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## EDITORIAL

### CONTEMPORARY PROBLEMS OF THE RULE OF LAW

To the concept of the Rule of Law, as it is understood by the International Commission of Jurists, belong the essential elements of substantive as well as of procedural law. Whilst it is often necessary for a lawyer to separate those two aspects of any legal order, they must nevertheless go together as will be seen in the present issue of the *Journal*, where their correlation finds a new and convincing expression. Even the most lofty principles of substantive law will remain a dead letter unless an effective procedure is provided for their implementation. The effectiveness of any legal system is directly related to the extent to which genuine judicial process is available and followed. A few instances taken from countries with vastly different régimes will illustrate the problem. In the Soviet Union and Spain the Constitutions contain provisions which *prima facie* satisfy the requirements of the Rule of Law. Both in the Constitution of the Soviet Union of 1936 and in the *Fuero de los Españoles* of 1945 there are to be found impressive lists of human rights and fundamental liberties which correspond to the standards of Constitutions in a free society. It may be useful to compare these two documents with the Indian Constitution of 1950 and the Nigerian Constitution of 1960. Between the two former and the two latter there is one fundamental difference, namely, that the latter provide to the citizen effective guarantees and in particular a judicial machinery for the protection of his rights. The Judiciary in those countries is independent and the legal profession is free. By way of contrast, the Constitution of the Soviet Union is confined to an enunciation of principles far removed from actual practice by the categorical imperative of the supreme will of the ruling Party. The basic concept of Socialist legality in the Soviet State consequently acquired an essentially political meaning. In the relation to the individual it is a notion stripped of that ethical content which is usually associated with the Rule of Law. A similar disparity between theory and practice in the field of civil liberties is to be found in Spain where, however, its background and reasons are different from those in the Soviet Union.\* Here the arbitrary will of governmental authority cannot be effectively checked firstly because the

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\* A special study on the situation in Spain is being prepared for early publication by the Commission.

basic law, *Fuero de los Españoles*, has not been properly implemented by subsequent laws and secondly because the Government has been able to establish and maintain various exceptional jurisdictions, military and otherwise; in this way the power of the Bench – whose traditional sense of independence and responsibility has to a not inconsiderable extent survived the constant and often subtle pressure of the régime – has been emasculated. Hence developments such as the recent political trials which affront the conscience of peoples who cherish freedom under the law.

The Commission has frequently emphasized the importance of both substance and procedure for the protection of human rights and has always defined the Rule of Law in terms of both. A number of articles in the present issue of the *Journal* reflect this double concern. A striking feature of all of them is the remarkable consensus on these problems in widely separated and vastly different systems.

Two Presidents of Supreme Courts have honoured us with their contributions to this *Journal*. Mr. Terje Wold, President of the Supreme Court of Norway, and also Chairman of the Committee in charge of the introduction to Norway of the "Ombudsman", has contributed an article on that subject. The "Ombudsman", as readers of the *Journal* will know, is the Parliamentary Commissioner for Civil and Military Administration. This characteristic feature of Scandinavian legal systems fills an important gap in the control of the ever expanding activities of public and governmental authorities and has commanded the increasing interest of public lawyers in other countries. "Justice", the British Section of the International Commission of Jurists, has recently launched a study group which will consider the applicability of a similar institution under British conditions. In Switzerland, where the deficiencies which exist in the sphere of judicial control of administrative acts are well known, great interest was displayed in the lecture recently given on the functions of his office by Professor Stephan Hurwitz, the Danish "Ombudsman", who addressed a meeting of lawyers in Berne.

The Chief Justice of Japan, Mr. Kotaro Tanaka, who is a distinguished Member of the International Commission of Jurists, has also written for the *Journal* an article of importance. He discusses some of the problems which exist in the administration of justice in present-day Japan. The value of his observations and conclusions reaches beyond the borders of his own country inasmuch as they reflect developments of new legal institutions in a democracy. The old traditions of Japan's independent judiciary have been recently strengthened by the growing prestige and influence of a strong Bar. These developments have greatly increased national confidence in the new administration of justice.

The rapid emergence of a number of independent states in

Africa has engaged the Commission's attention for some time past. Two articles in this *Journal* are devoted to contemporary legal issues in African states. Dr. T. O. Elias, a Nigerian jurist with a reputation as one of the leading authorities on African law, analyses the provisions on human rights and fundamental liberties of the new Nigerian Constitution which comes into effect on September 30, 1960. It is interesting to note that many of its substantive provisions are taken from the Convention on the Protection of Human Rights and Fundamental Liberties, signed in Rome in 1950. The second article focussed on Africa deals with the problems of the Judiciary in the "*Communauté*". It was written by a French judge, M. G. Mangin, who examines the problems of the administration of justice during the transitional period of the decolonization of the States of the *Communauté* and of their rapid progress towards independence. The author, writing with a background of years of judicial practice in Africa, stresses the importance of solid judicial institutions and of a well trained Bench for the full development and stability of new States who have to cope with problems of staggering complexity.

Mr. Saba Habachy belongs to that comparatively rare group of jurists whose experience in the legal field covers the practice of law as an attorney, judicial work and teaching activity. He has contributed to this issue an article on the Law, Bench and Bar in the Arab lands. The distinctive features of Islamic law necessitated a rather wider conspectus than in previous articles devoted in the *Journal* to the Bar in different countries of the world. In this case, it was not possible to separate the discussion on the organization and functions of the Bench and Bar from the rules of substantive law, but the Editors feel that this approach will be appreciated by our readers. This series of articles on the Bar will be continued in the next issue by a study on the organization of the legal profession in India.

The current number features one more article on the control of the administration: a paper by Professor Glenn Morgan analyses some aspects of the Soviet Prokuratura, an institution which was described in an earlier issue of this *Journal*.

Mr. Norman S. Marsh, proceeding from the outcome of the colloque held in Oxford in autumn 1959 under the auspices of the United Kingdom Committee on Comparative Law, analyses in his contribution to this issue the question of legal aid and the Rule of Law. The Commission has frequently emphasized the importance of a well organized and readily accessible system of effective legal aid for the fulfilment of the requirement of equal justice. Experiences gathered in a variety of countries will, it is hoped, contribute to the expansion of the scope and improvement of the functions of an institution which in most states still leaves much to be desired.

The treatment of preventive detention and freedom of expression

in India by Mr. Durga Das Basu in his treatise on the Indian Constitution is the subject of a note by the Editors. This is a subject that has increasingly attracted the Commission's attention and on which an inquiry is in progress. Examples of extrajudicial detention have recently led to serious concern over the dangers of abuse even in countries with high traditions of procedural safeguards, such as France, where the question is seriously discussed.

