints

¹⁷⁴ *Ibid.*, Arts. 215, 226.

¹⁷⁵ Cf. Statute on Correctional Labour Camps of the USSR (source *supra* note 164), Art. 53b.

¹⁷⁶ See *supra* pp. 74-75.

¹⁷⁷ Obligatory delivery is a kind of tax levied against *kolkhozes*.

¹⁷⁸ In Russian: *obyazatelnye resheniya (postanovleniya)*.

¹⁷⁹ In the RSFSR: Ordinance of March 30, 1931, *Sob. uzak. RSFSR*, 1931, No. 17, Art. 186.

¹⁸⁰ Complaints to the Procuracy are here of particular importance since in certain cases evictions may take place only with the sanction of the Procurator.

against decisions of the police, e.g., in enforcing the "passport régime" (compulsory registration etc.), or regulation of motor transport.¹⁸¹

Complaints to the Procuracy are, as a matter of law, not excluded by the fact that in many of these cases an ordinary administrative or judicial procedure is provided for deciding the alleged infringement of the rights of the individual.¹⁸² In practice, however, the Procuracy will refrain from action if such an ordinary procedure has been initiated and not yet completed. It will merely take the matter under control if it seems to be of sufficient importance and supervise the proceedings with a view to taking appropriate actions after the procedure is closed.¹⁸³

In cases where available ordinary administrative or judicial procedures have not yet been initiated by the complainant, the Procuracy may:

- 1) Advise the complainant of the ordinary administrative or judicial channel;¹⁸⁴
- 2) Initiate itself administrative or judicial proceedings in cases where this right is given to the Procuracy, e.g., in civil procedure;¹⁸⁵
- 3) Take action with regard to the act which forms the subject of the complaint and address directly the organ against which the complaint has been made by way of protest, proposal or by initiating of proceedings against those guilty of a violation of law.

The last alternative — taking direct action — is, however, considered to be not expedient in practice. It amounts, as one Soviet writer puts it, to interference and may prevent "a correct decision of the complaint in substance"; it may create collisions between the decision of the organ provided for settling the dispute in the ordinary procedure and the activities of the Procuracy.¹⁸⁶

But there is no rule to the effect that existing remedies have

¹⁸¹ See Lebedinsky, *Obratzsy* (op. cit., note 35), pp. 144-146, 157; Lebedinsky, op. cit. (note 32), pp. 153-155; Karev, op. cit. (note 77a), p. 139.

¹⁸² See *supra* pp. 61-65; cf. Statute, Art. 14.

¹⁸³ Usually a "supervisory file" (in Russian: *nablyudatelnoe proizvodstvo*) is started for this purpose.

¹⁸⁴ Berezovskaya, op. cit. (note 32), p. 55.

¹⁸⁵ See *supra* p. 81 and note 155.

¹⁸⁶ Berezovskaya, op. cit. (note 32), pp. 55, 61. The view held by Berezovskaya that such a course, apart from being inexpedient, is also "without a legal basis" can hardly be considered correct. There is no express legal provision, for example in the Statute, restricting the Procuracy to act upon a complaint. Berezovskaya is apparently inclined to interpret the various laws providing for administrative and judicial procedures as if they exclude *impliedly* actions by the Procuracy. This argument, if valid, could be used, however, only in case of a pending action and not if administrative or judicial proceedings have not yet been instituted. Cf. also the forms Nos. 84 and 85 in Lebedinsky, *Obratzsy* (op. cit., note 35), pp. 157-158.

to be exhausted before a complaint can be presented to the Procuracy. In fact many complaints are filed with the Procuracy precisely because the complainant prefers to see the matter taken up by the Procuracy rather than to pursue it himself through ordinary channels.

If the complaint is declined by the Procuracy the complainant has the following choice of actions to follow up the matter:

- 1) He may complain to the next higher office of the Procuracy and so forth up to the Procurator-General of the USSR;
- 2) He may start ordinary administrative or judicial procedures if available and not yet exhausted.

The same applies if the Procurator failed to decide the complaint in time. The complainant has, however, not the right to take a negative decision of the Procurator or mere inaction on his complaint to a Court or to a third organ. The only exception to this rule is the right of a person under investigation to appeal to the regional Court, if he is not satisfied with the decision of the Procurator on his complaint against an investigator;¹⁸⁷ this right covers, however, only the case if the Procurator has made a negative decision but not if he failed to decide a complaint, i.e., in case of inaction.

2. Internal Rules of the Procuracy for Handling Complaints

To ensure citizens of their right to complain to the Procuracy detailed regulations were enacted on how complaints have to be handled in the offices of the Procuracy. The internal rules of the Procuracy for handling complaints deal with the following stages of processing complaints:

registration of complaint,
examination of complaint,
decision on the complaint,
informing the complainant of the decision taken,
control over handling of complaints.

a. Registration of Complaint

Each written complaint reaching the Procuracy has to be marked with a stamp indicating the date of receipt and registered in a "journal" under a consecutive number. For each registered complaint an individual alphabetical card has to be filled out, or, in small Procuracies, an entry has to be made in an alphabetical book. After this a file on the complaint is started.¹⁸⁸

¹⁸⁷ Code of Criminal Procedure of the RSFSR, Arts. 220, 226; cf. *supra* pp. 83-84 and notes 171-174.

¹⁸⁸ "Instruction on the Operation of Offices of the Procuracy" (quoted from Lebedinsky, *op. cit.* [note 32], pp. 173-175).

Complaints of certain categories have to be taken "under special control".¹⁸⁹ Complaints to be accorded a preferential treatment include:¹⁹⁰

- 1) Complaints by leading Party and State organs, such as the Central Committee of the Communist Party of the Soviet Union;
Council of Ministers of the USSR and Union Republics;
Deputies of the Supreme Soviet of the USSR and Union Republics;
Procuracy of the USSR under the signature of the Procurator-General, Procurators of Union Republics and of their Deputies;¹⁹¹
- 2) Editorial offices of newspapers;
- 3) Members of armed forces and their families, invalids and demobilized persons;¹⁹²
- 4) Complaints containing data on "serious" violations of legality.¹⁹³

These complaints are to be separated from the others¹⁹⁴ and entered on special control cards.¹⁹⁵

To facilitate the bringing of oral complaints before the Procuracy "visiting hours" have to be organized at each office of the Procuracy, starting with the lowest level and including the Procurators of Republics.¹⁹⁶ It is made the duty of the Procurators and their Deputies to receive personally complainants if they so wish.¹⁹⁷ Visiting hours have to be set preferably after working hours so that the population has in fact an opportunity to make use of the right to complain. A special book of visitors has to be kept. The standard form of this book provides for an entry of the name of the complainant, the subject of his complaint and of the decision reached.¹⁹⁸

b. Examination of Complaint

All correspondence, including complaints, is handed over after registration to the Procurator in charge of the office. This has to

¹⁸⁹ In Russian: *bratj na osoby kontrol*.

¹⁹⁰ Order of the Procurator-General of the USSR of July 3, 1946, No. 112, "On the Improvement of the Work of Examining Complaints in Organs of the Procuracy", Art. 4, reprinted in: *Sovetskaya prokuratura* (op. cit., note 25), pp. 455-456 and *Spravochnik* (op. cit., note 30), Vol. 3, pp. 478-479.

¹⁹¹ These examples were listed by Lebedinsky, op. cit. (note 32), p. 48.

¹⁹² The reference to demobilized persons is now probably obsolete.

¹⁹³ Lebedinsky, op. cit. (note 32), p. 162.

¹⁹⁴ *Ibid.*, p. 133.

¹⁹⁵ *Ibid.*, p. 48.

¹⁹⁶ Order of 1946 (quoted in note 190), Art. 12; Lebedinsky, op. cit. (note 32), pp. 32, 162.

¹⁹⁷ Lebedinsky, op. cit. (note 32), p. 162.

¹⁹⁸ Form No. 120 in Lebedinsky, *Obratzsy* (op. cit., note 35), p. 234.

be done the same day when the complaint is received. The Procurator is obliged to examine it and to give it the "first direction" ¹⁹⁹ within a period of not more than three days. ²⁰⁰ The two most frequent methods used to examine the substance of the matter are:

- 1) Examination on the spot by a functionary designated for this task. ²⁰¹
- 2) Forwarding the complaint to other organizations and agencies with a request to submit their views on the matter. ²⁰² But it is strictly forbidden to forward the complaint to the same organ which took the action concerning which complaint was made. ²⁰³

Procuracies on a higher level may in addition:

- 1) Request subordinate Procurators to report on the matter, in a written form or orally, ²⁰⁴
- 2) Forward the matter to the subordinate Procuracy with concrete orders as to the conduct of the matter. ²⁰⁵

c. Decision on the Complaint

The Statute of the Procuracy itself does not specify the time limit within which the complaint must be decided. It merely refers to the "laws" in effect on this matter. ²⁰⁶ For deciding a complaint time limits are fixed expressly for complaints lodged with local Soviets against their decisions, ²⁰⁷ viz.: twenty days for complaints filed with organs on the *rayon* level and one month for complaints to be decided at any higher level. ²⁰⁸ The same regulation is considered by Soviet authorities to be valid also for the Procuracy. ²⁰⁹ The Ordinance regulating the time limit for deciding complaints to local Soviets seems to impose, however, no absolute rule. Exceptions are allowed "in those cases where the complaint requires a prolonged examination" ²¹⁰ A different time limit exists for deciding complaints against investigators. It is fixed at only three days. ²¹¹

¹⁹⁹ In Russian: *pervichnoe napravlenie*.

²⁰⁰ Order of 1946 (quoted in note 190), Art. 2.

²⁰¹ Lebedinsky, *op. cit.* (note 32), pp. 45, 162.

²⁰² Cf. Order of 1946 (quoted in note 190), Arts. 4 and 8.

²⁰³ *Ibid.*, Art. 9.

²⁰⁴ Cf. *ibid.*, Art. 8; Lebedinsky, *op. cit.* (note 32), p. 45.

²⁰⁵ Order of 1946 (quoted in note 190), Arts. 2 and 5.

²⁰⁶ Statute, Arts. 14, 21, 36.

²⁰⁷ Ordinance of 1935 (quoted in note 25), Art. 30.

²⁰⁸ For complaints of members of the Armed Forces the time limits are seven and fifteen days respectively (*ibid.*).

²⁰⁹ Lebedinsky, *op. cit.* (note 32), p. 161.

²¹⁰ Ordinance of the Commission of Soviet Control attached to the Council of People's Commissars of the USSR "On Examination of Complaints of Workers" (issued in connection with the Ordinance quoted in note 25), Art. 10b. Text: *Sob. zak. SSSR*, 1936, reprinted in: *Sovetskaya prokuratura* (*op. cit.*, note 25), pp. 418-422.

²¹¹ Code of Criminal Procedure of the RSFSR, Art. 218.

Unless he rejects the complaint the Procurator may take the following decisions to comply with the complaint: file a protest, make a proposal or initiate proceedings against those guilty of a violation of law. But the Procurator is not bound to limit himself to these formal remedies. He may also address the organ from which the objected act originates in a written form or even only orally,²¹² e.g., by telephone. Once the action of the Procurator on a given complaint is completed an entry has to be made in the journal of complaints saying whether the complaint has been declined or complied with.²¹³

d. Informing the Complainant of the Decision Taken

The complainant must be informed:

- 1) if his complaint is considered to need no examination,
- 2) if it is forwarded to another organ,
- 3) how it is finally decided.²¹⁴

A duty to inform the complainant is specifically stated also for complaints against investigators.²¹⁵

There is no form established for this notification but internal rules require the Procurator to give reasons for any decision refusing a complaint.²¹⁶ The Procurator is legally not obliged to advise an unsuccessful complainant what further steps he may take to follow up his complaint, e.g., by complaining to the next higher Procurator.²¹⁷

e. Control over Handling of Complaints

Higher organs of the Procuracy are obliged to control subordinate organs.²¹⁸ This control extends in particular to the correct handling of complaints.²¹⁹ The exercise of this control is made the personal responsibility of the Procurator in charge of the office in question.²²⁰ To aid him in the work of control special organs and positions have been created.

At the offices of the Procurator-General of the USSR and of

²¹² Order of 1946 (quoted in note 190), Art. 10; Berezovskaya, *op. cit.* (note 32), pp. 92-93.

²¹³ Berezovskaya, *op. cit.* (note 32), p. 93.

²¹⁴ Order of 1946 (quoted in note 190), Arts. 2, 8 and 6.

²¹⁵ Code of Criminal Procedure of the RSFSR, Arts. 213, 220.

²¹⁶ Order of 1946 (quoted in note 190), Art. 11.

²¹⁷ Nevertheless such advice is contained in Form No. 60 of Lebedinsky, *Obratzsy* (*op. cit.*, note 35), p. 101.

²¹⁸ Instruction of the Procuracy of the USSR "On the Organization of Control of Execution in the Organs of the Procuracy", confirmed June 19, 1944 (quoted from Lebedinsky, *op. cit.* [note 32] p. 42).

²¹⁹ Lebedinsky, *op. cit.* (note 32), pp. 45, 97, 163.

²²⁰ *Ibid.*, pp. 47-48.

the Republican Procurators special "Control and Inspection Groups" exist. Their task is to control the observance of Party and State directives as well as of the orders of the Procuracy by subordinate agencies.²²¹ They regularly carry out inspections and are given the right to familiarize themselves freely with all complaints filed with their own Procuracy and subordinate Procuracies.²²² At the regional level special Procurators are designated as "Assistant to the Procurator for complaints and control".²²³ If the table of organization of a particular Procuracy does not provide for this post the Deputy of the Procurator of the region has to take over the function mentioned. These Procurators are responsible for control of the handling of complaints in the appropriate departments of their own Procuracy as well as of the execution of orders which may be given by a higher Procuracy for examining and deciding a particular complaint.²²⁴

The control work is said to be highly responsible and complex.²²⁵

3. Legal Nature of the Right of Complaint

It may now be useful to consider the system of complaints to the Procuracy by individuals from the standpoint of comparative administrative law. In many systems of administrative law a distinction is drawn between two kinds of complaints: formal complaints and informal complaints. The procedure used to enforce a decision on the complaint serves as a distinguishing criterion.

Formal complaints are decided in a contentious procedure where the complainant enjoys a similar procedural status to the organ from which the act complained of originates. From the decision reached in this procedure appeal can usually be made to a Court. In accordance with the specific features of a formal complaint initiation of such a procedure has usually — unless there are express provisions to the contrary — a dilatory effect, i.e., the act

²²¹ Control and Inspection Groups operate on the basis of a "Statute on Control and Inspection Groups at the Procuracies of Unions Republics", confirmed by the Procurator of the USSR on February 15, 1945; the control of the Central Apparatus of the Procuracy of the USSR is regulated in an Instruction, confirmed February 22, 1945; a special Order of the Procurator of the USSR (May 18, 1945) concerns the control of the Procuracies of the three Caucasian Republics (Georgia, Armenia, Azerbeidzhan) (quoted from LEBEDINSKY, *op. cit.* (note 32), pp. 42-43).

²²² Lebedinsky, *op. cit.* (note 32), pp. 43-44.

²²³ These Assistants operate on the basis of a "Statute on Assistants to the Procurators of Autonomous Republics, Territories and Regions for Complaints and Control", confirmed by the Procurator of the USSR February 17, 1948 (quoted from Lebedinsky, *op. cit.* [note 32], p. 43).

²²⁴ Lebedinsky, *op. cit.* (note 32), pp. 43-44.

²²⁵ *Ibid.*, p. 44.

as falling into the category of formal complaints. It is the complaint complained of is not carried out while the complaint is pending. Sometimes it has the effect of transferring the complaint automatically to the next higher organ in the hierarchy in question, if the administrative organ which took action refuses to comply with the complaint.

The procedure for dealing with informal complaints accords on the other hand no procedural rights to the complainant. His rôle is limited to that of an informant. The device used to ensure that a decision on the complaint is made, is not the subjective right of the individual but rather the administrative subordination and control of the next higher organ. Internal rules are issued to this end. Their observance is made the duty of officials; non-compliance entails administrative and disciplinary sanctions.

Applying these criteria to the complaints filed with the Procuracy in the USSR it will appear that they clearly fall under the category of informal complaints. The complainant is not given the right to enforce a decision on a complaint in a formal litigious procedure. It is rather the supervisory power of the higher Procurators over their subordinates which is used as a device to guarantee a correct handling of complaints. Its aim is to ensure the observance of the internal rules in the handling of complaints. If they are violated the complainant can merely apply to the next higher Procuracy and urge a stricter administrative supervision. The informal character of the complaint is confirmed by the fact that it produces neither a dilatory effect nor a transfer of the complaint to a higher authority.²²⁶

Two more characteristic features of a complaint to the Procuracy may be cited in support of classifying them as informal complaints. There is first the relative nature of the time limit fixed within which a decision has to be reached. As stated above,²²⁷ an extension of the time is allowed if the complaint requires prolonged examination. Whether or not this is the case is decided solely by the Procuracy. Secondly, not all complaints are treated equally. There is a special category of complaints which — according to the internal rules of the Procuracy — has to be given a preferential treatment. These are the complaints by high Party and State officials, Deputies of Supreme Soviets, newspapers, etc.²²⁸ The principle of equal procedural rights for the complainant and the State organ in question is, it follows, not applied.