This issue of the *Journal* introduces one new feature and substantially expands another. The first Document published in this periodical is a report of the Kerala Inquiry Committee, composed of leading Indian jurists and engaged in an impartial study of the developments brought about by the 27 months of Communist rule in that Indian State. The experience of Kerala, though a regional one, contains elements of typical political and legal techniques observed in various parts of the world under conditions of Communist domination.

The book review section has been considerably expanded. The Editors hope that the readers of the Commission's publications, among whom are represented all legal activities, will welcome a broader survey of relevant literature and a wider view of what might interest them.

In concluding this introduction I wish to mention that starting with the next issue, the readers of the *Journal* will be requested to pay a small subscription fee. While the *Bulletin* and *Newsletter* of the International Commission of Jurists will continue to be distributed without charge, the rising costs of the Commission's publications and its ever expanding number of readers do not permit the distribution of the *Journal* on the same basis. The *Journal* will henceforth appear at regular semi-annual intervals in the four languages of the Commission and the Editors trust that the lawyers who are now receiving and reading this periodical will continue to do so and in this way express once more their approval of the objectives of the International Commission of Jurists and their support of its work for the universal recognition of the Rule of Law.

JEAN-FLAVIEN LALIVE

## DEMOCRACY AND JUDICIAL ADMINISTRATION IN JAPAN

The judicial system in force in Japan since the Meiji Restoration of 1868 has been based on the European systems – at first on the French, then on the German, pattern. The Constitution of 1889 (the “Meiji Constitution”), which divided the power of the State into legislative, executive and judicial branches under a constitutional monarchy, thus following Montesquieu’s principle of the separation of the three powers, was influenced by the Constitution of Prussia. Under this Constitution the judicial power was exercised by the courts in the name of the Emperor in whom sovereign authority resided, and the position of judges was guaranteed, it being seldom if ever that the executive interfered with the contents of a judgment of the courts.\* The national institutions, however, were so framed that the administration of matters concerning the courts appertained to the Ministry of Justice. As the Minister of Justice was a member of the Cabinet, the courts appeared to be subordinate to the Executive, and the independence of the judges was in fact only relative.

In respect of the forms of law, both substantive and procedural, the Continental principles of law-making were adopted, and instead of the Common-law or case-law principles of Anglo-Saxon nations, the codification principle of Continental jurisprudence was followed. The Civil Code, Commercial Code, Criminal Code, Code of Civil Procedure and Code of Criminal Procedure were successively enacted.

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\* An exceptional case of interference by the executive with the judgment of a court took place in 1891. The Crown Prince of the Empire of Russia (later the Emperor Nicolas II), travelling in the countryside, was attacked by a policeman at Otsu, near Kyoto, and was wounded. In view of the delicate Russo-Japanese situation, the Japanese Government was of opinion that such a grave attempt on a member of the Russian Imperial family should be visited with capital punishment. However, the Japanese Criminal Code dealt only with an attempt on a member of the Japanese Imperial family; it did not deal specifically with an attempt on a member of a foreign royal family. The maximum penalty for attempts to murder in general was life imprisonment. The Government exercised pressure on the Court of Cassation (Daishin-in), in which the case was pending. But the conscientious and courageous Chief Justice, Iken Kojima, decisively rejected the political intervention of the Government by imposing life imprisonment on the accused, and thus maintained the independence of the judiciary. Kojima became a hero and the symbol of the spirit of the judge, and his example has encouraged the succeeding generations to our own day. This is the famous Otsu Case.

In the compiling of the Civil Code some consideration was given to a few ancient indigenous customs – in parts of its Law of Family Relations and the Law of Succession – but in the main the German law which succeeded to the Roman Law was regarded as the basic law. The other Codes mentioned above also approximated to the corresponding German laws, except that in the Company Law of the Commercial Code some elements of Anglo-American law have been introduced during the past twenty years, particularly in the field of corporation finance.

It must also be admitted that the trend of jurisprudence and legal education in universities was generally speaking in the German tradition. Losing sight of the object of laws and regulations, scholars often devoted themselves exclusively to the study of conceptual or analytical jurisprudence, out of touch with other social sciences and the demands of social life; they learned by heart and filled their heads with systematized abstract theories, which are by no means suitable for training legal minds.

Such tendencies, coupled with an educational method depending on the exclusive employment of lectures, hindered the development of jurisprudence and the improvement of the administration of law. Legal procedure, which should be regarded only as a means, was complicated by theories of procedural law with their conceptual and deformed development. As a consequence, lawyers, forgetting the original object of a lawsuit, often would not hesitate to play in court between themselves a sort of litigious game, or to direct their energies towards “catching out” the court. Delay in dealing with lawsuits thus became a chronic disease of legal life.

The new democratic and pacific Constitution of 1946 has achieved many radical reforms in every branch of the national administration. Of these, the reform of the judicial system was one of the most important. Such a reform would never have been effected unless strongly backed up by the occupation forces. The same can be said concerning the democratization of other institutions and principles, such as equality under the law, the introduction of female suffrage, the abolition of the nobility and the feudal family-system with its *patria potestas*, the principle of parity of religions, agrarian reform, guarantee of the freedom of labour unions, reform of the Upper House, etc. As regards the reform of the judicial branch, nevertheless, it is especially noteworthy that there was always comparatively smooth co-operation between the occupation authorities on the one hand and the Japanese Government authorities and judicial circles on the other. The principal reason for this was that as judicial reform had not as its object any compromise between or accommodation of conflicting interests or different political views, all discussion of the matter centred on such technical considerations as were relevant to attainment of the judicial function and purpose.



Under the new Constitution, the judicial power is vested in a Supreme Court and in such inferior courts as may be established by law (Article 76, paragraph 1). In this hierarchical organization of ordinary courts is vested the whole judicial power, and such extraordinary tribunals as the Administrative Court, provided for in the old Constitution, and courts-martial – which presuppose the existence of armed forces – are not to be established (Article 76, paragraph 2).

The extinct Administrative Court had judicial power over a very limited number of matters, but at present a suit attacking any allegedly illegal act of an executive agency may be brought in the ordinary courts of law. In cases where an executive agency has competence to hear an appeal from an executive decision, the procedure of the executive agency follows that of a tribunal of first instance, and the law-courts function as tribunals of not lower than the second instance. In short, the courts under the new system have jurisdiction not only in civil and criminal cases, as they had in the past, but also in administrative litigation in a broad sense (such as cases pertaining to taxes, labour, agricultural land, education and local self-government). All suits, civil as well as criminal, concerning elections were within the jurisdiction of the law-courts in the past as at present.