²²⁶ Cf. *supra* p. 86.

²²⁷ See *supra* p. 88 and note 210.

²²⁸ See *supra* p. 87 and notes 190–193.

Only one kind of complaint to the Procuracy may be considered of a person under investigation against actions of an investigator. Here an appeal to a Court is envisaged if the decision on a complaint is unsatisfactory to the complainant.²²⁹

VI. EFFECTIVENESS OF PROTECTION ACCORDED BY THE PROCURACY

The setting up and operation of a special organ for the observance of law, an organ for which there is no equivalent in countries outside the Soviet bloc, inevitably raises the question whether it proved to be effective in practice and what experience can be drawn from the Soviet model. In the context of this study it is of a particular interest how the Procuracy discharged its function to protect the individual against the State.

The most reliable method to find an answer to this question is to review the past record of the Procuracy in this field. Unless a basic change in the law functions of the Procuracy occurred — and there is no evidence to this effect — it will allow conclusions with regard to the present situation and future developments in the field of protection of the rights of the individual in the Soviet Union.

1. Performance in the Past

The Procuracy of the USSR in its present form has existed since 1933. Its activities were regulated in a Statute issued in the same year. It seems useful therefore to take the period between 1933 and the present day as a testing time for the effectiveness of the Procuracy as a protector of the rights of the individual.

It is not possible to evaluate the past record of the Procuracy in terms of figures and on the basis of numerical data, the simple reason being that no statistics and figures were published. Silence on this subject is to be explained by policy consideration rather than by lack of information since statistical reports have to be prepared by all organs of the Procuracy every month.²³⁰ But these are evaluated only internally.

Other materials, however, allow an insight into the effectiveness of the Procuracy, in its strength and weaknesses. The most reliable sources are laws and orders issued by the Procuracy itself. Their motivation and sometimes the mere fact of their enactment is revealing.

A direct judgment on the merits of the work of the Procuracy

²²⁹ See *supra* pp. 83–84, and notes 171–174.

²³⁰ Lebedinsky, *op. cit.* (note 32), p. 167.

is contained in an Order of the Procuracy of May 11, 1935 under the title "On the Strengthening of Supervision over Revolutionary Legality". It starts as follows:

"Side by side with a considerable strengthening of the work of the supervision of Courts and of investigation authorities, the organs of the Procuracy in a number of places have evidently relaxed their efforts in supervising the legality of ordinances and directives of local organs and People's Commissariats".²³¹

Shortly afterwards "practical measures for the realization" of this Order were decreed.²³² Half a year later the Procurator of the USSR issued a new Order on the same subject. He pointed out that the great importance of the work in this field had been emphasized in the two previous Orders. "Nevertheless", he continues,

"the practice shows that these Orders are not fulfilled on the spot. Procurators . . . overlook illegal actions and acts of local Executive Committees and individual officials, [they] do not lodge protests against these actions and acts".²³³

As far as complaints by citizens are concerned, which are of particular interest in the context of this paper, a number of Orders were issued which suggest that supervision by the Procuracy was not considered to be satisfactory. A Letter circulated by the Procurator of the USSR in 1934 reveals that the procedural order for handling complaints against investigators

"in practice went out of use and complaints submitted were either simply filed in the dossier or remained without response in the 'rosters of the control-file' ".²³⁴

An Ordinance of the Central Executive Committee [Supreme Soviet] of the USSR of 1935 also deals with the subject of complaints. It obliges the Presidents of Executive Committees of autonomous Republics, regions, *rayons* and cities

- 1) "to make persons strictly answerable, in the last resort by taking them to Court, who do not fulfil decisions made as to complaints and who are responsible for red tape and a careless attitude towards complaints and complainants";
- 2) "to control systematically the carrying out of decisions on complaints; to pay special attention in case of control . . . of subordinate organs . . . to the organization of work with

²³¹ *Sbornik tsirkulyarov (op. cit., note 31), p. 5.*

²³² Order of the Procurator of the USSR of June 13, 1935, *ibid.*, p. 6.

²³³ Order of the Procurator of the USSR of November 1, 1935, *ibid.*, p. 8.

²³⁴ Directive Letter of the Procurator of the USSR of August 13, 1934, Art. 3, *ibid.*, p. 108, reprinted also in: Lebedinsky, *Obraztsy (op. cit., note 35), p. 131, note 1.*

regard to receiving and examining complaints and to deciding them in time and correctly..."²³⁵

In circulating this Ordinance the Commissariat of State Control attached to the Council of People's Commissars [Ministers] of the USSR drew the attention of its subordinate organs

"to the presence of *mass violations* of time limits established for the examination of complaints by workers".²³⁶

Meeting this criticism, the Procuracy of the USSR issued in 1936 a detailed instruction on the subject of handling complaints filed with the Procuracy.²³⁷ Ten years later it was replaced by a new Order "On the Improvement of the Work on the Examination of Complaints in the Organs of the Procuracy".²³⁸

Criticism of the unsatisfactory state of handling complaints is frequently made at conferences of jurists and administrative workers, in the daily press as well as by individual lawyers in articles and notes printed in Soviet law journals.²³⁹

Procurators also did not live up to their task of supervising investigating authorities. Thus, it is reported in a Directive Letter of 1934 that:

"The All-Union Conference of Court and Procuracy workers held in April this year [1934]... noted a number of defects in the pre-trial procedure of criminal cases...

4. Up to now the main defect of the pre-trial procedure is its excessive duration... Hence the prolonged periods of deprivation of freedom...
5. Investigation in practice almost completely disregards the presentation to the accused of the materials after the investigation is finished, as is presented by law.
6. An examination of current practice shows that often in the most serious cases the bill of indictment contains, instead of a business-like, concise... statement of the circumstances of the crime, general considerations about the policy of the Soviet régime, economic achievements, class-struggle, etc., sometimes having nothing to do with the given crime"...²⁴⁰

and in another Circular Letter of the same year:

²³⁵ Art. 3h, i of the Ordinance, text: as quoted in note 25.

²³⁶ Art. 10 of the Ordinance quoted in note 210 (italics supplied).

²³⁷ Circular of the Procuracy of the USSR of June 3, 1936, No. 37/23 with a Model Statute for "Bureaus of Complaints" of the organs of the Procuracy. Text: *Sbornik tsirkulyarov* (op. cit., note 31), pp. 141-143.

²³⁸ Order of 1946, quoted in note 190.

²³⁹ The number of critical statements published precludes any attempt to list them.

²⁴⁰ Directive Letter of the Procurator of the USSR of August 13, 1934. Text: *Sbornik tsirkulyarov* (op. cit., note 31), pp. 108-109. Cf. *supra* note 17 and Lebedinsky, op. cit. (note 32), pp. 106-108.

"In practice cases are far from infrequent where the accused is handed over not a copy of the bill of indictment but an arbitrarily abridged extract of it . . ." ²⁴¹

Constant admonitions in the form of Ordinances, Orders and Letters were necessary to eliminate existing shortcomings. Even more disturbing than the inefficiencies criticized at the time when they occurred are those which were admitted later — at the XX Party Congress in 1956 and after. The facts mentioned by Khrushchev in his secret speech as well as subsequent admissions in Soviet publications bear evidence to past violations of the rights of the individual on an enormous scale. Judging by these statements it must be concluded that the Procuracy has in large measure failed in practice to act as the guardian of the rights of the individual against the State.

2. Reasons for Failure

The discrepancy between the task entrusted to the Procuracy and the actual performance of its work in the past is so striking that the Soviet leadership considered it necessary to attempt an official explanation of past shortcomings.

a. Official Version

The official version is based on the argument that the failure is due to the negative consequences of the "cult of the individual" which flourished under the Stalin régime. In a Decision of June 30, 1956, "On Overcoming the Personality Cult and its Consequences", the Central Committee of the Communist Party of the Soviet Union advances the following theory with respect to the illegalities which occurred in the past:

"The XX Party Congress noted that the Central Committee was perfectly correct in its timely condemnation of the personality cult, the dissemination of which . . . not infrequently led to . . . gross violations of socialist legality . . . The facts concerning violations of socialist legality . . . made public by the Party naturally cause grief and profound regret . . . For a long period, the State security agencies justified [the great] confidence [placed in them], and their special status did not entail any danger. But things changed when Party and Government control over the security agencies was gradually replaced by the personal control of Stalin, and the normal administration of justice not infrequently replaced by his personal decisions. The situation was further aggravated when the State security system came to be headed by the criminal gang of Beria, that agent of international imperialism. There were

²⁴¹ Circular of the Procurator of the USSR of October 10, 1934, *ibid.*, p. 123

grave infractions of Soviet legality, and mass repressions. As a result of enemy intrigue, many honest Communists and non-Party Soviet citizens were slandered and suffered innocently . . . The following consideration should also be borne in mind: many facts and improper actions by Stalin, notably those relating to the violation of Soviet legality, became known only recently, after Stalin's death, mainly as a result of the exposure of the Beria gang and the establishment of Party control over the State security agencies."²⁴²

The arguments of the official version are hardly convincing as far as the work of the Procuracy is concerned. They give for instance no satisfactory explanation why the Procuracy remained passive when:

- 1) investigating authorities applied — as is common knowledge — physical pressure in the conduct of investigations; this clearly violated Article 136 of the Code of Criminal Procedure of the RSFSR;²⁴³
- 2) the "Special Board" of the Ministry of Internal Affairs of the USSR exiled on a mass scale "socially dangerous persons" to correctional labour camps in an administrative (i.e. extra-judicial) procedure without a possibility of defence. This activity carried out on the basis of a law formally adopted in 1934²⁴⁴ was a source of gross illegalities. Why did the Procuracy not intervene, the more so as the Procurator-General of the USSR was required by the same law to attend the sessions of the "Special Board" and was given the right to lodge a protest against its decisions?²⁴⁵
- 3) inmates of correctional labour camps were deprived even of those minimum rights which the codes for correctional labour camps provide.²⁴⁶

More examples could be cited. But these may suffice to characterize the areas where the repression of the Stalin regime was carried out most flagrantly and obviously.

The instruments of this repression were in many cases the organs of State security. These organs were, it should be

²⁴² *Pravda*; July 2, 1956, pp. 1-2; English translation: *New Times* (Moscow), 1956, No. 28, Supplement, 14 pp. (here quoted from pp. 4-6, 8-9).

²⁴³ Khrushchev told the delegates at the XX Party Congress in a closed session on February 25, 1956 that the Central Committee of the Communist Party of the Soviet Union "permitted" the application of physical pressure during investigations in a secret Decree of 1937 and made it obligatory against "enemies of the people" by another secret Decree of 1939.

²⁴⁴ Source in note 7.

²⁴⁵ Art. 3 of the law of 1934 (source in *ibid.*).

²⁴⁶ Cf. Rakhunov in the leading journal of the Communist Party of the Soviet Union *Kommunist* (Moscow), 1956, No. 7, pp. 43-44.

emphasized, subject to control by the Procuracy. Thus the Statute of 1933 which was valid until 1955 provided in Article 4 that the Procuracy of the USSR exercises

"Supervision over the legality and correctness of the activities of the OGPU [Unified Government Political Administration], of the police and of correctional labour institutions on the basis of a special Statute".²⁴⁷

Previous Statutes of the Procuracy contain a similar obligation.²⁴⁸

If the Procurators did not intervene in the innumerable individual cases of injustice which occurred at all levels, this was due, it is submitted, not to certain characteristics of two individuals — Stalin and Beria — and also not to certain accidental conditions mentioned in the Party Decision, such as the threat of internal and external enemies (Trotskyists and Fascists), but rather to the inherent weakness of the Procuracy itself.

b. The Inherent Weakness of the Procuracy

The Procuracy is by its structure and jurisdiction not capable of protecting individuals against measures of repression imposed by the regime, even if the latter clearly violate the law. The very structure of the Procuracy makes it an instrument rather of the regime than of justice, if the regime enters on an illegal course of action.

The character of the Procuracy as an instrument of the regime follows first of all from its close dependence on the State and Party leadership. No attempt is made to conceal this dependence. On the contrary, it is emphasized. Thus Kalinin, then President of the Central Executive Committee of the USSR [Supreme Soviet] observed in 1934 that

"the people's judge, the *rayon*-Procurator, the people's investigator — are the most important chains in the struggle of the Party for overcoming the remnants of capitalism in the economy and in the conscience of people".²⁴⁹

The same view prevails also to-day as can be seen from a joint article by Mishutin, the Deputy Procurator-General of the USSR, and Kalenov, published in 1955 in the leading Soviet law journal:

"The tasks which face the organs of the Procuracy can only be fulfilled on the condition that the work of the Procuracy is

²⁴⁷ *Sob. zak. SSSR*, 1934, No. 1, Art. 2b, reprinted in: *Sovetskaya prokuratura* (op. cit., note 25), pp. 402-406 and *Istoriya zakonodatelstva* (op. cit., note 30), pp. 512-513. The "special Statute" was never published.

²⁴⁸ Statute of 1922, Art. 2; Statute of 1923, Art. 22; Statute of 1929, Arts. 58, 73-75. The texts of these Statutes are reprinted in the collections quoted in note 247.

²⁴⁹ Speech at the 10th anniversary of the Supreme Court of the USSR, reprinted in: *Sovetskaya prokuratura* (op. cit., note 25), p. 393.

carried out under the constant control and direction of Party organizations. The Communist Party is the directing force of Soviet Society, the directing nucleus of all the organizations of the toilers, both social and national. Constant Party control is particularly necessary in the work of the Soviet Procuracy, which is a strictly centralized organ and a powerful weapon in the hands of the State in the fight against hostile anti-Soviet elements and in the protection of the rights and legitimate interests of Soviet citizens".²⁵⁰

and at another place in the same article:

"In all their actions the Soviet Procurator and investigator must base himself on the policy of the Communist Party. In order to carry out the Party line effectively in practical work and to be able to find their bearings in complicated communal happenings, they must constantly study Marxist-Leninist theory and acquire a grasp of the historical experience of the Communist Party".²⁵¹

For students of the law of the Procuracy who may hesitate to accept unreservedly the principle of Party leadership in the work of the Procuracy a textbook on the subject contains the following passage:

"But it would be the most flagrant political mistake to consider Party leadership exercised by *rayon* Party organizations as an intervention in the operative work of the Procurator. One has to remember [and here the author quotes from a leading article of the journal of the Communist Party of the Soviet Union *Kommunist*, 1953, No. 10] . . . that Party leadership of all organizations is the main condition for their successful activities".²⁵²

Another Soviet writer is therefore right in saying that the Soviet Procuracy is

"the true champion²⁵³ of the policy of the Communist Party in the field of State construction".²⁵⁴

Formally the dependence of the Procuracy on the leadership of the régime finds its expression in the power vested in the Supreme Soviet — the highest State organ — to appoint and recall the Procurator-General of the USSR and in Article 36 of the Statute of the Communist Party of the Soviet Union which reads in part:

²⁵⁰ *Sovetskoe gosudarstvo i pravo*, 1955, No. 3, p. 41.

²⁵¹ *Ibid.*, p. 42.

²⁵² Lebedinsky, *op. cit.* (note 32), p. 182.

²⁵³ In Russian: *vernoy provodnik*.

²⁵⁴ Berezovskaya, *op. cit.* (note 32), p. 103.

"The Central Committee guides the work of the central Soviet and public organizations through the Party groups within them".

In substance the dependence is demonstrated by the fact that acts of the Supreme Soviets and activities of the Communist Party are excluded from supervision by the Procuracy.²⁵⁵

This dependence on the régime makes it difficult and — as the historical record shows — under certain conditions indeed impossible for the Procuracy to act as a protector of the individual against the State. It precludes the taking of a detached attitude in collisions between the individual and the State, a function which in other countries may be entrusted to an independent tribunal of a judicial character.

Two devices deprive the individual of a legal guarantee in pursuing his rights against the State through the Procuracy:

- 1) the fact that the individual has only the right of an "informal complaint" to the Procuracy which he cannot enforce by appealing to an independent organ;
- 2) the discretion given to the Procuracy to apply the principle of expediency in rectifying violations of law.²⁵⁶

The lack of legal guarantees is not offset by the elaborate internal rules of the Procuracy, detailed as they may be, for handling complaints. They offer no legal safeguards to the citizen since they are not enforceable by him.