The most important authority given the Court by the new Constitution is the power to pass on the constitutionality of laws, ordinances or official acts. This corresponds to what is known in America as the power of “judicial review”, the “check and balance” by the judicial branch of the legislative and the executive. The power may be said to have been established in America by Chief Justice John Marshall (1755–1835) of the Supreme Court of the United States during his tenure of office of thirty-four years, and is still exercised; but it is a power not yet recognized by the legal organization of many countries of the European Continent – except a few, such as Germany and Italy, which have established special Constitutional Courts. Japan, which followed the Continental system of laws, had not recognized it until the 1946 revision of the Constitution. Under the old Constitution, Japanese judges had to decide cases according to the terms of the laws, without power to examine their constitutionality. What is called the power of courts to review constitutionality is based on the provision of Article 81 of the Constitution, providing that “The Supreme Court is the Court of last resort, with power to determine the constitutionality of any law, order, regulation or official act.”

The interpretation of this provision is, however, not entirely free from doubt. Some jurists are of the opinion that even in a suit not involving any concrete controversy, the Supreme Court has the power to pronounce an abstract decision, as the court of first instance

and of last resort, on the constitutionality of given legislation. Mr. Mosaburo Suzuki, Chairman of the Central Executive Committee of the Left-wing Socialist Party, brought an original action in the Supreme Court asking the Court to declare a nullity the law and ordinance providing for the establishment by the Government of the National Police Reserve. The Supreme Court, however, dismissed the action on the ground that, under the present system, it had no power to give hypothetical judgment, but only in concrete controversies (judgment given by the full Bench of the Supreme Court on October 8, 1952).

During the eleven years since the new court-system came into force, the Supreme Court has only given one decision holding a law or ordinance to be unconstitutional; the one exception is the *Akahata (Red Flag)* case. This case involved the legal issue whether an ordinance promulgated under the occupation authority, and limiting freedom of expression, could continue to be enforced after Japan had attained her independence and the new Constitution had come fully into effect. The Supreme Court allowed the appeal of the accused, on the ground that the application of that ordinance by the inferior courts was unconstitutional. The majority opinions, however, were divided into two groups: the one being based on the reasoning that after the attainment of independence the ordinance ceased to have effect, and its application was therefore unconstitutional; the other, that the content of this ordinance was unconstitutional from the viewpoint of freedom of expression as required in the new Constitution. The dissenting opinion would have dismissed the appeal on the ground that the old law was applicable to the offence committed during the time when that law was effective. The decisions of the Supreme Court have involved constitutional issues arising under 47 Articles of the 103 composing the Constitution. More than 600 points have been involved in these decisions.

From the fact that the Supreme Court until now has almost uniformly upheld the legality of acts, the constitutionality of which were attacked, we cannot conclude that it has neglected its function as a Constitutional Court. To give affirmative decisions on constitutional questions demands the same amount of study and consideration as in the case of negative decisions. It cannot be denied that the Court has contributed greatly to the certainty of law, by defending laws and ordinances from varied attacks in this post-war transitory period. The fact that the Supreme Court is now the Court of last resort with the power to determine the constitutionality of laws constitutes a remarkable enhancement of its position in contrast with the Court known to the old systems. Above all, this system completes the protection of fundamental human rights and freedoms guaranteed to the people by the new Constitution. It is true that the old Constitution also afforded various guarantees of rights, but they

were subject to restriction by legislation of the Diet. Under the new Constitution, not only is restriction by law of such guaranteed rights impossible, but any law restricting them can be declared invalid. The Supreme Court is popularly called the "Guardian of the Constitution" and it is in fact not unreasonable to regard the Supreme Court as a bulwark of human rights.

In the view of the new Constitution, fundamental human rights were not created by the State, but are eternal and universal institutions, common to all mankind and antedating the State, and founded upon natural law (see the Preamble and Article 11). But the people must refrain from abuse of their rights, and are always responsible for utilizing them for the public welfare (Article 12). The public welfare grows from the natural character of a body politic called the State.

It is the duty of the Supreme Court to determine the respective bounds of the two concepts through decisions in concrete cases coming before it. Unlike the old Constitution based on legal positivism, the new Constitution has a natural law foundation. The supra-constitutional character of natural law is clearly expressed in its preamble, declaring that: "This (the principle of democracy) is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith." The sanctity of natural law is carried a stage further by conferring upon the courts, especially the Supreme Court, the power of judicial review. Fundamental rights derived from natural law are written into the Constitution and the Constitution provides the Court with power to review any act which violates those rights. To this extent the Supreme Court functions as the guardian of natural law, protecting the nation from both anarchy and dictatorship. It also acts as a safeguard of the Rule of Law in protecting basic rights.

In order to enable the Supreme Court and the inferior courts to discharge their duties, their independence must be guaranteed. Such independence has two sides. The one is the independence of judges, the other that of courts. The independence of judges was essentially recognized and guaranteed by the old Constitution, but the new Constitution made it more complete. The remuneration of judges, formerly below that of officials of the executive branch of the government, is now a little higher.

As regards the judges of the Supreme Court, the Chief Justice is, under the Constitution, appointed directly by the Emperor, as in the case of the Premier (Article 6, paragraph 2), and the fourteen other Justices are accorded the same status as ministers of State. The Chief Justice receives remuneration equal to that of the Premier, while all other Justices are given the same amount as ministers of State. The Cabinet has the power of nominating the Chief Justice

and of appointing the other justices, the formal appointment of the Chief Justice being made by the Emperor, as in the case of the Premier. In this connection it may be noted that the appointment of the justices of the Supreme Court has to be reviewed by the people every ten years; this may be said to correspond to endorsement by the Senate of the United States, and is in substance an institution of recall (Article 79). The Judges of the Supreme Court and those of the summary courts – corresponding to small-claims courts, or justices of the peace – retire upon reaching the age of 70 years, and the judges of the other courts at the age of 65.

The Supreme Court is not composed exclusively of career judges, in which point it differs from the Daishin-in, the highest court of the old system, which most nearly corresponded to the Court of Cassation in the Continental system. About one-third of the Supreme Court consists of career judges, the rest being men who have distinguished themselves as lawyers, men of practical experience in constitutional or administrative law, professors of law or diplomats. The setting-up of a Supreme Court in which specialists in civil or criminal law plus non-specialists of varied knowledge and experience take part is largely the result of the Court's increased power which, as already mentioned, now extends to judicial review of legislation. It is an attempt to meet the need for far-sighted judgment and statesmanship at a high level.

In regard to the selection of judges in general, present-day Japan is as yet a long way from the circumstances of the United States, where judges are taken from the common pool of lawyers. In order to become a judge, public prosecutor or a practising lawyer, a graduate from a university, having passed the state judicial examination, is required to undergo two years legal training at a special training school, the Legal Training and Research Institute under the jurisdiction of the Supreme Court.

In Japan there are now approximately 2,200 judges, including 450 assistant and 700 summary-court judges. To become a fully-fledged judge the assistant judge is required to serve at least ten years in the courts. These are about 6,000 attorneys at law. The total judicial personnel is very small in relation to the population of Japan, numbering 90,000,000. This is one of the causes of the law's delays.