The lack of legal guarantees does, however, not mean that the protection accorded by the Procuracy to the individual against the State is in all cases necessarily inefficient. This would be a conclusion not corresponding to the realities of Soviet life. There can be little doubt that the Procuracy has often played a useful role in the efforts to achieve an overall observance of the law — a role which is probably even greater today. This applies for instance to the struggle against criminality and administrative arbitrariness, to cases where ignorance, narrow local interests or personal antagonism have prevented a just decision in a dispute between a citizen and a local soviet, a State enterprise or a public organization, etc. The Procuracy has to be credited with having achieved by its intervention a reversal of unjust decisions and re-establishment of justice in many cases.

But it is in the nature of the Procuracy that it cannot effectively handle certain types of cases. These cases may be termed "political". The word political is understood in this context as meaning real, alleged or potential opposition to the régime. In such cases the

²⁵⁵ See *supra* pp. 74-75.

²⁵⁶ See *supra* pp. 90-92 and 76.

Procuracy has not, as its past record shows, been an effective defender of justice.

As an organ for the protection of the individual against the State the Procuracy furthermore has the disadvantage of being a highly centralized authoritarian organization susceptible to red tape, lack of initiative, and indifference to the material results of the work, unless the personal interest of the officials concerned is affected. Frequent admonitions and criticisms from above are a necessary factor in the work of the Procuracy. This pressure through administrative channels can in fact be observed over the whole period of existence of the Procuracy, though with various degrees of intensity. It is bound to continue as long as the examination and decision on grievances of individuals against the State are not entrusted to an independent organ with both parties — State and individual — participating in the procedure on equal terms and as long as the inherent structure of the Procuracy offers to its officials no other stimuli for work than administrative subordination and material incentives.²⁵⁷

3. Present Situation

The Soviet leaders claim that a drastic improvement recently occurred in the work of the Procuracy. To substantiate this claim the following arguments are usually advanced:

- a) the Procuracy is strengthened by new personnel;
- b) it is "fully re-instituted"²⁵⁸ in its rights;²⁵⁹
- c) the Statute of the Procuracy of 1933 is replaced by a new law of 1955.²⁶⁰

The first two changes relate to the factual situation. Only the third marks a change in law. Comparing the old and the new Statute it appears that the new codification is more detailed (56 instead of 20 articles) and provides the Procuracy with a number of new rights such as:

- a) the power to order the transfer of a case from one investigating agency to another, thus enabling it to remove a case from the State security organs;²⁶¹

²⁵⁷ Cf. the "measures of incentives" (*supra* p. 71, notes 88–89) and the fact that Procurators may be made personally responsible for initiating groundlessly criminal proceedings if the arrested was acquitted by the Court (Lebedinsky, *op. cit.* [note 32], p. 113 and also pp. 74, 80–81, 131).

²⁵⁸ In Russian: *polnostyu vosstanovlen v svoikh pravakh.*

²⁵⁹ Khrushchev in his report to the XX Party Congress on February 14, 1956 (*Pravda*, February 15, 1956, p. 9; English translation: *Current Digest of the Soviet Press* (New York), March 14, 1956, p. 14); Voroshilov before the XX Party Congress (*Pravda*, February 21, 1956, p. 6).

²⁶⁰ Source in note 36.

²⁶¹ See *supra* p. 80 and note 143.

- b) the power to lodge a protest against illegal orders of the administration of camps of confinement. It seems that the Procuracy so far had only the right to suggest an abolition of illegal orders.²⁶²

However important these and other changes may be, and allowing for an improvement in personnel and a greater readiness to permit the Procuracy to perform its functions, nevertheless the basic structure of the Procuracy remains unchanged. Those characteristics which were considered in this paper to be the reason for the inefficiency of the Procuracy during the Stalin regime are still present. No change has been made with respect to the dependence of the Procuracy on the supreme State and Party organs. Decisions by these organs are still exempted from supervision by the Procuracy.²⁶³ Nor are the principles changed which allow the Procuracy to act on the grounds of expediency rather than of legality. Finally, and of vital importance to the individual, the right of complaint to the Procuracy remains informal and not legally enforceable.

If the Soviet authorities sought to reimpose the repressive measures of the past there is little hope, therefore, that the Procuracy would be able to protect the individual against the State more efficiently than it did under the Stalin régime. If, nevertheless, it is true that the status of the individual vis-à-vis the State improved markedly after the death of Stalin — and there is ample evidence that it did — this improvement is due, it would appear, not to a change of law but to a change of political climate.

4. Outlook for the Future

Soviet legal science greatly benefited from the change of climate. Previous shortcomings in the administration of justice and suggestions for future improvement are discussed with a degree of boldness and conviction unprecedented since the early years of the Stalin regime. The protection of the rights of the individual against the State and its organs forms an ever recurring theme. There is general agreement among Soviet lawyers that this protection must be effectively strengthened. Numerous proposals are put forward, such as enacting provisions to the express effect that the innocence of an accused must be presumed and that confessions may not be used as the sole basis of a conviction. The demand is voiced that the right of complaint should be fixed in the Constitution, that defence counsel should be admitted during the investigation and before Courts of appeal, that appeals should be heard in the presence of the parties, and that the law of correctional labour be reformed.

²⁶² See *supra* p. 82, and notes 162-165.

²⁶³ See *supra* pp. 74-75.

In relation to the subject matter of this article, one of the most significant proposals is that of Professor STROGOVICH, a distinguished Soviet jurist, Corresponding Member of the Academy of Sciences of the USSR.²⁶⁴ In an article in the leading Soviet law journal published in 1956 he points out that

"the indissoluble connection between protection of the right of the citizen and the legality of the activities of State organs manifests itself in any field of Soviet law. This question is felt particularly acutely in the field of criminal procedure. At the XX Party Congress facts concerning crying illegalities committed by the Beria gang were mentioned".²⁶⁵

Strogovich argues on this basis: —

"The Soviet legislation establishes a broad system of legal guarantee of legality in all fields of socialist law and the main task consists in applying these guarantees in practice. At the same time the important task of improving and broadening the legal guarantees of legality ought to be appreciated. In particular we believe it to be expedient to broaden the *judicial* [italics in the original] guarantees of legality by way of extending the jurisdiction of Courts to various questions of an administrative character which so far have not belonged to the competence of Courts . . . There are grounds to move forward in this direction and to permit in certain cases an examination by the Courts of complaints as to actions by organs of the State, agencies and officials, if the complaint has not been complied with by the higher organ . . . One of the means to improve the work of examining complaints by citizens may be the granting of the right to citizens to apply to a Court if the complaint is rejected or not examined by the agencies or officials in question."²⁶⁶

The proposal to enlarge the jurisdiction of Courts in cases where the legality of acts of State organs is at issue was repeated on the pages of the same law journal one year later (1957) in an article by Nedbailo.²⁶⁷ The author, a lecturer in law at the University of Lvov (Ukrainian SSR),²⁶⁸ argues that:

²⁶⁴ Strogovich is known to have been an advocate of legal guarantees for the individual also during the Stalin régime.

²⁶⁵ *Sovetskoe gosudarstvo i pravo*, 1956, No. 4, p. 22 (German translation: *Rechtswissenschaftlicher Informationsdienst* [Berlin], 1956, No. 16, cols. 470-483).

²⁶⁶ *Ibid.*, pp. 24-25.

²⁶⁷ P. E. Nedbailo in *Sovetskoe gosudarstvo i pravo*, 1957, No. 6, pp. 20-29.

²⁶⁸ Nedbailo has written previously on the subject of "socialist legality" in: *Uchenye zapiski* (Scientific Papers) of Lvov University (Lvov), Vol. XXVII, Juridical Series, No. 2 (1954), pp. 5-22.

"The legal status of Courts, their functions and the strictly established order of their action, create advantages for ensuring the correct application of legal norms . . . which no other form of State activity can provide. Within the system of juridical guarantees judicial guarantees are, therefore, the *highest* [italics in the original] guarantees of the rights of citizens . . . Hence one ought to draw the practical conclusion that it is necessary . . . to widen the competence of Courts, to raise its role and prestige in public life. In particular one ought, in our opinion, to extend the functions of Courts to many questions of the administrative work of governmental organs in their mutual relations with the population . . . According to legislation now in effect citizens may apply to Courts in administrative questions only in few cases. Complaints and statements on incorrect actions of officials and [State] agencies are filed, as a rule, with the superior organ through a hierarchy of authorities. Such a procedure does not always ensure a timely, objective and lawful decision on the complaints and statements because the administrative authorities appear in these cases as judges in their own case, also because the administrative procedure does not ensure a participation of the interested persons in the examination of their cases to such a degree as would the judicial procedure . . ." ²⁶⁹

The suggestions made and the arguments used by Nedbailo receive additional weight if seen in the context of his article, entitled, "On the Juridical Guarantees of the Correct Realization of Soviet Legal Norms". He begins with the following significant distinction:

"In Soviet legal literature so far the main attention was paid to the material and *political* means for ensuring a correct realization of legal norms and a protection of the rights of citizens"

while the

"*legal* means were to a certain degree underestimated." ²⁷⁰

To substantiate this Nedbailo makes the following challenging observation:

"The material and political means in a socialist society play the *decisive* role in the realization of law, but only as the necessary condition and general basis of socialist legality. They create the personal interest of officials and citizens to fulfil the law . . . But . . . they do not guarantee the lawful and well-founded application, observance and execution of legal norms in each concrete case, they do not provide guarantees against errors and possible abuses in the realization of legal norms." ²⁷¹

²⁶⁹ Nedbailo, *op. cit.* (note 267), p. 25.

²⁷⁰ *Ibid.*, p. 20 [italics added].

²⁷¹ *Ibid.* [italics in the original].

Proceeding from this thesis, which confirms the conclusions reached in this paper, the author enumerates and examines the following guarantees: constitutional guarantees, procedural norms, control and supervision including that of the Procuracy, judicial guarantees, responsibilities of lawbreakers, in particular of officials guilty of a violation of law, right of complaint of citizens. Analyzing these guarantees Nedbailo criticizes Soviet legislation in so far as it fails, in his opinion, to provide and to implement them. He maintains for instance that

- 1) matters, the regulation of which would require the enactment of a law, are sometimes decided by administrative organs in executive orders and instructions "not providing at times sufficient guarantees for the rights of the personality";²⁷²
- 2) the supervision of the Procuracy does not extend to the activities of local soviets;²⁷³
- 3) disciplinary legislation does not provide personal responsibility of officials for carrying out unlawful orders and directives;²⁷⁴
- 4) the responsibility of State agencies and officials for damages caused to citizens in the exercise of administrative-imperious functions should be expanded;²⁷⁵
- 5) no uniform law exists regulating the procedure for the examination of complaints.²⁷⁶

However encouraging the views thus expressed may sound, it must be borne in mind that the existing system of government imposes many limitations on any effort to improve the status of the individual vis-à-vis the State, which must be, therefore, a difficult and long-range task. But the prospects for its achievement are not without hope.

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²⁷² *Ibid.*, p. 21.

²⁷³ *Ibid.*, pp. 23-24; cf. *supra* p. 74 and notes 93, 97-101.

²⁷⁴ Nedbailo, *op. cit.* (note 267), p. 27.

²⁷⁵ *Ibid.*; cf. *supra* p. 62 and note 9.

²⁷⁶ Nedbailo, *op. cit.* (note 267), pp. 27-28.

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THE LEGAL PROFESSION AND THE LAW

THE BAR OF ENGLAND AND WALES, HISTORY, ORGANIZATION AND RULES OF CONDUCT *

I. THE ENGLISH LEGAL SYSTEM

The part played by the Bar in the English Legal System cannot be considered without brief reference to the constitution and procedure of the Courts.

The Courts

A diagram showing the structure of the English courts is attached as an Appendix to this article. It must suffice here to say that on the civil side, the County Courts have jurisdiction where the amount in issue does not exceed £ 400, whereas the jurisdiction of the High Court is unlimited. On the criminal side the most serious offences, e.g., murder, treason, arson, rape, are tried by the Central Criminal Court (in London) or by Judges of the High Court at Assizes (in the provinces). Less serious offences, e.g., burglary, breaking and entering, larceny, obtaining money by false pretences, are normally tried at Quarter Sessions (though they may be tried also at the Central Criminal Court or at Assizes). Minor offences are tried by Magistrates Courts, which cannot normally impose a penalty of more than a fine or six months imprisonment. Magistrates Courts also have the task of examining in the first instance all charges which are triable only in superior Courts, and if they consider that there is a *prima facie* case for the accused to answer, of committing them to those Courts for trial. There are no distinct categories of crimes in English law, as are found in Continental countries, determining the courts by which they must be tried. All criminal offences tried at the Central Criminal Court or at Assizes or at Quarter Sessions (except where the prisoner pleads guilty), are tried by a jury of 12 lay members of the public.¹ One of the Judges of the High Court or a Queen's Council appointed *ad hoc* as a commissioner presides at Assizes and the Central Criminal Court (where, however, there are other Judges who sit there permanently). Quarter Sessions are presided over either by a Recorder (a member of the Bar who sits as a Judge

* The legal profession is of such vital importance to the administration of justice that the International Commission of Jurists has devoted a special section of its Questionnaire in the Rule of Law to the topic. See I.C.J. Newsletter No.1 (obtainable from the headquarters of the Commission, Buitenhof 47, The Hague, Netherlands). This article is the first of a series on "The Legal Profession and the Law" and in future issues of this *Journal* the position in other countries will be reviewed.

¹ Juries in civil cases are now very rare, except in trials for defamation and breach of promise of marriage.

for a short period four times a year) or by a body of lay and unpaid magistrates, with a legally qualified Chairman (a Barrister or Solicitor). There are no juries at Petty Sessions (Magistrates Courts) which consist of lay unpaid magistrates. In London and a few of the larger towns in the provinces, a legally qualified paid Magistrate sits as a single Judge. He is known in London as a Metropolitan Magistrate and a Stipendiary Magistrate in the provinces.

It is important to explain in connection with the Bench in England that there is no judicial service equivalent to that in continental countries. There is no such thing as a judicial career. A person who wishes to practise law in any capacity must become either a barrister or a solicitor. All High Court Judges and County Court Judges are selected from the ranks of those barristers who have built up a substantial private practice over the course of many years. A Recorder must be a barrister of at least 5 years' standing. Chairmen of Quarter Sessions and Metropolitan and Stipendiary Magistrates must be either barristers or solicitors.

In the same way there are no professional prosecutors in England and Wales. Prosecutions are conducted by members of the Bar in those courts where they have exclusive right of audience and by solicitors or the police in Magistrates Courts. Where members of the Bar prosecute, they are instructed on behalf of the police. In serious cases they are instructed by the Director of Public Prosecutions (a Government Department). In the most serious cases of all, e.g., treason, offences under the Official Secrets Act, murder by poisoning, the prosecution is conducted by a Law Officer (Attorney General, or Solicitor General) who are barristers, but also members of the Government of the day and paid as servants of the Crown.

The number of judges and full time judicial officers in England and Wales is extremely small.

| | |
|--|----|
| House of Lords and Privy Council | |
| (Lords of Appeal in Ordinary) | 9 |
| Court of Appeal (Lords Justices of Appeal) | 12 |
| High Court Judges | 42 |
| County Court Judges | 65 |
| Recorders | 97 |
| Metropolitan Magistrates | 27 |
| Stipendiary Magistrates | 13 |

Procedure

The procedure adopted at all trials in English Courts, both Civil and Criminal, follows the same pattern. This pattern differs essentially from that of continental countries, in that a trial is not primarily an enquiry or inquisition by the presiding judge, but rather a contest between the parties, in favour of one of whom the Court

be it judge or jury, or magistrates, must at the end give its findings. In all trials of first instance the emphasis is always on the oral evidence given by parties and witnesses and the weight to be attached to each rather than upon written contentions or dossiers.

Apart from the speeches of counsel (or solicitors) and the summing up by the judge at the conclusion of the trial in cases where there are juries, every hearing is taken up with the examination of witnesses. Each witness normally goes through three stages of examination — examination-in-chief (by counsel for the party on whose behalf he is giving evidence) cross-examination (by counsel on the other side) and re-examination (by counsel who examined him in chief).

The object of examination in chief is to extract the witness's evidence in the shortest, simplest and most telling manner. Counsel who is examining the witness may not put evidence into his mouth by asking leading questions, i.e., questions which themselves suggest the answers. The question "Did you see the accused trying to open the door of a car at 9 p.m. on 20th December in St. James's Square" is inadmissible. Counsel would have to ask the witness

- a) Have you seen the accused before?
- b) When and where did you last see him?
- c) What was he doing?
- d) What time was it?

The object of cross-examination is to destroy or at least minimise the effect of the evidence previously given by the witness. It may be directed both to the substance of his evidence and as to credit. In other words he may be questioned not only about points in the story he has told so far but also about unconnected matters, the object being to test whether he is the sort of person whose evidence should be believed. Leading questions may be asked in cross-examination. As will be seen later on there are rules which govern the limits within which counsel may conduct the cross-examination of witnesses.

The purpose of re-examination is to clear up, if possible, points of doubt which may have arisen as a result of cross-examination. It must be confined to matters which have already been the subject of evidence given by the witness.

The judge is at liberty to ask questions of a witness at any stage but he must not do so too frequently. If he does, he will be said "to have descended into the arena and been blinded by the dust of the conflict". Undue interference by a judge may form a good ground of appeal to a higher court.

In a criminal case there is (apart from one or two technical and special exceptions) always a burden upon the prosecution to prove the guilt of the accused to the reasonable satisfaction of the

Jury or of the Magistrates. Unless it can do so, the accused must be acquitted. In a civil case victory goes to the side with a preponderance of evidence.

The English Legal Profession

The legal profession in England and Wales is, and for centuries has been, divided into two branches. This division is more complete and clearly defined today than at any time in the past. Legal practitioners consist of barristers, on the one hand, and solicitors (formerly called attorneys), on the other.

Barristers cannot act for clients except upon the instructions of a solicitor. Clients accordingly always have to go to a solicitor in the first instance. Solicitors are concerned with legal work of every variety, contentious and non-contentious alike. A great deal of their work consists of non-contentious matters, such as the conveyance of land, and the making of wills and settlements. In contentious matters they are concerned with the preparatory side of litigation, taking statements from potential witnesses and preparing instructions upon which a barrister will appear in court. Solicitors have a right of audience in both the County Courts and Magistrates Courts and many of them act as advocates. When they do so act they normally handle their own cases from start to finish.

Barristers specialize in advocacy and they have exclusive right of audience in the High Court and share with solicitors right of audience in other courts. Apart from pleading in court, however, it is part of their normal duties to advise on the merits of a case and the prospects of success if it should come before a court; to settle the pleadings in civil actions, e.g., Statement of Claim or Defence, in which the issues to be tried by the court are defined; and to advise as to the evidence which will have to be adduced on behalf of a client if his case is to succeed. Barristers, especially those practising in the Chancery Division, may also be instructed to act in non-contentious matters, e.g., to draft wills, conveyances of land or settlements, etc.

There are some 17,000 practising solicitors in England and Wales and 2000 practising barristers. The professional organisation of solicitors is the Law Society.

II. HISTORY AND ORGANIZATION OF THE ENGLISH BAR

History of the Bar

In Norman times (11th—13th centuries) it was quite common for a party to have assistance in the conduct of his case, but this

was given by a friend not by a professional expert. The main function of this friend was to recite the formal words necessary in the making of a claim of defence, and the reason for persuading him to do it was that if he (the friend) made a mistake the party could disown it with impunity, whereas, if one party were to make an error himself, it would be fatal to his case. By the thirteenth century, however, the Common Law of the country, and the procedure as developed by the courts which enforced it, had become so complicated that a need for more expert assistance arose. As a consequence the friend of the party came to be replaced by a professional pleader or 'narrator' who not only conducted the oral pleadings but argued questions of law on behalf of his client, and it is from the 'narrator' that the barrister of present times is descended.

In the reign of Edward I (1272—1307) a second class of professional lawyer emerged, called an Attorney, to whom the modern solicitor owes his origin. The Attorney was not a mere assistant in the conduct of litigation, but a person who was competent to act in place of his client as his agent. A need for such a representative arose because some litigants, especially large landowners, found it difficult or inconvenient to attend court and carry through their cases in person. This division of the profession into two different categories of lawyer, though passing through many stages of development and evolution, has remained in England to the present day.

In early times the education of all lawyers was placed in the hands of the judges who had authority to decide which of them might practise before the Courts. Gradually we find a picture emerging of groups of junior practitioners and students (apprentices) gathered in the house of some great lawyer or judge under whom they studied. These groups in the course of time formed themselves into permanent societies, each with its Inn or premises where its members lived a more or less communal life. Of these Inns of which there were at one time quite a number, only four survive today as communities of lawyers — Lincoln's Inn, Inner Temple, Middle Temple and Gray's Inn. They have changed little in their organization during the 600 years or more since they were formed. In affect the Inns were residential colleges similar to a University for the study of the Common Law; but in addition to law, tuition was given in other subjects also such as music, history and dancing and it was customary for the sons of wealthy families to be sent there for a polite and useful education even though they did not intend to practise.

The Inns comprised (as they do today) three distinct groups of persons. First, there was a governing body of senior members called 'Benchers' because they acted as judges on the bench at the frequent moots or mock trials which constituted one of the main

methods of instructing students. Secondly, there were the utter or outer barristers who were sufficiently advanced academically to argue in the moots, and lastly the inner barristers or students who were not allowed to argue at the moots, but had to attend for the purpose of instruction. The significance of the words 'utter' and 'inner' as applied to these last two classes of barrister, lay in the places (outer or inner ends) on the forms which they had to occupy respectively when moots took place.

The word 'barrister' was not actually found in use before the fifteenth century. Up to that time we find pleaders and students divided into two categories, Serjeants and apprentices. The Serjeants who were few in number were primarily the King's own advocates and legal advisers, though they were free to take cases other than on behalf of the Crown, and even against the Crown. Until the time of James I (1603—1625) they had precedence in court over other counsel. All Judges were selected from their number. The Serjeants were selected from amongst the ranks of the apprentices. In some, if not all courts, they originally had sole right of audience and it was therefore possible that at one time the apprentices were no more than students, but it is clear that in due course they formed the greater part of the practitioners. No more Serjeants were appointed after 1877 and the last of their order died in 1921.

At one time Attorneys could be members of the Inns of Court (though it is not clear whether they had to be such) and until the end of the seventeenth century could be called to the Bar. They were also permitted by the Court to plead their clients' cases in court. By the eighteenth century, however, the clerical and preparatory side of legal work came to be recognised as the proper and principal function of Attorneys and at that stage they were no longer admitted to the Inns or called to the Bar.

In the sixteenth century a new rank of barrister appeared, taking precedence after the Serjeants and over other barristers. These were the King's Counsel. They came into being as a result of a practice of appointing leading barristers to be counsel to the Crown and to advise and assist the Attorney General and the Solicitor General. It was their duty to give their services to the Crown as and when required. Originally they were paid £40 per annum for this retainer but later, fees according to the work actually done. In the eighteenth century the duty to the Crown became nominal, although it was only comparatively recently (1920) that King's Counsel were relieved of the need to obtain a special licence before appearing against the Crown. Queen's Counsel (as they are called during the reign of a Queen) wear silk gowns in court and are commonly referred to as 'silks'. Other counsel wear stuff gowns and are referred to as stuff-gownsmen or juniors.

As already explained, the control of legal education passed out of the hands of the Judges to the Inns of Court. With it went also control of the power to admit persons to practise before the Courts and of the revocation of admission once granted, i.e., power to call to the Bar and to disbar or suspend. These powers are still said to be delegated to the Inns by the Judges. This proposition is supported by the fact that a member of an Inn who has been disbarred or suspended is still entitled to appeal to a Committee consisting of the Lord Chancellor and the Judges of the Supreme Court.

Whilst the Inns of Court provided from early times an organization of the profession in London, further organizations came into being in the provinces as the result of the Circuit system. It was Henry II (1154—1189) who first sent judges out from London to travel round the Kingdom and at Assizes to administer both the civil and criminal law. The country was divided up into different Circuits and one or more judges were allotted to each circuit, within which they travelled from town to town. As the judges moved from place to place, the clerk of the court and Members of the Bar moved too, on horseback or by coach. There was no question as today of barristers travelling back to London between the conclusion of one case and the beginning of the next or between Assizes. The distances were too great and the means of travel too slow. Consequently the members of the Bar on each circuit formed themselves into communities which reproduced some of the features of the life of the Inns of Court in London; and especially the habit of dining together at night after the Court had risen. These communities or Circuit Bar Messes as they were (and are) called, although possessing none of the disciplinary powers of the Inns of Court in London, nevertheless maintained a strict standard of professional behaviour amongst their members if by nothing more than the moral force of collective opinion.

Compared with the Inns of Court and the Circuits, the General Council of the Bar is a completely modern institution. It came into being in 1895, as the successor of the Bar Committee which first appeared twelve years earlier in 1883. The need had evidently begun to be felt by that time for a single body which could speak for the Bar with one voice and act promptly on its behalf in an era in which corporate representation was becoming increasingly important. The four Inns were still performing all the functions they had performed for several centuries, but in spite of machinery for maintaining liaison between them, they were not collectively organised to act with speed and unanimity in regard to the increasing number of matters, both internal and external, requiring the attention of the profession. The functions which devolved upon the Bar Committee and the General Council of the Bar had to some extent been previously undertaken by the Attorney General who had for long been

recognized (as he still is today) as the head of the Bar — and particularly as regards the giving of opinions on matters touching upon professional etiquette. But his official duties must have increased very considerably during the nineteenth century and could obviously only leave him limited time for attention to professional matters. In addition there was a growing demand at the Bar for representation through an elected body as had already long been the case with the solicitors' branch of the profession.

The General Council of the Bar was established as a result of General Meetings of the Bar in 1894 and 1895. The Inns of Court gave their approval and undertook to contribute financial assistance on the understanding that the Council would not claim to exercise any of the jurisdiction, powers or privileges of the Inns.

Constitution and Organization of the General Council of the Bar

The General Council of the Bar, normally called the Bar Council, is the only single body which represents the Bar of England and Wales. It derives its authority from the Bar acting in General Meeting and by virtue of that authority is under a permanent duty to consider all matters affecting the profession and to take such action thereon as it deems expedient.

The Council is for the most part an elected body, 48 out of its 58 members being elected members. Of the remaining 10, the Attorney General and Solicitor General are *ex-officio* members. There are also 8 additional members who are appointed each year by the elected members to represent those sections of the Bar, e.g., Tax, Parliamentary, Patent and Divorce Bars, which are not normally able to obtain representation through the ballot box. Two of the additional members may be non-practising barristers.

All members of the Bar are entitled to vote at the Annual Election which now takes place in the latter part of July. Ballot papers are sent out by the Secretariat to all practising members of the Bar and to such others as subscribe to the Council, but any barrister who has not received a ballot paper is entitled to have one on request. Twenty-four members are elected each year to fill vacancies caused by the compulsory retirement of those twenty-four of the forty-eight elected members who have been longest in office. Provided he has not served for more than four years consecutively and has not attained the age of 72, a member of the Council who retires by rotation, is eligible for re-election.

The Officers of the Council — Chairman, Vice-Chairman and Treasurer — are elected each year at the first meeting of the Council which takes place after 1st October (the beginning of the legal year). A Chairman may not serve as such for more than four years consecutively and the same applies in practice to the Vice-Chairman and Treasurer.

Once a year (now in July) the Council faces the Bar at the Annual General Meeting which is normally held in the mediaeval surroundings of the Middle Temple Hall. Any member of the Bar is at liberty to put down for discussion at this meeting any resolution he pleases, provided he gives at least 21 days notice of it in writing to the Secretary of the Council. Before these private resolutions are moved and debated, the meeting is addressed by the Attorney General who, as the head of the Bar, presides, and by the Chairman of the Council. It is customary for these addresses to include a review of the principal matters which have been engaging the attention of the Council during the previous twelve months and to touch on the more acute problems facing the profession and the lines along which solutions have been or may be sought. The Chairman concludes his address by moving the adoption of the Annual Report, or Annual Statement as it is called, of the Council covering the Council's activities over the past year. The Statement is circulated to the Bar about a month before the Annual General Meeting. Apart from the Annual General Meeting, the Council can and sometimes does convene Extraordinary General Meetings of the Bar; and an Extraordinary General Meeting can also be requisitioned at any time by not less than 40 practising barristers.

The business of the Council is conducted in the main by its several committees. There are seven standing committees, Executive, Professional Conduct, Law Reform, External Relations, Legal Aid, Court Buildings, and Legal Education. There are also two Standing Joint Committees — one with the Inns of Court and the other with the Law Society. In addition the Council has four members on the Law Society's Legal Aid Committee on which falls the burden of the administration of the Legal Aid and Advice Act 1949. Special Committees are appointed as and when required. A very wide range of business is dealt with by the Executive Committee which meets once a fortnight during term time.

All business is attended to in the first instance by the Secretariat and, wherever necessary, allotted to the appropriate Committees. Committees have a wide authority to take decisions on matters referred to them. Otherwise they make recommendations to the full Council. The Council meets once a month during term time and the Agenda consists of reports and recommendations from the various committees. As regards finance the Council derives the majority of its income from subscriptions and the remainder from annual contributions by the Inns of Court. Every practising member of the Bar (there are approximately 2000) is expected to subscribe a specified amount each year according to his seniority; but the Council has no sanction to enforce the payment of subscriptions and its willingness to give its services to a member of the Bar is not dependent

upon his being a current subscriber. A measure of financial support is received also from members of the profession who are not in practice but who wish to keep in touch with the Council's activities.

The Work of the Council

As already explained it is the function of the Council to consider all matters affecting the profession and to take such action thereon as it deems expedient. More specifically its objects as provided by a revised constitution approved by the Bar in a General Meeting in 1946, are as follows: —

- a) The maintenance of the honour and independence of the Bar, and the defence of the Bar in its relations with the Judiciary and the Executive.
- b) The encouragement of legal education and the study of jurisprudence.
- c) The improvement of the administration of justice, procedure, the arrangement of business, law reporting, trial by jury and the circuit system.
- d) The establishment and maintenance of a system of prompt and efficient legal advice and aid for those persons in need thereof irrespective of their capacity to pay.
- e) The promotion and support of law reform.
- f) Questions of professional conduct, discipline and etiquette.
- g) The furtherance of good relations and understanding between the two branches of the legal profession.
- h) The furtherance of good relations between the Bar and lawyers of other countries.
- i) The protection of the public right of access to the Courts and of representation by counsel before Courts and Tribunals.

As will be seen from the earlier paragraph on organization the Council consists, with two possible exceptions, of practising barristers and it is in general true to say that it represents primarily the interests of the practising profession. One of the phenomena of the Bar today is the large proportion of men who are called and then do not proceed to practise or, if they do, cease within a comparatively short time. This is due largely to economic reasons and especially to the difficulty of young men in finding means to support themselves during the initial years of practice when earnings are negligible. But whatever the reasons the result is that in contrast to the 2000 barristers who are in practice, there are probably three or four times that number who have entered other occupations — e.g., Government, Service, Colonial Legal Service, Local Government, commerce and industry. The Council does not attempt to provide any collective form of representation for these barristers. Their activities and interests are so diverse that it would in any

event be impossible. But it is prepared to consider requests for support which may be made by any particular section of non-practising barristers. For example, the Council supported members of the Bar in the Government Legal Service some years ago in a claim for higher salaries. But quite apart from the question of support the Council cannot ignore the activities of non-practising barristers where they threaten to undermine the high standing of the profession or to bring the Bar into conflict with the solicitors' branch of the profession. It follows that the Council has a limited responsibility for those who are qualified but do not practise as barristers and has perforce to lay down from time to time rules for their guidance. It does in fact receive requests for advice from and gives guidance to a substantial number in the course of each year. But subject to these preliminary observations, further references to the Bar and to barristers are directed to the practising profession.

III. DISCIPLINE AND PROFESSIONAL ETIQUETTE

It will be noted that one of the declared objects of the Council above referred to is — questions of professional conduct, discipline and etiquette. It must be explained, however, that the Council has no direct disciplinary powers at all. The only persons who can enforce any form of punishment for acts of professional misconduct are the Benchers or governing body of the Inn of Court of which the offender is a member. The Benchers have power to disbar, suspend from practice or to reprimand. There is always a right of appeal by a barrister who has been found guilty of professional misconduct by his Inn to the Lord Chancellor and a Committee of Judges of the High Court.

Although the Council has no power to impose punishment, it can and does investigate complaints which are made to it concerning the professional conduct of members of the Bar. If upon investigation, the Council considers that disciplinary action is *prima facie* merited, it directs the file to be sent to the appropriate Inn for the consideration of the Benchers. The Council also gives rulings on questions of etiquette which are published each year in its Annual Report or Annual Statement as it is called. These rulings, given over a period of 70 years, cover a very wide range of subjects. In some fields individual rulings have been consolidated into coherent sets of rules. The Council has no power to enforce these rules or rulings but a barrister who ignores or commits breaches of them is liable to be reported to his Inn. Perhaps an even more effective sanction is the moral force of collective opinion of the Bar expressed through the Council for which the great majority of barristers have the highest regard.