Practising lawyers have organized and maintain Bar Associations by areas, and have a National Federation of Bar Associations. The Lawyers' Law of 1949, regulating lawyers and Bar Associations, freed lawyers from supervision of the Government and the Courts and conferred upon the Bar Associations complete autonomy. This will certainly serve to enhance the social standing of lawyers, which was not very high in the past. Japan until recently had no organization comparable to the "Bar Association" of the United States,

which -- including not only practicing lawyers but judges, prosecutors, law-school professors as well as other jurists -- is so influential both in the legal world and in society. Such an organization is an absolute necessity for Japan, since it is an important means of attaining one of the aims of our judiciary, namely the co-ordination of the administration of the internal affairs of all courts. For this reason a Bar Association of this type was founded in 1952, but it remains still in an embryonic stage. Whether the new Bar Association will grow up soundly, discharge its mission as a colleague of the judiciary, and become as influential in society as its sister institutions in the United States, remains to be seen.

With regard to the independence of the courts, the new system is implemented by the provision that the Supreme Court shall carry on the administration of the internal affairs of all courts through its conference of fifteen Justices. The Justices meet once a week and decide upon the adoption, amendment or revocation of rules, the designation of judges of inferior courts and other matters of personnel, the internal budgets of the courts, and other questions. Each inferior court has its own conference of judges to manage its administrative business.

The administration of court business, which under the old system lay within the jurisdiction of the Minister of Justice, has thus been separated completely from politics. The Minister of Justice, who is a Cabinet member and more or less corresponds to the Attorney-General of America, is placed in charge of some business which in a broad sense is judicial, the major items being affairs concerning the procurators' office, the registration and execution of punishments, and preparation of drafts and bills of a judicial character for presentation to the Diet.

In not being a member of the Cabinet, the Chief Justice of the Supreme Court differs from the Lord High Chancellor of Great Britain; his position is different also from that of the Chief Justice of the United States, in that he is in charge of the administration of the judicial business throughout the country. Apart from being first judge in order of precedence, he presides over the meetings of judges dealing with administrative matters. As a consequence of the Supreme Court's responsibility for the administration of the courts, a Secretariat comparable in size to that of the former Ministry of Justice has been established.

A most important power vested in the Supreme Court is the rule-making power; by virtue of this power it adopts rules of procedure and rules for the governance of attorneys, the internal discipline of the courts and the administration of judicial affairs (Constitution, Article 77, paragraph 1). Rules so far promulgated by the Supreme Court since its establishment in the summer of 1947 amount to about 150. These deal with procedure in civil and criminal

cases, the organization of the courts, and details of judicial administration. In respect of the scope of the rule-making power, the judges of the Supreme Court disagree; some of them argue that since a law is superior to rules, the latter can be adopted only within the scope of the former, some contend that a law can be modified by a rule, while some others insist that laws and rules stand on an equal footing, so that, in cases where they conflict, the issue is to be settled by having regard to the order in time of their adoption. For the present, the Supreme Court has been making rules for regulation of details only within the scope of the laws.

As already mentioned, the position of the judges and the Courts alike has been raised to a striking extent under the new Constitution, by comparison with their position under the old system. The judicial power has attained complete independence as the third branch of the national Government, parallel with the executive and the legislative.

If the sphere of judicature were invaded by the executive, the legislative, or any other power, the foundation of the Rule of Law would be endangered. The judicature aims at the maintenance of the legal order, embracing the guarantees of freedom and the realization of justice as its purpose under the Constitution.

Ten years ago conflict arose between the legislative and judicial branches, in the form of a controversy whether the provision of Article 62 of the Constitution, conferring on the two Houses of the Diet the power to conduct investigations "in relation to government", includes a visitational power over the courts. Under that Article, each House of the Diet may conduct investigations in relation to matters of government, and may compel the presence and testimony of witnesses and the production of records. Accordingly, the Judicial Committee of the House of Councillors, taking up a case in an inferior court then under public criticism on the score of punishment awarded and other points, had commenced investigation and had made adverse comments before the judgment was finally rendered. The conference of justices of the Supreme Court thereupon sent on May 20, 1949 an open letter in the name of the Chief Justice to the President of the House of Councillors, protesting against the acts of the Committee on the ground that the power to inquire into the correctness of a judgment or to carry out investigation concerning the finding of facts and the fixing of penalties belongs exclusively to the courts in whom is vested the judicial power, and that the Diet cannot on the strength of Article 62 of the Constitution lay claim to such a power. It has, moreover, not seldom occurred that a defeated litigant, dissatisfied with a judgment, has petitioned the Committee on Prosecution of Judges for action under the Law for Impeachment of Judges; but this is owing to the misunderstanding of the spirit of the impeachment system. Fortunately, there has so far

been no case in which the Committee has acted on such a petition and demanded the dismissal of a judge thus attacked.

The courts and the judges have obviously been vested with very important powers under the new Constitution, but have they really acquired a social position commensurate with their responsibility? We regret to have to confess that in Japan recognition by the people of the importance of the position of the courts and popular interest in the work of the judges are still very low, if measured by the standards of England and America. This may be surmised from the tone of public opinion as recorded in the press in connection with the recent vote by the people on newly appointed Justices of the Supreme Court, which took place simultaneously with the general elections for the House of Representatives. It is very doubtful whether a great majority of the people who voted knew – not only anything of the judgments rendered by the individual judge, or his views as expressed therein – but anything even of his character, intellect or career. The people in general are too preoccupied with the affairs of everyday life – their thoughts are on prices of the necessities of life, the food-ration, their taxes, getting their children admitted to schools, and the like – and they often fail to perceive that maintenance of the social order by means of the justice administered by the courts is the cornerstone of a democratic community. As a consequence, the people generally showed little interest in the voting mentioned, and votes for the dismissal of each judge submitted averaged on each occasion about ten per cent of the total number of ballots cast. It is conceivable that these votes for dismissal were cast chiefly on instructions issued by leaders of labour unions to their members, by some elements of the left-wing parties and in particular by the Communists. This system of review is at present the target of a great deal of criticism and amendment is being urged. It is, however, undeniable that the system has been instrumental in linking the people psychologically with the Supreme Court, and has thus emphasized the latter's importance.

Maintenance of order in the courts and the more speedy despatch of cases are the two important problems now confronting the courts of Japan. Before the termination of World War II, the judicial annals of Japan afforded almost no instance of disturbance, during a public trial, of order in the court. Freedom of speech, press and association, which the Japanese people enjoyed after World War II, to some extent involved the courts as a subject for criticism and a field for propaganda, and the Communists in particular made extensive use of this opportunity.