Principal Rules Governing Practice at the Bar

Before attempting to explain the rules with which a barrister must comply in the actual conduct of his practice, it is relevant to enumerate certain fundamental principles, though not necessarily of an ethical character, which have to be scrupulously observed by every member of the Bar who decides to follow his profession.

Firstly, as has already been explained, a barrister cannot do any professional work, except upon the instructions of a solicitor. This rule did not until recently extend to the field of non-contentious business, but it is now virtually all-embracing. Important exceptions, however, are

- a) the ancient rule that a prisoner who is unrepresented may, when he is brought into the dock, select to act for him any counsel who happens to be in court at that moment, for the fixed fee of two guineas (known as a dock brief) and,
- b) cases where a Judge, or Recorder or Chairman of Quarter Sessions, asks counsel in court to undertake the defence of a prisoner who is without means to pay for legal representation privately. In such cases a solicitor is not employed.

Secondly, a barrister may not enter into any form of partnership. He must rely entirely (apart from assistance received from his clerk and advice frequently sought and obtained from his colleagues) upon his own efforts, skill and ability. The idea not uncommon in the minds of laymen that because barristers have common sets of chambers there is some form of association between them is unfounded. A client instructs a firm of solicitors (who may be partners) but the solicitors do not instruct a firm of barristers; they must instruct one (or more) individual counsel. And where a barrister who has been instructed to appear in court finds for any reason that he is unable to do so, he cannot hand over the case to another barrister without the consent of the solicitor. Unless such consent is forthcoming he must return his brief (as his instructions are called) to the solicitor.

Thirdly, a practising barrister may not carry on any other profession or business or be an active partner in or a salaried official or servant in connection with any such profession or business. The origin of this rule probably lies in the centuries-old conception that the engagement by a member of a gentlemanly calling in business was something to be regarded as derogatory. It was (and still is) applicable also to some of the other professions, e.g., to officers of the armed forces of the Crown. But today a perhaps more cogent reason which underlies the principle is the importance of maintaining the position of complete detachment and independence in which a practising barrister is expected to hold himself. Were it possible for a barrister readily to practise also in another profession or to

enter into business transactions, a danger would arise of his being subjected to external influences which might affect detrimentally his objectivity towards the clients for whom he is retained to act in the course of his legal practice.

The general rule is not without exceptions, perhaps the most important of which is that a practising barrister may be a Member of Parliament. He may also be a director (but not a Managing Director) of Companies of good standing (a Company which conduct football and racing pools does not come within this definition). In creating this latter exception, the Council has drawn a distinction between the usual work of ordinary directors in the privacy of a Boardroom, on the one hand, and the active carrying on or management of a business, on the other.

It is also well established that a practising barrister may engage in journalism and lecturing (which includes a full time lecturership at a University) and the coaching of pupils for law examinations; and it has long been a practice for members of the Bar in the spare time to "vet" for fees or a salary proofs of newspapers for defamatory matter. Finally it should be mentioned here that many practising barristers give their services at Legal Advice Centres which have been set up in London and elsewhere to give free advice to those members of the public unable to pay for it, but for this work they may not receive remuneration.

Fourthly, a barrister is strictly prohibited from any form of self-advertisement and from canvassing (or 'touting' as it is called) for professional business. Until recently this rule was unwritten, but breaches of it in recent years have prompted the Council to draw up and publish guidance for the Bar of a detailed character. The following points may be of interest.

A barrister may not normally describe or permit himself to be described as such, for example on his stationery or visiting cards, or in conjunction with articles written by him for the press or periodicals, unless they are legal periodicals. He may not write for publication or otherwise give any publicity to his life, earnings or practice at the Bar. Under no circumstances may he give an interview to the press concerning any case or matter in which he is or has been engaged. He may not take steps to procure or permit the publication of his photograph as a member of the Bar in the press or any periodical. Fourthly, a barrister may not broadcast (on sound or television services) on a legal subject without the consent of the Bar Council; and in giving consent the Council has to consider in each case how the member of the Bar may be announced and described in conjunction with the broadcast.

Finally, a barrister must not negotiate his own professional fees. The fee for each item of work which he does must be negotiated and agreed between his clerk and his instructing solicitor or

the solicitor's managing clerk. The fee agreed for conducting a case in court must always be marked upon the brief before the case begins. Under no circumstances may a 'contingent' fee be accepted, i.e., a fee which depends upon the result of a case.

Rules governing the Acceptance of Instructions

A barrister is bound to accept any brief in the courts in which he professes to practise at a proper professional fee dependent on the length and difficulty of the case. He cannot pick and choose his cases. Indeed, he has been compared for this reason with a taxi-driver on the rank, who is bound to take the first passenger who wishes to hire his cab.

It is of interest to note in this connection the contrast between the obligation placed upon a member of the English Bar and the principle which governs advocacy in the courts of some other countries, namely, that a lawyer should not act in any case in the right-eousness of which he does not honestly believe. Such a thesis is quite incompatible with the contribution which the Bar makes to the English legal system, for two reasons. Firstly, it could (in the eyes of the profession at least) provide a wholly undesirable avenue of escape for a member of the Bar asked to undertake some unpopular cause; and secondly, it would result in counsel departing from his role of advocacy and usurping the functions of the court itself. This fundamental rule of the profession finally became established in 1792 as a result of the trial of Tom Paine. Tom Paine had written a book called the 'Rights of Man' which contained some offensive remarks about the Sovereigns, William III and George I. He was prosecuted for seditious libel. Thomas Erskine, a member of the English Bar, felt that it was his duty as a barrister to defend the prisoner to the best of his ability. Great pressure, however, was put on him to persuade him to refuse the brief, but he accepted it and when he came to address the jury, he used these memorable words:

"I will forever, at all hazards, assert the dignity, independence and integrity of the English Bar without which impartial justice, the most valuable part of the English constitution can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise — from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgement; and in proportion to his rank and reputation puts the heavy influence of perhaps a mistaken opinion into the scales against the accused in whose favour the benevolent principle of English law makes all presumption and which commends the very judge to be his counsel."

The jury found Paine guilty, and Erskine was made to suffer for accepting the brief. He lost his office as Attorney-General to the Prince of Wales who, however, later made amends by appointing him Chancellor.

There are more modern examples of this fundamental duty of the English barrister being put to the test. In the 1920s two eminent counsel who were also Members of Parliament accepted instructions to appear on behalf of certain public men to whom they were politically opposed and whose character had been attacked in connection with matters which had aroused the bitterest party feeling. A great controversy arose and received much publicity in 'The Times' as to whether the counsel concerned had acted correctly in accepting the instructions. The suggestion was made that the rule whereby a barrister is under the duty to accept any brief in the Courts where he professes to practise should be discarded where obedience to it would involve dereliction of higher duties to the State. It was contended that by taking up these cases the counsel in question had rendered impossible the performance of their duties as Members of Parliament to their constituencies and to the public. But in the eyes of the profession the two counsel acted entirely in accordance with their duty as members of the Bar. A barrister may if he chooses stand as a candidate for, and if he is elected, become a Member of Parliament but the duties and obligations which he assumes by so doing cannot modify the duties which he owes as a member of the Bar to those clients who wish to retain his professional services.

More recently still there are the examples during the Second World War where members of the English Bar defended spies or 'fifth columnists' who were held in particular odium by the general public. No member of the Bar ever refused to appear for one of these and a number were represented by counsel of the greatest distinction.

The position is summarized most succinctly by Dr. Samuel Johnson who said: —

"A lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the Judge. Consider, Sir, what is the purpose of Courts of Justice? It is that every man may have his cause fairly tried, by men appointed to try causes. A lawyer is not to tell what he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the Judge and determine what shall be the effect of evidence — what shall be the result of legal argument . . . If lawyers were to undertake no causes till they were sure they were just, a man might be

precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim."

The rule that a barrister must accept any brief in the courts in which he professes to practise has its exceptions. The first applies where counsel is faced with a conflict of interests in the shape of special circumstances which would render it difficult for him to maintain his professional independence or would otherwise make the acceptance of instructions incompatible with the highest interests of the Judge and determine what shall be the effect of evidence — different ways. A common example is where a barrister is a member of or closely associated with some body or association in a non-professional capacity. In such a case the general rule is that he may not appear professionally for or against that body or association. For example, a barrister who is a member of a local authority may not accept a brief for or against the authority, and a barrister who is a director of a company may not appear on behalf of that company.

The same principle applies where a barrister holds an appointment connected with the administration of justice. Thus a Recorder may not appear either for the prosecution or the defence at a Magistrates' Court of the borough of which he is Recorder, and a barrister who is a county magistrate ought not to practise either at County Quarter Sessions or at any Magistrates' Court composed of justices of the county of which he is a magistrate.

The second exception to the general rule as to the acceptance of briefs applies where counsel finds that he would be personally embarrassed. Embarrassment may arise in two different ways. The first is where counsel finds himself in possession of confidential information from a source other than his instructions. His duty in such circumstances has been laid down as follows: —

"No counsel can be required to accept a retainer or brief or advise or draw pleadings if he has previously advised another person on or in connection with the same matter, and he ought not to do so if he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by such other person, or if his acceptance of a retainer or brief or instructions to draw pleadings or advise would be inconsistent with the obligation of any retainer held by him, and if he has received any such retainer, brief or instructions inadvertently he should return the same."

Secondly, embarrassment may arise out of some personal relationship between counsel and a party to the proceedings. Although no written rule is to be found, it is well established that if because of such relationship counsel would find it difficult or impossible to maintain the independence and objectivity which is ex-

pected of him in the performance of his duty to his client, he is justified in declining to act and, indeed, ought not to do so. He could not, for example, reasonably be expected to prosecute, or in civil proceedings to appear against a close relative or personal friend.

The employment of counsel places him in a confidential position and imposes upon him the duty not to communicate to any third person information which has been confided to him in his capacity of counsel. This duty has been established by decisions of the courts as well as being a rule of etiquette of the profession. The courts will even interfere by injunction to prevent counsel from disclosing the secrets of the client.

The nature of practice at the Bar is such that counsel sometimes finds that two cases in which he has been briefed to appear are due to be heard on the same day and that he is consequently unable to attend to both of them. It is a paramount duty of a barrister not to embarrass his client and where he foresees a clash of commitments to allow sufficient time for another counsel to be engaged and to master the brief. But he may not return a brief for the defence of an accused person who is to be tried on a capital charge, apart from the most extreme and exceptional circumstances, and then only if sufficient time remains for another counsel to master the case; but no question must arise of the prisoner being even remotely prejudiced through publicity being given to the fact that counsel originally retained is to give up the case. Where a clash occurs between a brief to defend a person charged with a criminal offence and another in a civil case, it is normally the latter which counsel must return. Sir John Simon (as he then was) said in an address to the Canadian Bar Association at Ottawa in 1931:

"There is an honourable tradition at any rate at the English Bar that even a man who may be busy with different cases, if he undertakes and is called upon to defend the meanest criminal charged with a crime, is bound to give his own personal attention to that work, odious and unremunerative as it may be, to the exclusion of all other business coming his way".

The Conduct of Proceedings

According to the best traditions of the Bar of England, a barrister should, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interests of his client without regard to any possible unpleasant consequences either to himself or to any other person. As regards the defence of prisoners, counsel has the same privilege as his client of asserting and defending the client's rights and of protecting his liberty or life by the free and unfettered statement of every fact and the use of every argument and observation that can legitimately, according to the principles and practice of law, conduce to this end, and any

attempt to restrict this privilege is jealously watched. Every counsel for an accused man must spare no effort to defend him, no matter how much public opinion is against the man, no matter how distasteful is the task, no matter how inconvenient to himself and no matter how small his fee. He must make the most of every flaw and every gap in the net which seems to be closing round the unhappy man. But he is not entitled to attribute wantonly or recklessly to another person the crime with which his client is charged unless the facts or circumstances given in evidence, or rational inferences drawn from them, raise at the least a not unreasonable suspicion that the crime may have been committed by the person to whom the guilt is so imputed.

Nor may counsel, if he is defending, provide or devise a line of defence for the accused. This raises the question as to what counsel may do if his client makes a confession of guilt. The guidance given by the Bar Council on this point is as follows:

"Different considerations apply to cases in which the confession has been made before counsel has undertaken the defence and to those in which the confession is made subsequently during the course of the proceedings.

"If the confession has been made before the proceedings have commenced, it is most undesirable that a counsel to whom the confession has been made, should undertake the defence, as he would most certainly be seriously embarrassed in the conduct of the case, and no harm can be done to the accused by requesting him to retain another counsel.

"Other considerations apply in cases in which the confession has been made during the proceedings, or in such circumstances that the counsel retained for the defence cannot retire from the case without seriously compromising the position of the accused.

"In considering the duty of a counsel retained to defend a person charged with an offence who, in the circumstances mentioned in the last preceding paragraph, confesses to counsel himself that he did commit the offence charged, it is essential to bear the following points clearly in mind: (1) that every punishable crime is a breach of the common or statute law committed by a person of sound mind and understanding; (2) that the issue in a criminal trial is always whether the accused is guilty of the offence charged, never whether he is innocent; (3) that the burden of proof rests on the prosecution. Upon the clear appreciation of these points depends broadly the true conception of the duty of the counsel for the accused. His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence suffi-

cient to support a conviction for the offence with which he is charged.

"The ways in which this duty can be successfully performed with regard to the facts of a case are (a) by showing that the accused was irresponsible at the time of the commission of the offence charged by reason of insanity or want of criminal capacity, or (b) by satisfying the tribunal that the evidence for the prosecution is unworthy of credence, or, even if believed, is insufficient to justify a conviction for the offence charged, or (c) by setting up in answer an affirmative case.

"If the duty of counsel is correctly stated above, it follows that the mere fact that a person charged with a crime has in the circumstances above mentioned made such a confession to his counsel, is no bar to that counsel appearing or continuing to appear in his defence, nor indeed, does such a confession release the counsel from his imperative duty to do all he honourably can do for his client.

"But such a confession imposes very strict limitations on the conduct of the defence. A counsel may not assert that which he knows to be a lie. He may not connive at, much less attempt to substantiate, a fraud."

"While, therefore, it would be right to take any objection to the competency of the court, to the form of the indictment, to the admissibility of any evidence, or to the sufficiency of the evidence admitted, it would be absolutely wrong to suggest that some other person had committed the offence charged, or to call any evidence, which he must know to be false having regard to the confession, such, for instance, as evidence in support of an alibi, which is intended to show that the accused could not have done or in fact had not done the act; that is to say, a counsel must not (whether by calling the accused or otherwise) set up an affirmative case inconsistent with the confession made to him.

"A more difficult question is within what limits, in the case supposed, may a counsel attack the evidence for the prosecution either by cross-examination or in his speech to the tribunal charged with the decision of the facts. No clearer rule can be laid down than this, that he is entitled to test the evidence given by each individual witness, and to argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged. Further than this he ought not to go."

A prosecuting counsel stands in a positions quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation. Crown counsel is a

representative of the State; his function is to assist the jury in arriving at the truth. He must not urge any argument that does not carry weight in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused. It is not his duty to obtain a conviction by all means; but simply to lay before the jury the whole of the facts which comprise his case, and to make these perfectly intelligible and to see that the jury are instructed with regard to the law and are able to apply the law to the facts. The business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury.

It would be improper for counsel for the prosecution to attempt by advocacy to influence the court towards a more severe sentence, or, after a plea in mitigation by defending counsel who asks that the prisoner be bound over to keep the peace, to tell the judge that he opposes the suggestion. It is, however, a common and proper practice, especially in the case of an unrepresented offender, for prosecuting counsel to draw the attention of the court to any mitigating circumstances as to which he is instructed.

Counsel always has to bear in mind that in addition to his duty to his client, he also has a duty to the court and these two obligations sometimes appear to be in conflict. He must on no account deceive or mislead the court, and this rule extends to the point of making it obligatory for counsel to draw the attention of the court to any relevant statutory provision or binding decision which is immediately in point whether it be for or against his contention. But counsel is under no duty to disclose facts known to him regarding his client's character or antecedents, nor to correct information which may be given to the court by the prosecution if the correction would be to the client's detriment. Counsel ought always to treat the court with courtesy and deference, and this applies equally to a Bench of magistrates in the country as to the highest court in the land.

It is a recognised practice that witnesses (other than the parties and experts or professional witnesses who are instructing counsel), should not be present at consultations or conferences with counsel and that counsel should not interview such witnesses before or during a trial. It is recognised, however, that there must necessarily be exceptions to this practice, and it is a matter which has to be left to the judgment and discretion of counsel in each case, as to whether a departure from the practice is justified. Except with the consent of counsel on the other side or by leave of the Tribunal, counsel may not, however, communicate directly or indirectly with a witness (whether or not his client) who has begun to give evidence, until his evidence is concluded.