The provisions of the Code of Criminal Procedure, the customary way of administering it and the psychology of the judges, were all equally unfitted effectively to control defendants, attorneys, and spectators who chose to take advantage of the principle of

public trial. In this connection it should be mentioned that the Japanese judge has no power of committal for "contempt of court", such as exists in Common Law countries.

It is considered desirable that the criminal law should provide for the effective punishment of such acts as obstructing the performance of public duties or interfering with a trial in courts, but the provisions which exist are in practice not employed as they raise difficulties of preserving evidence and are inconvenient to the prosecution for the purpose of controlling threats, abuse, shouting and other acts of obstruction at public trials. Following the lead given by the English and American concept of "contempt of court", a law dealing with maintenance of order in the courts was enacted in 1951, but it is open to doubt whether a twenty-day detention and a Yen 30,000 fine, both maxima, which are not criminal penalties, can be expected to deter those, such as the Communists, who, ignoring the Constitution, the power of the State and the authority of the courts, do their utmost to defy them. Nor is it certain that the dignity of the courts and the orderly progress of trials can be protected through the new law. Recently disturbances in the courtroom have become rare, owing to a change in the strategy of those who are seeking to undermine the authority of the courts. Legal measures are now being used to carry on the "court struggle", for instance, the right of challenging the judges. In any event, what is most desirable is that judges should be alert to discern the true nature of cases of this kind, and duly to determine them with moral courage and firm resolution.

The slow progress of proceedings in the courts has from antiquity been a world-wide evil. It has become a chronic disease in Japan. Anyone of common sense in Japan knows that a civil case of little importance – for example a dispute of daily occurrence over a rented house or land – will require at least three or four years before a final judgment by the court of last instance will be given, if it should go to the court of last resort. Nor will a criminal case be determined much more quickly, if appeal be taken to higher courts.

This delay in justice generally is bitterly criticized by the press. If such a condition continues, the realization of justice and the protection of fundamental human rights, which are the courts' aims, will be next to impossible, and confidence of the people in the courts cannot be expected.

In order to bring about an improvement in the situation it is imperative that judges entirely rid themselves of their inefficient and easy-going ways, characteristic of bygone times for despatching judicial business. The administration of justice calls in general, not only for sound interpretation of the law (or scholarship) and pursuit of truth (or historical sense), but also administrative efficiency. In Japan the judges have paid conscientious attention to the first and



second qualities, but often not to the third. The judicial conscience must be aroused and directed to cultivating all three qualities equally; Japanese judges ought always to remember the maxim, "Justice delayed is justice denied," in discharging their duties.

Prompt justice, however, will never be realized through the mental preparation and efforts of judges alone. Lawyers must share with the courts the responsibility for dilatory justice in Japan. When a lawyer is found not fully prepared for a scheduled hearing and asks for postponement of a hearing more than once, or proposes to introduce useless evidence, the judge in charge often assents, simply out of the desire to have the proceedings progress smoothly. Again, the losing party in a civil suit in an inferior court, or his attorney, even though fully aware of the hopelessness of his case, often appeals to the higher courts with the sole purpose of delaying satisfaction of the judgment as long as possible. As under Japanese law the tax costs which the successful party is entitled to obtain from the losing party do not include attorneys' fees the latter will appeal at the cost of the successful party, without risk. To prevent purely delaying appeals it is desirable that attorneys' fees shall be included in the costs. In criminal cases, also, a convicted defendant or his counsel often appeals with the purpose of delaying the carrying out of the sentence. The Codes of Civil and Criminal Procedure contain some provisions designed to prevent abuse of the right of appeal, but these provisions are seldom applied in practice.

As a consequence, moreover, of the provision of Article 31 of the Constitution, that no criminal penalty shall be imposed except in accordance with due process of law, even such an infraction by an inferior court of the legal procedure as could in no way affect the outcome of a trial will be used by lawyers as a pretext for appeal in the name of violation of the Constitution. For these reasons, the Supreme Court nowadays has a "pending" list of 4,000 cases, and is working hard in the attempt to dispose of them. It is necessary for judges to remind themselves that time is not their own property nor that of the parties, but belongs to the public; lawyers also should co-operate in speeding up proceedings.

No attempt will be made here to deal in detail with safeguards of human rights. Some fundamental principles already recognized or newly introduced are given a special place of honour by being incorporated in the Constitution itself; we may instance the "due process" clause, restrictions on powers of arrest, detention, seizure, etc., the right of cross-examination, the right to counsel, the privilege against self-incrimination, and the prohibition against conviction on confession only.

It should be pointed out that in criminal procedure the "party-principle" was adopted, modifying the "official" principle prevailing in the countries with the Continental system. Under the new concept

the position of the public prosecutor has changed, being equated with that of the accused so far as the trial is concerned.

In brief, a new system for democratization of the Japanese judicial system has been established by the new Constitution. In order to realize it in our social life, instead of leaving it as a mere paper-plan, deeper understanding of the judicial system by the people generally and greater efforts on the part of all judicial officials will be required. Although the system is transformed, yet it is not entirely free from the fetters of tradition or time-honoured habits and customs. Judges, procurators and lawyers should realize that they are not opponents, but have a common task of maintaining the legal order as a way of realizing justice and defending liberty. Such self-awakening will only come about if they develop the strong belief that democracy is possible only on the basis of the Rule of Law.

It may be asked, how we can further such a belief and destroy the evils lurking in our judicial system, so that it may satisfy all reasonable demands of the people? By way of reply, two points should be emphasized and these deserve general recognition by the Judiciary in Japan.

In Japan, the practical and administrative aspect of judicial proceedings has in the past been rather neglected, although scholars in procedural law have studied this field theoretically and minutely. In the first place, therefore, Japanese judges and lawyers must apply critically and in a realistic way an international standard to what we are actually doing. Fortunately, such an atmosphere is gradually forming in our country. Visits of jurists to and from Japan and America have become frequent since the end of the War; a number of Japanese judges, public prosecutors and lawyers have visited the United States, and while there have studied how judicial business is managed in America, on returning home then suggestions have provided a stimulus to the improvement of our judicial administration. Such useful trips of inspection by jurists are gradually being made not only to the United States but also to England and other countries. It is certain that the presence of Japanese delegates or observers at international conferences of jurists held in different parts of the world helped the Japanese legal profession to recognize the universal nature of the mission of justice and to realize more keenly the necessity for the comparative study of law and the co-operation of all nations in the attainment of their common objective. In particular, it is noteworthy that Japanese judges and lawyers, trained in German jurisprudence, have become familiar with the Anglo-American way of legal thinking. Since the end of the War we refer more than before to Anglo-American lawbooks in deciding cases. Our experience has proved that harmony between

two legal systems – the Continental and Anglo-American – can in large measure be established.

Where judiciaries share a common aim, the means and technique of attaining that aim do not differ fundamentally as between one legal system and another.

Secondly, such co-operation of various nations, such understanding of the universality of the mission of justice, will be possible only when all acknowledge the existence of a basic rule, universal for mankind, of justice and freedom. It is the ethical principle constituting the foundations of the Charter of the United Nations and the Universal Declaration of Human Rights of 1948, and also of what is solemnly declared in our Constitution. This principle is the criterion for judging whether a nation is “free” or “totalitarian”, whether it lives under the Rule of Law or the rule of force. Mutual co-operation of all free nations in efforts to protect and realize this principle is an indispensable condition for democratization of the whole world, and for the peace and welfare of humanity. The mission of the Japanese judiciary is to play its part in fulfilling this universal duty.

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# THE NORWEGIAN PARLIAMENT'S COMMISSIONER FOR CIVIL ADMINISTRATION

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*[In Vol. I, No. 2 of this Journal we published an account by Professor Stephan Hurwitz of his work as the first Danish Parliamentary Commissioner for Civil and Military Government administration. This office, which has parallels in Sweden and Finland, has aroused wide interest in many other countries. Reference may be made in this connection to two articles by the legal correspondent of the London Observer published in that paper on May 31 and June 7, 1959 and to an article by Mr. I. M. Petersen of the Danish Ministry of Justice on "The Danish Parliamentary Commissioner in Action" in Public Law (1959), p. 115. We are now pleased to publish the following contribution by the Chief Justice of Norway, which country has recently been considering the introduction of an institution similar to, but not identical with, the office of Parliamentary Commissioner in Sweden and in Denmark. Chief Justice Terje Wold was Chairman of the Committee in Norway, which considered the matter and its recommendations formed the basis of the proposed Act the purpose and function of which is described in this article. — Editors.]*

# THE NORWEGIAN PARLIAMENT'S COMMISSIONER FOR THE CIVIL ADMINISTRATION

## I. Introduction

In 1945 the Norwegian Government appointed a Committee on Administrative Procedure. In the terms of reference the Committee was specially asked to report on the guaranties and safeguards which are observed when administrative authorities make decisions influencing the rights and interests of the individual citizen. The Committee was further required to recommend what measures the Committee considered necessary to improve the administrative procedure and to strengthen the judicial security of the individual citizen in his dealings with administrative authorities. The mandate which was given to the Committee was, as will be understood, very comprehensive, and it was not until 1958 that the Committee had finished its work. The report contains two main proposals for new legislation – an *Administrative Procedure Act* laying down provisions of procedure to be applied by the administration when exercising its powers, and an Act establishing a *Norwegian Commissioner for the Civil Administration*. It is the second proposal which forms the subject of this article.

It may, however, be useful first briefly to explain what safeguards already exist in Norway in the administrative field. As a general rule any administrative decision may by way of complaint be brought before a higher or superior administrative authority. This administrative appeal goes in most cases to the ministries, but can even go to the King in Council. Furthermore, Parliament exercises a fairly extensive control over the administration. We have a system of constitutional control and, in addition, all administrative matters or decisions may be made the subject of interpellations and questions in Parliament. But most important is the very extensive and thorough judicial review which is exercised by the courts. Any decision of an administrative authority – even decisions of the King in Council – may be brought before the courts. The courts have jurisdiction regarding both fact and law. A very large proportion of all cases

before the ordinary courts are cases to which the State, a municipality or other public authorities are parties. We consider the judicial review exercised by our ordinary courts as the most important guarantee of the rights of the individual citizen in his relation to the administration.

## II. The Background

It follows from what has been said that we have a fairly ample and effective system of constitutional, parliamentary and judicial control of the administration. Nevertheless, the Committee on Administrative Procedure has come to the conclusion that the safeguards should be strengthened, and the Committee has made a number of important recommendations to that end. The proposal to establish an office of "Stortingets ombudsmann" is only one of these recommendations.

In this connection it should be emphasized that the recommendations are not based upon any assumption or allegation on the part of the Committee that the Norwegian administrative system is a bad one or that the civil servants are incompetent. The Committee states, on the contrary, that our administration may bear comparison with any other system of administration. This also true of the guarantees and safeguards. The reasons behind the proposals to strengthen the means of control are much more far-reaching and go deeper. They have their origin in the characteristic development of the modern Welfare State. It seems unavoidable at the stage of economic and technical development which, regardless of politics, has been achieved in all modern societies, that ever larger and broader powers shall be bestowed upon the administrative authorities. As Professor Otto Bachhof has written, it is a "fundamental change from the rule of law in a liberal State, merely guaranteeing freedom, to the modern administrative State which is decidedly influencing and shaping the social order".<sup>1</sup>

This is the background against which the Norwegian proposals – and the many efforts in other countries to introduce reforms in the same field – must be considered. It should be evident that "the greater the powers given to the executive, the greater the need to safeguard the citizens from their arbitrary or unfair exercise".<sup>2</sup>

<sup>1</sup> *International and Comparative Law Quarterly*, Vol. 2 (June 1953), p. 368.

<sup>2</sup> W. A. Robson, "Administrative Law", in Morris Ginsberg (ed.), *Law and Opinion in England in the 20th Century* (London: Stevens & Sons Ltd., 1959) p. 198.

When the Committee first felt convinced that it was sound to strengthen the safeguards and control, it was only natural that we, like Denmark, should consider the introduction of a Commissioner for the Civil Administration, an institution of long standing in Sweden.

### III. The Swedish "Justitieombudsman"

The Swedish institution *Justitieombudsman* goes back to 1809. It is, however, important to take into account that the Swedish Commissioner – when his office was established – was (and is) part of the Swedish Form of Government. His main function was to exercise a constitutional control over the King and his subordinate civil and military officers. It was his duty to see to it that the King did not usurp more power than the Constitution bestowed upon him. As an organ of constitutional control he has, however, long lost his significance. The main reason is that the parliamentary system through constitutional practice has been introduced in Sweden. Nevertheless the *Justitieombudsman* has not only been maintained, but the powers of the Commissioner have recently even been increased and extended also to the local administration. This is explained by the fact that the *Justitieombudsman* has not only been maintained, but the powers field, has more and more asserted his position as a protector of the "little man". As time has passed, his main task has become to supervise the administrative authorities, in order that they do not exercise their powers arbitrarily or wrongfully and abide within the law in their dealings with the ordinary individual citizen.

To this end the *Justitieombudsman* has retained wide powers to investigate, to obtain information and to take action whenever he finds that a civil servant has acted wrongfully, unjustly or against the law. He can take action on his own initiative or act on complaints from citizens. His dealings with complaints, coming from all sections of the community, comprise by far the greatest part of his work. The Swedish *Justitieombudsman* provides a good illustration of an old institution keeping pace with the development of society, and acquiring greater importance in modern conditions than it enjoyed in earlier times. It is this new and modern task of the Swedish *Justitieombudsman* which the Committee recommends should be entrusted to the Norwegian Commissioner.