Reference has already been made at the beginning of this article to the testing of the evidence of witnesses by cross-examina-

tion. This is a powerful weapon in the hands of counsel who knows how to use it to the best advantage. It is of vital importance that it should not be abused and with that object in view the Bar Council has laid down rules which define the limits of its legitimate use. The principal rules are as follows. Counsel must not ask a witness questions which are only intended to insult or annoy him or some other person; and he must be on his guard against being used by his client as a channel for putting questions in this category. He must not ask a witness questions suggesting fraud, misconduct or the commission of any criminal offence, if the only purpose of such questions is to impugn the witnesses character. But he is justified in putting such questions if he is satisfied that the matters suggested to the witness are part of his client's case. Questions which attack the character of the witness with the object of shaking his credibility (but are not otherwise relevant to the issues in the case) must not be asked unless the counsel asking them has reasonable grounds for thinking that the imputation conveyed by question is well founded or true; and whilst counsel may accept a statement from his instructing solicitor that the imputation is well founded or true, he cannot without ascertaining so far as is practicable in the circumstances that there are satisfactory reasons for it, accept such a statement from any other person.

WILLIAM W. BOULTON *

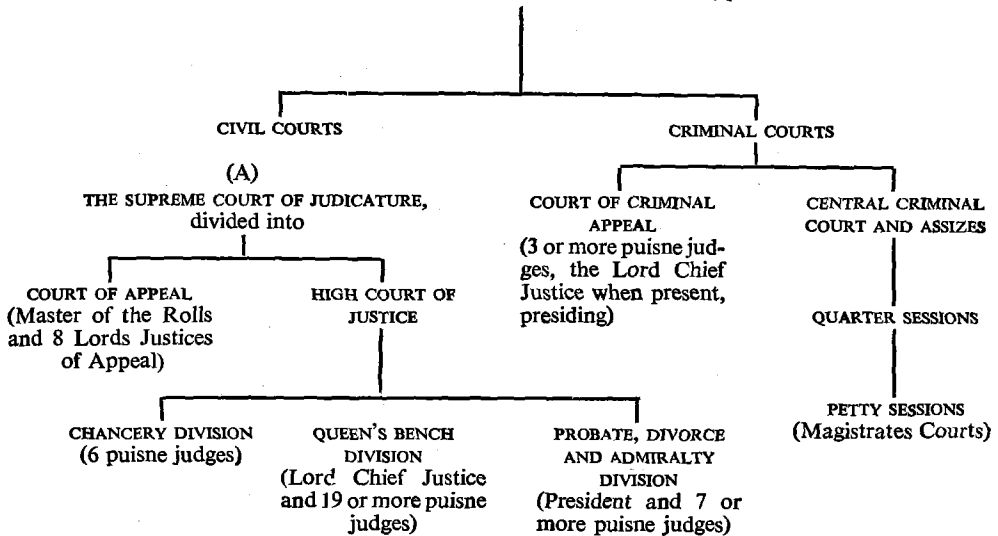
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APPENDIX

THE ENGLISH LEGAL SYSTEM OF COURTS

HOUSE OF LORDS

The final appeal both in civil cases from the Court of Appeal, and (though of a limited character) in criminal cases from the Court of Criminal Appeal, is to the House of Lords where the Lord Chancellor, when he attends, presides.



(B)

THE COUNTY COURTS

There are some 59 County Court Circuits in England and Wales: for each Circuit there is one County Court Judge who may hold his Court in as many as 12 places on his Circuit.

BOOK REVIEWS

The Proof of Guilt. By Glanville Williams, LL.D., Fellow of Jesus College, Cambridge, of the Middle Temple, Barrister-at-Law. Published under the auspices of the Hamlyn Trust. [London: Stevens and Sons Ltd. 1955. VIII and 294 pp. 17s6d. net.]

Criminal law, with other branches of law, never stands still. But the law, and certainly criminal law, has a tendency to lag compared to progress in other departments of knowledge. Even in his time Goethe complained: "Vom Rechte das mit uns geboren ist leider nie die Rede". The tempo of the evolutionary process is also never the same in all countries. It is thus remarkable to see how greatly the different legal systems influence each other. When at the end of the XVIII century Montesquieu, Beccaria and Voltaire turned criminal law, and especially the rules for criminal procedure, in an entirely new direction, the change was not restricted to the Continent: a similar development took place in Great Britain and America. Conversely, the English jury system and later the British, Irish and American prison system and concepts of parole and probation, have had enormous influence on Continental penal systems. Such comparisons are the more usefully made in the province of criminal law because of its fruitful influence on all branches of law. Consequently, we must be grateful to Miss Emma Warburton Hamlyn who in her will created "The Hamlyn Trust". "The object of this charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European countries, including the United Kingdom." Miss Hamlyn hoped that the people of the British Commonwealth would find out for themselves which "privileges they enjoy in comparison with other European Peoples". She was evidently completely convinced that the British law system was the best in the world.

As seventh in the series of Hamlyn Trust Lectures, Dr. Glanville Williams gave a series of four lectures at the University of Birmingham in 1955 on the subject of "The Proof of Guilt". He compares the English trial procedure, and in particular the law of evidence, with the Continental, and especially the French, laws concerning trial and evidence. It is a pity that he was unable to take into account the Dutch trial law, since this last is set forth in a Code, dating from 1926, which is more modern than that of the French. In this Dutch code an attempt is made to bring together the best features of the Continental and the British systems. Because the jury is generally unknown in the Netherlands, it provides an even greater contrast to the British system than does the French.

Perhaps the reviewer may therefore be permitted to draw an occasional parallel between the British and the Dutch systems.

The criminal trial has always been a conflict between society and an individual. The latter can be either guilty or innocent. In both cases there is a fight against society. If the individual is guilty of the charge, then this fight is at least in part in the interests of justice; if he is not guilty then this conflict clearly furthers justice. In saying that in the first instance the conflict is "in part" in the interests of justice, the reviewer means that in many cases, especially in earlier times but also at the present day, criminal law can be too rigorous and too severe. In such cases it is understandable that both the guilty individual and his counsel try to escape this harshness. As criminal law becomes humane and takes more into consideration the psychological and sociological factors which cause criminal behaviour, the trial would appear to become less and less a struggle between the individual and society. Is then less protection for the individual required in trial procedure? Dr. Glanville Williams says (p. 133): "A rule giving excessive protection to an accused person becomes even less defensible as the criminal law turns to remedial treatment instead of punishment". But he immediately adds the qualification: "This argument is not a very strong one as applied to the present law, because so much of the criminal law and its administration is still punitive". Indeed, if ever the administration of criminal law comes to consist entirely of remedial measures and a process of social readjustment, the conflict of the criminal trial will lose much of its sharpness. To this extent it can justly be said that the greater or lesser stringency of the rules concerning "the proof of guilt" provide a certain "test" of the state of evolution of criminal law.

However, criminal law will never entirely lose its elements of conflict. Conviction for a penal offence remains for all time a moral disqualification to which a man — and certainly an innocent suspect — will not willingly submit. Moreover, there must always be protection for the guilty defendant, so that he cannot be placed at an unfair disadvantage. A defendant is ordinarily a very poor judge of his own position. A case, for example, was personally observed by the reviewer in Scotland, concerning a sergeant in the Air Force who, during a quarrel in a train, had grabbed his girl by the throat. He had thereby unintentionally pressed upon a nerve which caused the heart suddenly to stop. After vain efforts to revive her, he cried: "I have murdered my girl!" It was at first assumed that he had indeed committed murder, but on the post-mortem investigation, and when his own story of what had actually happened became clear, he was charged with "culpable homicide". In spite of the fact that the judge and his own counsel tried to dissuade him from pleading guilty even to "culpable homicide", he persisted in the

plea which meant, according to Scottish law and also English law, that he had to be convicted. The judge then gave him six months imprisonment. According to Continental law this necessity to convict him could not have arisen. In this connection it may be doubted to what extent the British system concerning the choice of pleading guilty or not guilty — and the relevant rules concerning the evidence — are preferable to the Continental system. A defendant who feels himself guilty can be far less guilty than he himself realizes. Thus even a defendant who feels himself guilty must remain protected against excessively harsh conduct of the prosecution.

For the innocent defendant the element of conflict in the administration of criminal law retains its full potency. Dr. Glanville Williams indeed says: "It is then a question of degree: some risk of convicting the innocent must be run". But we should not assume in the law of evidence that criminal law has become so humane that it now makes no difference whether it is applied to a guilty or to an innocent man. It is in this connection especially pertinent to consider the lie-detector and the use of narcotic analysis, i.e., of drugs, particularly penthotal. It is somewhat surprising that Dr. Glanville Williams has not included these two modern means of obtaining evidence, so much discussed both in America and on the Continent, in his critical review. This is perhaps due to the fact that the British system is so thoroughly permeated by the idea, on the one hand, that no one may be compelled to incriminate himself and, on the other hand, that the accused has a certain right to be heard himself as a witness under oath in support of his own case if he so wishes. As a result, Dr. Glanville Williams does not even consider the possibility of the application of the lie-detector and drugs in English law. It is a pity that he has not expressed himself on the subject on one or the other side, since, as these methods become perfected, the question will arise in all countries and all systems of law whether such methods of obtaining evidence are to be admitted or not. In the Netherlands this question is already topical, owing to the fact that the *Nederlandse Juristenvereniging* (Dutch Jurists Society) discussed the question in 1956 at its annual meeting after hearing lecture the subject by Professor G. A. H. Feber, member of the *Hoge Raad* (High Court of Justice) and Mr. P. Meyjes, Vice-President of the *Rechtbank* (Tribunal of First Instance) of The Hague. Both these jurists come to the conclusion that the lie-detector is an admissible means of obtaining evidence. Concerning the use of drugs their opinions differ. Professor Feber deems it neither morally nor juridically objectionable, especially in serious circumstances, but is of the opinion that it would not at present be accepted by public opinion. Mr. Meyjes deems it more clearly in conflict with the principle that the defendant may not be compelled to testify and that the presiding judge or official must avoid "anything designed

to obtain a statement which cannot be regarded as freely made" (Article 29 of the Dutch Code of Criminal Procedure). As an argument for admitting the lie-detector and drugs it is suggested — from various sides — that the testimony of witnesses is far from reliable. The great difference between the classic forms of evidence (confession, statements by witnesses and by experts) on the one hand, and the lie-detector and drugs on the other, is contained in the fact that those in the first group remain in the realm of the conscious while the latter involve the unconscious. We must appreciably widen our knowledge of the unconscious before we can judge the admissibility and the usefulness of these modern methods of obtaining evidence.

For the present the Netherlands and Great Britain will remain dependent upon the above-mentioned classic methods of collecting evidence, with all their inadequacies, imperfections and the resulting possibilities of judicial errors. The necessity is thus to find as many guarantees as possible against such pitfalls in the collection of evidence. A large part of Dr. Glanville Williams' lectures therefore is devoted to the ways of judging cases. In this connection he compares the British system of juries and lay and stipendiary magistrates with the German *Schöffengerichte*. The writer clearly gives preference to the latter. He notes all the longstanding objections to the English jury system as already summed up by Stephen in his *History of Criminal Law*. Dr. Glanville Williams summarizes Stephen as follows: —

"Juries consist of twelve unknown men who bear no social responsibility for their decisions. They do not give reasons for their verdicts and this generally excludes the possibility of an effective appeal in the question of fact. The verdicts of juries are unjust in a minority of cases which are more numerous than in trials by judges without juries. It continually happens that some members of the jury fail to follow the evidence".

Dr. Glanville Williams cites the following passage from Stephen: —

"The great bulk of the working classes are altogether unfit to discharge judicial duties, nor do I believe that, with rare exceptions, a man who has to work hard all day long at a mechanical trade will even have either the memory, or the mental power, or the habits of thought, necessary to retain, analyse and arrange in his mind the evidence of, say, twenty witnesses to a number of different minute facts given perhaps on two different days . . . I think that the habit of flattering and encouraging the poor . . . has led to views as to the persons qualified to be jurors which may be very mischievous".

Stephen suggested solving the difficulties by appointing "special juries". In that case — and of this Dr. Glanville Williams is also

convinced — it would be better to go over entirely to the German *Schöffengericht* which in 1924 replaced the jury in Germany.

In the Netherlands there is in general satisfaction with the system, by which in important cases three professional jurists must pass judgement and appeal can be made to a *Hof* (Court of Appeal) also composed of three professional judges. In both cases they decide by majority vote. Only when the first group has acquitted must the appeal board be unanimous if it wishes to record a conviction. This is a guarantee that two judges of the appeal board cannot sentence a defendant when four other judges (three from the first group and one from the appeal board) want to acquit. Further, there is a still higher level of appeal, *in cassatie* (cassation), to the *Hoge Raad* of the Netherlands which, however, only passes judgement on points of law and as to the correctness of the decision in matters of form. If the *Hoge Raad* is of the opinion that there are grounds for cassation then, in the event of a mis-trial, it sends the case to a new court or where there is infringement or wrong application of the law, and there is sufficient evidence before the Court, it disposes of the case itself. If in the last instance the facts have not been completely investigated, then the *Hoge Raad* sends the case back to the judge responsible for the decision against which appeal has been made. In this manner the interests of the defendant and of the community are very thoroughly investigated and safeguarded. The greatest difficulty is that the same body of judges sits in both civil and criminal cases, while the demands upon a criminal law judge today are quite different from those put upon a civil law judge. The criminal law judge needs a profound knowledge of psychiatry, psychology, sociology and criminology, while a civil judge must possess knowledge more in the field of economics, finance and banking, shipping, insurance and corporation law. Eventually the necessity for the specialization of judges sitting in criminal law cases will become inevitable.

The need for a jury has never been felt in the Netherlands, even though the Dutch people are essentially democratic. The administration of justice in our present society is a profession which makes enormous demands on the intellectual powers and the learning of the judges. It would be absurd to have laymen practice such a profession. Criminal cases of an uncomplicated nature are in the first case handled by a police or children's judge. This judge is also a jurist. Against his decisions appeal can be made to the same *Hof* of three professional judges who on a higher level judge the more important cases. Almost 75 per cent. of all criminal cases are first tried by the police judge. Appeal rarely occurs. It is a pity that Dr. Glanville Williams was unable to study this Dutch system. He would probably then have written with even more conviction against the jury system, and have defended a system of administering

justice by professional judges. Under the circumstances he says only:

"What needs consideration is whether criminal cases would not better be decided by a bench of three judges, who would require unanimity in order to convict. At present [i.e., in England] we trust to the head of one judge in matters of sentence, I think improperly; a bench of judges would be greatly preferable".

Perhaps for an Englishman this is in itself a very revolutionary statement. The experience acquired in the Netherlands with this system, however, confirms that such administration of justice is of a very high order. Yet it is not to be expected that countries which use the jury system will easily relinquish it. And this is understandable, for so many frequently illogical emotional arguments keep it going. "The people", and thus also the legislator, see therein, quite wrongly, a protection for the democratic administration of justice.

The worst problem is, however, that those who in the first place would have to supply the leadership in abolishing the jury system do not show much inclination to do so. The barristers do not because in general they have far more success in pleading before a jury than before a professional judge. A case tried before a jury — and especially the obtaining of an acquittal — involves much more "éclat" than a plea before a professional judge, even when the latter results in an acquittal. A jury is easier to influence with all sorts of irrelevant side issues. A defence before a jury allows far more opportunity to sway sentiment by eloquence than does one before a judge. In Belgium the reviewer was once present when a famous defence lawyer — "who had never yet made a defence without getting an acquittal" — was able to save an army doctor from conviction in spite of the fact that the accused "à bout portant" had shot at the mother and a friend of his fiancée and killed one of them. He achieved this primarily by producing a number of witnesses who all testified that during the War the defendant had been a splendid underground fighter while another doctor from the same town had been cowardly. All this had nothing to do with the indictment, but the jury was greatly influenced by it. Moreover, in countries where the jury system is in force this element is too little resisted by the judges themselves. What ought to be the heaviest responsibility of the judges, namely the decision concerning guilt or innocence, is frequently taken over by the jury. The jury — Dr Glanville Williams also remarks on this — renders on this a sort of godlike judgement the truth of which need not be further explained and cannot be questioned. Judges, on the other hand, must give reasons for their decisions and can be criticized by appeal and cassation.

The most energetic opposition to the jury comes from the Ministère Public which in countries where it exists is an institution for the prosecution of crimes. But in England, where there is no comparable single body, no such source of opposition to the jury system can be hoped for.