### IV. Earlier Norwegian Experience

The proposed office of *Stortingets ombudsmann* will be a new institution in Norway. Nevertheless we are not quite without precedent. When Norway was in union with Sweden, the King in 1822 established an office of *Generalprokurör* to control the civil servants. The *Generalprokurör* exercised, however, his power on behalf of the

King, and he was from the beginning very much disliked throughout the entire administration. After a few years the office was abolished.

It should also be mentioned that we in Norway since the war have established a new office of a Military Commissioner (*militaerombudsmann*). His task is to be of help to military personnel, primarily the ordinary soldiers, and to deal with grievances and complaints regarding military service. The *Militaerombudsmann* was introduced in 1952, and the experience so far has been a positive and good one.

### V. The Norwegian Proposal

The Norwegian proposal of a Commissioner for the Civil Administration follows the same lines as Denmark has followed in establishing the office of *Folketingets ombudsman*.<sup>3</sup> The task of the Norwegian Commissioner will, according to the proposal, in the main be the same as that of the Swedish and the Danish Commissioners. The proposed Act lays a heavy burden upon the Commissioner. According to Article 3 of the Act he must endeavour to ensure that the individual citizen suffers no wrong through decisions made by administrative authorities, and that they, and all persons exercising power in the service of the State do not make mistakes or neglect their duties. This sounds very ambitious. The office of the Commissioner must, however, be considered as one of a number of measures and remedies working to the same end. He has to function as an *additional* safeguard to obtain a lawful and just administration.

The *jurisdiction* of the Commissioner will extend only to the State administration. In the opinion of the Committee it would be desirable if the Commissioner could deal with local administration. It is, however, considered advisable, until more experience is achieved, to limit the jurisdiction of the Commissioner to the State administration. But according to Article 3, Section 3, of the Act the *Storting* (Parliament) may lay down in the general directives that the Commissioner, when dealing with an individual case, shall have jurisdiction to investigate how the case has been dealt with by the local administration in an inferior instance before the case was brought before the State administration.

Decisions of the King in Council are exempted from the jurisdiction of the Commissioner. Such decisions are subjected to constitutional and parliamentary control, which in the consideration of the committee should suffice. The courts will also be outside the jurisdiction of the Commissioner. This follows from the independent

<sup>3</sup> See Professor Stephan Hurwitz's article in this *Journal*, Vol. I, No. 2, p. 224.



position of the courts, with which the Commissioner must not interfere.

One may ask what *power* the commissioner will have in performing his duties. In this respect the Norwegian proposal differs from the Swedish and Danish institution. The Norwegian Commissioner will have the authority to investigate any administrative case. He can do this on his own initiative. But his principal task will be to deal with complaints from individual citizens. It follows that the Commissioner as a rule will deal with individual cases only. The Danish Commissioner's task is first of all to supervise all State administration.<sup>4</sup> This is not the task of the Norwegian Commissioner. The Commissioner must operate wholly outside the administration and will have no general responsibility for its supervision or direction. If when dealing with an individual case, the Commissioner finds that there are defects in laws or regulations, he is entitled to inform the ministry concerned. He will also have the right to deal with negligence or impropriety shown by a public servant in an individual case even if no private right or interest has suffered. But it is the *judicial right* of the private citizen which it is the Commissioner's first and foremost duty to protect.

The Commissioner has the right to see *all* documents of the administration. This goes far, but it is very important that the Commissioner, when he considers a case, shall have at his disposal all available information. Besides this right to demand full information in any administrative case, the Commissioner has no express power or authority. He himself can make no administrative decision. Neither has he any authority to give instructions, and that applies to both general instructions and instruction in the individual case. The Swedish Commissioner himself initiates criminal proceedings against a civil servant if he finds that a breach of the law has been committed. The Danish Commissioner can in the same circumstances demand that criminal or disciplinary proceedings are initiated.

In the opinion of the Committee such power is not a necessary prerequisite for the achievement of the objects of the Norwegian Commissioner's office. On the contrary, it might weaken his position if he too often should be a litigant party before the courts. The main thing is that the Commissioner is absolutely independent, first and foremost independent of the administration. He must therefore be no part of the administration himself. At the same time it is especially emphasized in the report that the Committee's proposal is in no respect directed *against* the civil servants. As already mentioned the Commissioner will have no authority to interfere in the work of the administration. As a rule he will deal with complaints only when the administration has already made its decisions.

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<sup>4</sup> See Hurwitz, *ibid.*, p. 225.

In Denmark, when preparations were being made for the introduction of a Commissioner's office, some fear was expressed that the Commissioner's work might undermine the position of the civil servants. In this respect the Norwegian Committee underlines that the administration will work absolutely independent of the Commissioner, and so far from his interfering in their work, the civil servants on their side will have no right to rely upon the Commissioner in the execution of their duties.

The Committee's report attaches great significance to the fact that the Commissioner shall be absolutely independent also of the *Storting*. The *Storting* can give general directives for his work, but the *Storting* can give him no instruction in regard to the cases under his consideration. The Commissioner will not exercise any kind of political or parliamentary control over the administration. It has been suggested that the Commissioner should have a board consisting of members of the Parliament to assist him, but this suggestion has been rejected by the committee to secure that the Commissioner in his work shall be absolutely free of any political influence.

It follows from what has been explained that the only real authority the Norwegian Commissioner will have is to investigate any administrative case and, after consideration, to express his opinion and inform the private party and the administrative authority of his conclusions. The success of the work of the Commissioner will entirely depend upon his personal authority and the respect and esteem he enjoys. It is therefore important that the right man is found for the job.

The Committee recommends that the Commissioner shall be elected by the *Storting* on grounds of his knowledge and skill. He shall be a lawyer of high standing. He shall not be a member of Parliament and must not hold any other office unless Parliament consents. For these reasons, and taking his independent position into account, there is every reason to believe that his conclusions will carry very great weight with the administration, the individual citizen and with public opinion. However, because his work so much depends on his personal prestige, the Commissioner must deal with all complaints personally. The number of cases with which he has to deal must not exceed his personal capacity. That is an additional reason why the Committee has proposed that his field of work to begin with shall be limited to the State administration.

It may be said that the main substance of the proposed Act is to introduce an opportunity for the private individual citizen to get the Commissioner's opinion when he thinks that any administrative authority has treated him wrongly or unjustly. An informal complaint is enough, and it is especially laid down that everybody who is deprived of his freedom, shall have the right to complain to the Commissioner in a sealed letter.