Aside from the judge's capability, experience, and knowledge of men, the guarantees of a just and fault-free practice of justice are contained in the legal regulations governing evidence. It may be taken as a premise that regulations concerning evidence have no meaning in the law when they stand by themselves. They can at the most provide a cautionary guide for the judge. In Dr. Glanville Williams' lectures they are treated in great detail. The principle of these rules, known in some degree in almost all countries, are the following:

1. The defendant is not obliged to answer. A refusal to answer either in general or to particular questions may therefore in principle not be taken as prejudicial to him.

2. There are witnesses who need not give testimony. In many countries, for example in the Netherlands, this rule applies to close blood and family relatives and to those who can claim the secrecy pertaining to position, profession, or office, as well as to those who would put themselves in jeopardy of a penal conviction by their testimony. Here too, the fact that a witness has exercised this privilege may not be taken as an indication of guilt.

3. Statements made by co-defendants may not be used as evidence against the defendant. Various methods have been thought out in different countries to circumvent this regulation, however, such as to split the cases of the various defendants and first try the defendant who has confessed and afterward have him appear as witness in the case against the defendants who have not confessed. In England "there is another way in which the Crown may make use of the evidence of an accomplice. The several accused persons may be charged jointly, and when one of them gives evidence on his own behalf, he may be cross-examined with a view to implicating his companion. This course may be taken even though the only evidence given in chief by the accused is that he is guilty. Any admissions made by him in examination-in-chief or in cross-examination become evidence in the case as a whole, and are therefore evidence against the co-defendant. The co-defendant is entitled to cross-examine the defendant giving the evidence".

4. Testimony by children must always be considered with great care. Hence in England, in the Netherlands and in many other countries "if the child is still too young to understand the nature of an oath, his evidence may still be received in proceedings for an offence against him, provided that he understands the duty of speaking the truth; but here corroboration is required by law".

Dr. Glanville Williams says further in this connection: "Although the rule requiring the corroboration of children is a sound and necessary one, it presents a formidable obstacle to the conviction of men who have been guilty of disgusting practices in private with such children. For this reason the rule should not be extended farther than is required by the necessity of the case".

5. On the Continent for many centuries the rule has held that *unus testis nullus testis*. Not that this rule has much significance. For each section of an indictment the evidence can still be obtained from one witness. The rule only applies when the entire indictment is based on the evidence of a single witness. On the other hand, in English law there is no general rule to the same effect, but there are a number of cases where corroboration is required.

6. In the Netherlands, statements of a feeble-minded witness are in the same category as statements by children. If a feeble-minded person cannot grasp the nature of an oath he may still be heard, but his testimony must be otherwise corroborated. In English law, the position is very similar, although there is only a specific provision to receive the unsworn testimony of children who cannot understand the nature of an oath.

7. In almost all countries there are also stipulations as to the content of witnesses' statements. The witness may only testify to what he himself has seen or experienced. The questions which arise hereby are then, (a) whether the hearsay evidence is admissible; (b) to what extent a witness may give information about his conclusions concerning what he observed. Concerning (a), hearsay evidence: in England the hearsay rule is applied with the same rigour whether the trial takes place before a jury or before magistrates or High Court judges. In the Netherlands, until 1927, the hearsay rule was very strictly interpreted. However, in that year the *Hoge Raad* became much less severe, largely under the influence of one of its members, Professor Taverne. It was his opinion that when a witness repeated something which he had overheard it almost always penetrated to the judge and unavoidably contributed to forming his opinion. He found it then more honest to include hearsay rule. In England an exception is also made for so-called can refuse to allow certain questions during cross-examination, it is perhaps possible to prevent hearsay testimony. On the other hand, there are, as Dr. Glanville Williams points out, "large exceptions to the present hearsay rule", especially concerning "confessions and admissions made by the accused". The so-called extra-legal confession of the accused is, in almost all countries, including the Netherlands, recognized by the law itself as an exception to the hearsay rule. In England an exception is also made for so-called "dying declarations". According to Dr. Glanville Williams, if the exception rests on the ground that the witness ought to be produced

in court for cross-examination, the exception should be extended to the declarations of all persons who are since deceased, or who, indeed, are unable for any other reasons to give evidence. In the Netherlands this exception to the hearsay rule is at present self-evident now that hearsay evidence is almost unrestrictedly admitted. In France, as in the Netherlands, the judges are no longer strict as to the hearsay rule, and apply the test recognized at the Nuremberg Trial, i.e., "that the tribunal shall admit any evidence, which it deems to have probative value". Dr. Glanville Williams prefers this test to the English system.

8. One of the foremost points of difference between the Anglo-Saxon and the Continental law is that in the former it is generally prohibited to include in the evidence the fact that the defendant has committed other crimes or is of bad character. Continental law on the other hand does not seek to exclude such evidence: the judge is well informed about the defendant through the *strafregister* (list of former convictions), and often has at his disposal the reports of social workers and psychiatrists. But this variance must not be exaggerated. In the end, in Continental and certainly in Dutch law, the judges fully realize that even an individual who has frequently committed offences is not necessarily guilty of the particular offence charged. Although it sounds quite elegant to say that Anglo-Saxon law excludes character-evidence, the difference between the two systems shows less strongly when one hears that in England "the courts have on a number of occasions admitted evidence of other crimes where they are sufficiently similar to the crime charged to be strongly probative of it".

In the Netherlands a man would not be convicted merely because he has had a number of convictions or because he is considered a person of bad character by the probation authorities. It has not infrequently occurred that even a confirmed recidivist has been acquitted in a particular case because of insufficient evidence, although his whole previous history made it probable that in the case before the judge the accused was guilty of the offence charged. On the other hand, a notorious murderer like Smith in England would also be convicted on the Continent, if he drowned his wife in a bath after she made a will in his favour and it appeared that two of his previous wives had died in the same circumstances.

A practice followed in the Netherlands which is, however, frequently criticized, is the use of so-called *dossiers ad informandum*. The Ministère Public sometimes prepares an indictment on a case but includes information on a number of other offences with which he has not been charged. From the point of view of saving work and time this procedure can be very practical, but at the same time it must be said that it is regularly criticized in juridical periodicals (e.g., de Leyten, *De bloemlezing in de dagvaarding*, N-J-B 1956,

p. 488). There is indeed serious objection to this method. It is possible for a defendant to receive much heavier punishment than the crime for which he is indicted justifies, because of material contained in the dossiers, without being able to defend himself adequately against the material contained therein. The same applies, although to a lesser degree, to all information in probation and other reports of psychiatrists and social services. But nevertheless, the Continental system seems more defensible than does the Anglo-Saxon. Ultimately it is ostrich-politics not to consider the personality, history and previous crimes of the defendant. Even many centuries ago a poet, otherwise unknown to the reviewer, said:

"He who has to pass judgement

Let him know man and matter".

The knowledge of the man must inevitably play a part if a deed is to be justly judged. The risks inherent in character-evidence and the evidence of similar facts must be assumed and trust laid in the objectivity of the judge that he will not be unduly influenced by his knowledge of them. In this respect, therefore, the reviewer disagrees with the conclusion arrived at by Dr. Glanville Williams, who, at the conclusion of his book says: "The English rules excluding prejudicial evidence of bad character and similar criminal acts survived critical inquiry, notwithstanding the difficulty occasioned in their application". He does indeed immediately add: "It is impossible to assess one's own impartiality and these approvals may, for all I know, be the result of an insular bigotry". The same reservation must really be made by every writer on this subject because there is very definitely not only an "insular bigotry", but also a "Continental bigotry". We have all of us, unquestionably, the tendency to see only the good side of our own legal system and greatly to exaggerate the shortcomings of other systems. The French saying: "Ni cet excès d'honneur, ni cette indignité", is almost always applicable. Dr. Glanville Williams' book is especially commendable for the open eye which he keeps for the limitations of his own legal system.

9. So far discussion has been concentrated on the guarantees offered by the various law systems against the errors which can result from the unreliability of the testimony of witnesses and the difficulty that, on the one hand, we cannot and may not compel the accused to speak the truth and, on the other hand, cannot allow him to go free because he has lied or has remained silent. The guarantees against mistakes which result from errors made by experts are still more difficult to try to clarify in the law. Dr. Glanville Williams also says, "questions on which the experts are disagreed obviously present great difficulty". Referring to Borchard's book, *Convicting the Innocent*, he says that a solution has been sought in "publicly employed impartial experts". But he adds: "This belief in the

scientific value of public employment is, perhaps, unfounded". It may be said here that in the Netherlands experience with the *Ge-rechtelijk Laboratorium* of the Ministry of Justice has been favourable, and that therefore the "scientific value of public employment" can be assessed quit highly, at least if the Government, and in particular the Ministry of Justice, select suitable experts. In countries which use juries it is admittedly very difficult to make clear to the jury the frequently highly technical questions discussed by experts. In countries which work with professional judges this problem is less acute. But sometimes even judges must decide questions where they must accept blindly the information supplied by experts. When such experts disagree among themselves it is most difficult for the judge to make a sound decision.

The most important conclusion is that each system of the law of evidence has its limitations and its advantages; and that in all countries there is to be found a certain conservatism which causes each to hold fast to its own system. A second conclusion is that the intelligence and the humanity of the judges is the most important guarantee against juridical errors. Legal rules about the law of evidence serve the judge only as cautionary indications of circumstances in which he must exercise unusual care.

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O niektórych gwarancjach praw oskarżonego w polskim procesie karnym (On Some Guarantees of the Rights of the Accused in Polish Criminal Trials). By TADEUSZ TARAS, Pro-Rector of the University of Lublin, Poland. [Lublin: Annales Universitatis Mariae Curie-Sklodowska, Vol III 6, Sectio 6, published by the University of Lublin, 1956. pp. 187—294. No price stated.]

This book was published on November 24, 1956 and is characteristic of the stand taken by Polish lawyers to remedy the grave and tragic defects in the administration of justice in their country. Professor Taras starts with this fundamental truth: rules of criminal procedure are the best test of the rights conferred on individuals, and he cites Montesquieu "les règles à suivre par la justice pénale intéressent le genre humain plus qu'aucune autre chose qu'il y ait au monde". This he says in an understatement "is not on the whole an exaggeration"; it certainly is not an understatement in his country with the mixed memories of pre-war concentration camps, of the Nazi extermination, and of the political trials particularly of the 1948—1953 period. Professor Taras's book contains a sincere search for proper safeguards for the accused. He explains his concern with the strict observance of rules of procedure in criminal trials by referring to cases of the not so distant past in which the accused confessed "in an unaccountable manner" and in which defence counsel considered it their duty to assist the prosecution. These trials were "a parody of justice". According to Professor Taras it is not only in the interest of the accused to defend himself, but also in the interest of the State to allow him full freedom and all facilities to conduct his defence. Some Soviet and Polish legal writers speak of 'unity' of interest of the accused and of the administration of justice, but Professor Taras points out that a criminal offender is a person who does not respect the legal system established by the society in which he lives and who disregards the common weal but pursues his own interests. If the accused is not guilty then naturally his interests coincide with those of society because his innocence must be proved, and for that reason he must be given all facilities to secure an acquittal. If on the other hand the accused is guilty, it is only human and to be expected that he will try to avoid responsibility for his crime or at the very least to secure leniency from the Court. It is then in the interest of society that the truth should be ascertained and the criminal punished. Proper safeguards given to the defendant in criminal trials achieve a just balance between this conflict of interests. Professor Taras feels that the basic safeguard is that criminal trials should always be conducted in open Court, because it is likely to result in stricter com-

pliance by the judge with the rules of criminal procedure and to assure his impartiality. The independence of judges is equally essential and Professor Taras criticizes the outside pressure on the judiciary in Poland particularly between 1950—1952.

The book does not cover the whole field of criminal procedure but deals with some of its aspects, perhaps because they are of special significance in Poland. The first of the problems singled out for discussion is the application of the principle *ne bis ad idem*, that no one should be tried for the same offence for which he had been once sentenced or acquitted. The author says: "It is a lesser evil to leave an offence unpunished than to submit an accused once acquitted to the constant fear and uncertainty of tomorrow". In some countries, such as England or Scotland and some Cantons of Switzerland, this fundamental guarantee in criminal procedure is accepted tacitly. On the other hand the French *Code d'instruction criminelle* of 1808 states this rule *expressis verbis* and the Federal Constitution of the United States gives the following guarantee . . . "Nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb". Polish law has accepted the principle *ne bis ad idem* only tacitly. Professor Taras thinks that this should be altered and that an express statutory guarantee is necessary, subject to the following exception: where it is discovered that an acquittal or lenient sentence is obtained by committing an offence, such as perjury, forgery or bribery, the accused should be re-tried. On the other hand Professor Taras criticizes Article 463 of the Polish Penal Code which permits (*inter alia*) new proceedings after acquittal if new facts not known at the time of trial are discovered. He advocates a return to the principles of Polish law in force between 1928 and 1932 which permitted re-trial only in the case where the accused was found guilty and new evidence is discovered justifying an acquittal or a sentence for a lesser offence. Professor Taras also criticizes some aspects of the procedure of extraordinary revision introduced by a Law of April 27, 1949. This is a form of application for a new trial before the Supreme Court which can be initiated by the Minister of Justice, the President of the Supreme Court or by the Prosecutor General. Professor Taras favours such revision only in the interest of the accused, but where the accused has been acquitted or sentenced too lightly the verdict should stand.

Professor Taras also deals with the prohibition of *reformatio in peius*, that is, against increase of sentence on an appeal by the accused or on a new trial granted at the instance of the accused. Under the Polish law of 1949 sentence could be increased at a new trial if new relevant circumstances came to light. This was abolished by the law of December 21, 1955 and a sentence cannot be increased even in such circumstances. On the other hand, even though the

sentence cannot be increased the Court on appeal or re-trial can alter the charge to a more serious one. Professor Taras considers this to be wrong in principle and recommends the repeal of this provision.

Professor Taras's third theme is the examination of the "preparatory procedure" (*Postepowanie Przygotowawcze*) — equivalent but by no means similar to the preliminary examination in England and bearing close resemblance to the *instruction* in Civil Law countries. It is pertinent to explain that the present Code of Criminal Procedure in Poland (*Kodeks Postepowania Karnego*, hereafter called KPK) has been amended by the Decree of December 21, 1955 already mentioned to remedy the grave injustice caused by the provisions of a Decree of July 20, 1950. The present position is that there are two kinds of preparatory procedure: the Preliminary Inquiry (*Dochodzenie*) and the Investigation (*Sledztwo*). The former is used in lesser crimes; the latter in more serious offences. An Inquiry is normally conducted by the Citizens' Militia and the Investigation by an Investigation Officer of the Procuracy or a similar official of the Security Police, and it can be set in motion either by the Procurator, or by the Investigation Officer himself. The Procurator must, however, in each case be notified of the commencement of an Inquiry, and when it is completed he must be supplied with the files and the indictment. The official conducting an Investigation has to comply with more definite formalities. Firstly he must prepare a charge, read it out and question the accused. At this stage the Investigation Officer determines whether a request by the accused or his counsel to be present during the questioning of other witnesses should be complied with. At the conclusion of the Investigation the accused or his counsel can as of right examine the files, request that further investigation be made and make submissions on the evidence. Finally, the official conducting the investigation makes an order that the Investigation is completed, the Indictment is settled and the case goes for trial. The Procurator must approve the indictment both in the case of an Inquiry and an Investigation.

Professor Taras examines with much care the thesis of the Soviet jurists Chelkhov and Strogovich that during the preparatory proceedings the accused is not a party *stricto sensu*. Professor Taras does not agree. The definite rights given to the accused during the proceedings show that he is a party and should be treated as such. Moreover, according to Article 73 of the KPK, the accused is not bound to answer questions and indeed can refuse to say anything. The Soviet Code of Criminal Procedure apparently goes further and prohibits "compulsion, threats and promises", a commendable principle if strictly observed. The Polish Code has no corresponding provision and is in that respect clearly deficient. Nor does the Polish Code impose any duty to warn the accused that he is not

bound to say anything unless he desires to do so. Professor Taras considers such a warning necessary.

Professor Taras compares Polish law to that of France and Switzerland. He refers particularly to the French Law of December 8, 1897, known as *Loi Constans*. According to that Law the accused can demand the assistance of counsel at all stages and some cross-examination is permitted. Contrasted with that system is a purely inquisitorial inquiry in which the accused has no rights whatsoever. This must be completely rejected as it provides none of the necessary safeguards. On the other hand the English system of investigation in open court and permitting free cross-examination is equally unsuitable. The author thinks that witnesses would be reluctant to give evidence in open court and it would lead to the possibility of collusion between lawyers and witnesses. His principal objection to this system is, however, that it does not seem very effective in ascertaining the truth. He prefers the method described by French jurists as *le système du contrôle après coup*, i.e., after the evidence supporting the accusation has been collected. Another principle commended by some French jurists attracts Professor Taras namely, the right of the accused to be present by counsel at the *actes matériels de l'enquête* as an observer of the collection of evidence, for example, at a search of premises. This right is described briefly but expressively: *le conseil pouvait tout voir, mais il ne pouvait rien entendre*.

Every country must necessarily work out the details of its criminal procedure according to its legal traditions and special needs. What is stimulating in Professor Taras's book is the recognition of fundamental rights of the accused even when in apparent conflict with the interest of the State. The precise extent and, what is even more important, the effective application of these rights can be greatly assisted by the comparative experience of lawyers in all countries where such rights are recognized.

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Civil Liberties in the United States, A Guide to Current Problems and Experience. By Robert E. Cushman, Goldwin Smith Professor of Government, Cornell University. [Ithaca, New York: Cornell University Press. 1956, xiii and 248 pp. No price stated.]

This work is described by the author as: "a summary which would present a bird's-eye view of the entire field of civil liberties. This is designed to be an outline of the entire area with perhaps just a little meat on the bones. It seeks to include all the problems which lie in this field . . . and to place them in their proper context". The book has been prepared by Professor Cushman at the suggestion of the Directors and Officers of the Fund for the Republic, originally for their own use. Professor Cushman has had the benefit of a wide range of knowledge in this field, being associated with the United Nations Commission on Human Rights, and having made a valuable contribution entitled, "Human Rights Under the United States Constitution", to the first volume of its Year Book.

Although no definition of "civil liberties" is given, the author has discussed either fully or at least mentioned every subject which has been regarded by an articulate group or minority as a civil liberty problem. The treatment of each problem is systematic. First, the position of each civil liberty at the end of World War II is indicated. A summary of the principal developments of these civil liberties in the last decade is then given, followed in each case by a careful indication of the problems together with some of the more important proposals for dealing with them, although Professor Cushman does not himself indicate his own solution.

The author has adopted the First Amendment in the United States Bill of Rights as the starting point. Thus, the first part of the book deals comprehensively with freedom of speech, press, assembly, and petition. Other traditional civil liberties discussed are freedom of religion (Part III), the right to security and freedom of the person (Part IV), the civil liberties of persons accused of crime (Part VI), and the most hotly debated subject of the present time, racial discrimination (Part IX). Part II deals with academic freedom. A separate section (Part V) is devoted to the consideration of military power vis-à-vis civil liberty. Special treatment is given to the clash between the need for national security, particularly in regard to Communism, and the demands of civil liberty (Part VII). Part VIII deals somewhat casually and perhaps too briefly with civil liberties of aliens, which in view of the increasing movement of peoples across the frontiers is a subject of international concern.

We may take as an illustration of Professor Cushman's informative and objective technique his treatment of the clash between the right to free criticism of the Courts and judges and the power

of the Courts to protect the administration of justice. From 1941, as Professor Cushman points out, the Supreme Court has clearly decided in favour of the right of free criticism on the grounds, to quote the words of Justice Douglas in *Craig v. Marney* (331 US 367, 1947), that "judges are supposed to be men of fortitude able to survive in a hardy climate". On the other hand, in later cases there has been some recognition by United States Courts, which however still speak with a rather divided voice on the matter, that unrestrained press publicity, even when given in the alleged interests of free criticism, may endanger a fair trial. Professor Cushman concludes, however, that on the whole the Supreme Court's attitude continues to be favourable to the freedom of criticism and to prevent the growth in the United States of a doctrine of "contempt of court" interpreted in the same strict way which characterizes the English system.

Another example of Professor Cushman's careful balancing of conflicting interests is provided by his handling of the problem of telephone-tapping, which is dealt with in the section on the rights of persons accused of crime. The admissibility of evidence secured by telephone-tapping has had a somewhat chequered career. In 1928, the Supreme Court, in spite of strong dissent, permitted the use of evidence thus secured in Federal Courts. In 1934, Congress passed the Federal Communications Act, a section of which forbids any person to intercept any telephone messages and to disclose their contents without the sender's consent. In a case in 1937, the Supreme Court held that this provision applied also to Federal officers. The Department of Justice felt somewhat handicapped by this rule, since telephone-tapping by Federal agents was permissible, but disclosure was not, and for years it has urged the legalization of the use of evidence obtained by telephone-tapping in legal proceedings subject to certain restrictions. Professor Cushman states that there is a general tendency to stiffen the prohibitions against telephone-tapping owing to the widely held conviction that "wire-tapping is a dishonourable enterprise, a device of totalitarian governments with which our government should not contaminate itself". "The uncovering in 1955," adds Professor Cushman, "of commercialized private wire-tapping scandals in New York City, in which private operators sold telephone-tap evidence for purposes of blackmail, increased the opposition to any relaxation in the law". Professor Cushman's cautious concluding comment is that "here is a problem which needs more thorough study than it has received".

Professor Cushman devotes about a fifth of the book to the conflict between civil liberties and national security. He surveys the various agencies and methods, whether sanctioned by legislation or administrative regulations, to preserve national security and in an important and extended section, entitled "Deviations from Tradi-

tional Civil Liberty Principles", subjects such matters as "guilt by association", "lack of procedural fair play" and "justice by politicians" to a searching and critical analysis. His comments provide a valuable background to the recent decisions of the US Supreme Court which has limited the powers of investigating bodies in their questioning of persons suspected of subversive sympathies or affiliations.

Professor Cushman quotes an observation of Justice Felix Frankfurter: "The history of American freedom is, in no small measure, the history of procedure". In his book, Professor Cushman has with great moderation and discretion shown what the legal profession in the United States can do and, in considerable measure, is doing, by its control over the technicalities of legal procedure, to maintain a tolerable balance between the age-long conflicting claims of the individual and society.

Professor Cushman's book is an example for the lawyers of other countries, whom, it is hoped, it will stimulate to produce similar periodical surveys of parallel problems in their own countries.

SOMPONG SUCHARITKUL

The Judicial Control of Public Authorities in England and in Italy. A Comparative Study. By SERIO GALEOTTI, of Lincoln College, Oxford; Professor "incaricato" of Comparative Constitutional Law in the Università Cattolica del Sacro Cuore of Milan; of Constitutional Law in the University of Urbino. With a Preface by F. H. LAWSON, D.C.L., Professor of Comparative Law, University of Oxford. [London: Stevens & Sons Limited. 1954. x and 253 pp. 30s net.]

Executive Discretion and Judicial Control. An Aspect of the Conseil d'Etat. By C. J. HAMSON, Fellow of Trinity College, Professor of Comparative Law in the University of Cambridge, of Gray's Inn, Barrister-at-Law, Chevalier de la Légion d'Honneur. Published under the auspices of the Hamlyn Trust. [London: Stevens & Sons Limited. 1954. x and 222 pp. 12s 6 d. net.]

Professor Lawson points out in the Preface that Dr. Galeotti's book is the first to compare at length Italian and English administrative law and that contrary to appearances the resemblances are more significant than the differences. The distinction made in Italian Law between "rights" and "legitimate interests" is probably the most interesting topic of the author's study. *Interessi legittimi* have been defined by Professor Zanobini as "an individual interest closely connected with a public interest and protected by law only through protection of the latter". The re-siting of a road causing detriment to adjoining owners and the permission to build a factory in a residential area are given as examples of injuries to legitimate interests.

Dr. Galeotti's study is, however, not designed as a merely technical examination of legal concepts. He is conscious of the need "for the observance of the law by public authorities and for the preservation of individual liberties" (two legacies implied in Dicey's conception of the Rule of Law) and his book considers how this object is achieved through judicial control of administrative bodies in Italy and England respectively. For this reason the book deserves careful consideration by the readers of this *Journal*.

In England the judicial control of administrative acts is in practice very limited and is exercised in the main by the High Court. In the Italian system recourse can be had to ordinary courts where an injury to "rights" is alleged. On the other hand the local *Giunta Provinciale Amministrativa* and the *Consiglio di Stato*, deal with injuries to "legitimate interests". The *Consiglio di Stato* consists of a President, seven Presidents of Sections, fifty-two Councillors, five *senior Referendari* and six *junior Referendari*; in practice the senior members of the *Consiglio* are appointed from amongst civil servants. It is divided into six sections: three consultative and three

judicial. The Presidents and the Councillors enjoy a very high degree of independence and there are a number of effective safeguards against their removal; indeed it appears that their status compares favourably with that of the ordinary judges in Italian Courts. On the other hand the independence of local administrative Courts is open to grave doubt. They consist of the Prefect (who is the Chief Government Officer within the *Provincia*), 2 Councillors of the *Prefettura*, appointed by the Prefect, and 2 elected members, who are thus in a minority. There is, however, the safeguard of a right of appeal to the *Consiglio di Stato* from the *Giunta Provinciale Amministrativa*. The cases of Conflict of Jurisdiction between ordinary and administrative Courts are dealt with principally by the *Corte di Cassazione*.

An administrative act can be challenged before the *Consiglio di Stato* on one or more of the following three grounds: incompetence, excess of power, violation of law. Incompetence is similar to lack of capacity in contracts; e.g., if the Minister of Transport makes an order, which if made by the Minister of Health would have been valid, the order may be void or in some circumstances only voidable. There are seven categories of excess of power known to Italian law. The category deserving special notice is misuse of power (*suicidio di potere: détournement de pouvoir*). It is illustrated by the decision of the *Consiglio di Stato* in *Spinolo e Grassano c. Prefetto di Alessandria e Bolloli*, *Foro Amm.* 1941, 1, 2, 21, in which it was held that compulsory purchase of land by the Prefect for the benefit of a private owner was not for "public utility", although it would indirectly relieve unemployment as the owner intended to build a factory on the land. This is a classic case of misuse of power; but it is perhaps even more significant that a complaint of misuse of power can also be made by a civil servant who is dismissed for disciplinary reasons under the pretext of improvement of the Civil Service.

Which of the two systems is better equipped to control administrative acts so as to ensure compliance with the Rule of Law? Professor Galeotti feels that in England its ancient but limited system of control through prerogative writs is inadequate in view of the change and expansion during the last fifty years: "One cannot compete with modern motor cars in a XIX Century carriage". Recalling elements laid down by Dicey as constituting the Rule of Law, Professor Galeotti points out that "universal subjection of all administrative acts to the control of an impartial judge" is achieved by the *Consiglio di Stato*. If that is so, "universal subjection of all classes to one law administered by the ordinary courts", an essential element of the Rule of Law according to Dicey, is no longer to be interpreted literally. The jurisdiction of the *Consiglio di Stato* in no way offends against the Rule of Law; it is a judicial body as

independent as the ordinary Courts and better equipped for the matters within its purview. Further, the powers of the administration in Italy are more strictly limited than in English law, where these can only be contested according to the principle of *ultra vires*. In matters of procedure Professor Galeotti is particularly critical of the English rule of privilege, under which the Crown can refuse the production of documents on the ground that it would be injurious to the public interest. It should be added, however, that some concessions have recently been made by the Crown. On the other hand the English system has definite advantages, particularly in that the procedure of prerogative writs once put in motion is quicker and in some ways more effective than its Italian counterpart; the self-restraint and feeling of responsibility of English administrators, partly because, unlike the Italians, they may be personally responsible compensates to some extent for the defects of the system itself. Professor Galeotti hopes that "the fading away of Dicey's distorted picture of 'droit administratif' coupled with a less insular attitude towards legal institutions of the Continent will hasten the day . . . when a readjustment of judicial control, better equipped to deal with modern administrative problems, will be brought about in England".

The book by Professor Hamson is a collection of Hamlyn Trust lectures delivered by him at Nottingham University in October 1954. This book has already received much well deserved praise and is a most readable and lively book on law for the academic, the practitioner and even for laymen. It provides, however, a great deal more than attractively set out information about the Conseil d'Etat of which Professor Hamson is an enthusiastic, if not uncritical admirer.

Professor Hamson is like Professor Galeotti of the opinion that the Rule of Law based upon the universal jurisdiction of comparatively few judges no longer exists in England. In the view of Professor Hamson there is a most important territory in which the writs of the High Court no longer effectively run, if ever they did: a domain which the Executive in England has made its own, where its own will is paramount and not subjected to any kind of judicial supervision or interference. This domain is in France the province of the Conseil d'Etat; and in its province the Conseil d'Etat has introduced a rule of law which deserves the admiration of any observer. The present Conseil d'Etat was established by Napoleon in 1799 and at first its chief duty was to give advice in the administrative field. In 1831 its jurisdiction in contentious proceedings was established. It is at present divided into five Sections. The *Section de Contentieux*, the judicial organ (sub-divided into nine *sous-sections*) has by far the most members which reflects the preponderance of its judicial business. The remaining four Sections, the *Sections Administratives*,

continue the original task of the Conseil d'Etat "of resolving difficulties arising in the administrative field, that is advising on and planning executive action before the event and resolving difficulties in the course of administration". The Conseil consists of a Vice-President (the actual head of the body), five presidents of the five sections, 46 *conseillers d'Etat*, 49 *maîtres de requêtes* and 48 *auditeurs*, that is 149 persons in all. Of these more than 80 are members of the *Section de Contentieux*.

To explain the working of the Conseil d'Etat Professor Hamson gives as an example the case known as *l'affaire de l'Ecole Nationale* considered by the Conseil d'Etat in 1954. This was an appeal of 5 men who had entered for an examination at the *Ecole Nationale d'Administration* but were informed that their names could not be included in the list of candidates and thus were excluded from public service. The proceeding was set in motion by the issue of a *requête*. In this case the appellants alleged (*inter alia*) in their grounds of appeal that they were excluded because of their political opinions and that this decision was erroneous in law and constituted an abuse of power (*entachée d'erreur de droit; détournement de pouvoir*), French public policy recognizing the right of a citizen to hold what lawful political opinion he pleases. The grounds of appeal were thus precisely similar to those which could have been relied on in Italy, where the debt due to the French administrative law is freely acknowledged. In his reply the Secrétaire d'Etat claimed a *pouvoir discrétionnaire*, that is to say that the Conseil d'Etat had no right to examine the decision of the Director of the School.

The next step, that is the preparation of the case, called *l'instruction*, should at this point be explained. It is entrusted to a rapporteur who is a member of the Conseil d'Etat; and the interest of the appellants are protected by another most important member, the *Commissaire du Gouvernement*. The procedure is a written one and each party is entitled to see and comment in writing on all the documents produced by the other side. Finally, there is a public hearing when the rapporteur produces his report; counsel for the parties may address the Conseil (legal representation is not essential) and the *Commissaire du Gouvernement*, whose duty is to consider the issues impartially beforehand, presents his conclusions. Judgment follows at a later date.

In the case of *l'Ecole Nationale*, after the reply of the Minister the *Section de Contentieux* required him to produce all the relevant files within 8 days. The Minister did not comply with this order although he produced some of the documents. The Conseil cannot enforce production of documents, but, as an order to produce shifts the burden of proof on to the Minister, his failure to comply led to the swift annulling of the orders excluding the appellants from the civil service examinations.

The case of *l'Ecole Nationale* was dealt with promptly but one of the greatest defects of the Conseil d'Etat is that its justice is dilatory; in 1953 the arrears of cases amounted to 24,000. To remedy this in January 1954 a good deal of first instance work was transferred to local *Tribunaux Administratifs*.

Some indication has already been given of the jurisdiction of the Conseil d'Etat. To invoke it there must be an *acte* of an administrative authority and the technical term used to describe the nature of the proceeding is *recours en annulation*. But the Conseil d'Etat has also another type of jurisdiction, the *recours de pleine jurisdiction* where a citizen sues the State or public authority for reparation of harm which he has suffered as the result of wrongdoing or breach of contract by the State — for example, if he has been run down by a vehicle belonging to the Army Authorities.

In Italy, a conflict of Jurisdiction between the *Consiglio di Stato* and the ordinary Courts is resolved by the Civil Court of Appeal (*Corte di Cassazione*). In France, there is a *Tribunal de Conflits* consisting of four *conseillers* from the *Cour de Cassation*, the highest civil tribunal, and four from the *Conseil d'Etat*. In case of a deadlock the Minister of Justice must resolve it.

Professor Hamson is not anxious that a 'Council of State' be introduced in England. He says "it cannot as such be transported across the Channel, it will not as such fit into our circumstances and our traditions". The tradition of England which is shared by some other countries with fully developed systems of parliamentary control is that administrative injustice can be freely complained of in Parliament; this safeguard is often effective in practice. Both books, however, although principally affording a comparison between two highly developed systems of administrative law and the English system are of wider interest. Securing administrative justice is a foremost task in bringing about the effective operation of the Rule of Law; the French and Italian examples are "a pledge of the possibility of administrative justice and a warrant that it is reasonable not to despair". Each country must develop its own institutions according to its own proper and peculiar genius, but the possibilities of change might escape notice if lawyers do not look "in the marvellous mirror of comparative law".

GEORGE DOBRY