The Commissioner can decline to deal with a complaint. In this respect he is also entirely free. But, as stated already, he has the right to give his opinion and conclusions in all administrative cases brought before him. If in his opinion the administration should have decided the matter differently, he is free to say so. He will consider if the decision taken by an administrative authority conforms with the law. His first duty will be to safeguard the legality of the administration. But in many fields of present day administration the administrative authorities exercise wide discretion. A decision may be legal, but even so the Commissioner may find it is unreasonable. There has been some doubt if the Commissioner should have authority to express his opinion when he is in disagreement with the administration's exercise of its discretionary power. The Swedish *Justitieombudsman* has no such right. He cannot investigate whether an administrative decision is appropriate or reasonable. The Danish Commissioner, on the contrary, has this jurisdiction and similarly the Norwegian proposal has not restricted the scope or authority of the Commissioner in this respect. But, of course, the Commissioner must be very cautious to express his disagreement regarding the exercise of the discretionary power of the administration. He is not a super administrator, and, if he goes too far here, he may damage the task of his office. The discretionary power of the administrative authorities plays a very important part in most administrative decisions, and there is very often a real need for the individual citizen to get an opinion from an independent organ on the administration's use of this power. The Committee has therefore found that the Commissioner ought to have jurisdiction also in regard to the exercise of administrative discretion, but at the same time the Committee in its report has given the warning that the Commissioner in this respect must be very careful and not express a critical opinion unless he feels convinced that a wrong has been committed or it is clear that injustice has been done in the specific case.

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# THE NEW CONSTITUTION OF NIGERIA AND THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

## INTRODUCTORY

At the Constitutional Conference held in Lancaster House, London, in September and October 1958 between the then Secretary of State for the Colonies with his advisers and some 108 Nigerian delegates of the three major political parties and their allies, a new Constitution was agreed to form the basis for the Government of Nigeria when it becomes independent on October 1, 1960, a date also fixed for the first time in the new Constitution at the conclusion of the Conference.

Most of the matters dealt with at this conference had first been raised at the Constitutional Conference<sup>1</sup> held between the same parties in May and June 1957, but, in view of their complexity, it was decided that certain commissions be appointed by the Secretary of State for the Colonies to investigate them in Nigeria and report back to a resumed Conference<sup>2</sup> which was the one held in 1958. As the concern in this article is only with the problems of the constitutional provisions regarding the protection of human rights, it will be confined to a consideration of the origin, provenance, and possible application of the rules and principles finally arrived at. The new Constitution itself is not yet ready from drafting in the Colonial Office but, at the insistence of the Nigerian leaders themselves in the months immediately preceding the last General Election, held on December 12, 1959, the section on the protection of human rights and fundamental freedoms was made available to enable the politicians to campaign, as they appeared to believe, in the Northern Region in particular, without let or hindrance.

**Origin.** It is necessary at this point to refer to the immediate cause of the demand of the delegates of certain minority ethnic groups,

<sup>1</sup> See Command Paper (hereafter cited as Cmnd.) 107, s. 67.

<sup>2</sup> Two Commissions were in fact appointed. The Fiscal Commission's Report was published as Cmnd. 481 on July 28, 1958, and the Minorities Commission's Report as Cmnd. 505 on August 18, 1958.

at the 1957 Conference, for definite provisions to be written into the independence Constitution to serve as a bulwark against any invasion of their rights and liberties by the majority groups after British power would have been withdrawn. It is significant that such minority fears should have been expressed with so much vehemence only on the eve of the transfer of power from British to Nigerian hands. No doubt, similar fears lay at the root of the demand of the National Liberation Movement based in Ashanti and the Northern Peoples' Party based in the North for a federal form of government when it became clear that the Gold Coast colony was about to become the Dominion of Ghana on March 6, 1957. But the faint cry of some groups for the entrenchment of human rights provision in addition to, or as an alternative for, a federal constitution for Ghana somehow soon died out in the general upsurge of the majority of the nation for immediate political independence. Ghana is perhaps fortunate in the fair amount of homogeneity existing among the Akans who form well over half the population of the country, as well as in the overwhelming ascendancy of the Convention Peoples' Party under the charismatic leadership of Dr. Kwame Nkrumah.

As the political development of Nigeria has taken very different paths, and as Nigeria with its 35 million people occupying some 372,000 square miles is governed in its three constituent Regions by three major political parties each deriving its main support from its own Region, the problems of minorities are indeed real, and they are made all the more urgent by the presence in each Region of a number of minority ethnic groups that often nurse probably exaggerated fears of possible oppression by the more numerous and politically dominant group. It was largely to meet these fears expressed by the delegates of the minority groups at the 1957 Conference that a commission was appointed by the Secretary of State for the Colonies in September 1957 under the Chairmanship of Sir Henry Willink "to enquire into the fears of Minorities and the means of allaying them." The commission's Report<sup>3</sup> recommended *inter alia* that one of the principal means of allaying the fears of minorities should be the inclusion in the constitution of detailed provisions based mainly on the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>4</sup>

In the light of this Convention and of the various memoranda submitted to the 1957 Conference by the Nigerian delegates, the Secretary of State sent draft clauses prepared by his legal advisers to the five governments in the Nigerian Federation for their consideration pending the opening of the resumed Conference in London on September 29, 1958. After a full and detailed discussion of these

<sup>3</sup> Cmnd. 505, published by H.M.S.O., London.

<sup>4</sup> Published as Cmnd. 8969 in October 1953.

draft clauses and other supplementary papers, the 1958 Conference agreed that provision should be made in the constitution under these fourteen heads: (1) The right to life; (2) Freedom from inhuman treatment; (3) Freedom from slavery or forced labour; (4) The right to liberty; (5) Rights concerning civil and criminal law; (6) The right to private and family life; (7) Rights concerning religion; (8) The right to freedom of expression; (9) Freedom of peaceful assembly and association; (10) Freedom of movement and residence; (11) Right to compensation for the compulsory acquisition of property; (12) The enjoyment of fundamental rights without discrimination; (13) Freedom from discriminatory legislation; (14) Powers of the Federal Government to safeguard the Nation.<sup>5</sup> A fifteenth heading, entitled "The enforcement of fundamental rights", concludes these vital provisions of the Independence Constitution of Nigeria.

But the list of fundamental rights guaranteed by the new Constitution is not exhausted by these definitive provisions. Other constitutional safeguards are to be found in (i) the elaborate arrangements making the Police Force a Federal Government responsibility, (ii) the reorganisation of certain sections of the Judiciary, especially the specific provision that the appointment, dismissal and disciplinary control of judges of Customary and Native Courts throughout the country should be divorced as far as possible from political and executive control, (iii) the inclusion of provisions for the creation of a Nigerian citizenship, and for ensuring that no Nigerian citizen should be liable to deportation or exclusion from Nigeria, (iv) the selection of the members of the Senate (the Upper House), and of the Advisory Committee on the exercise of the Prerogative of Mercy, and (v) the procedure laid down for the amendment of the constitution, for altering Regional boundaries and for creating new States after independence.

### FUNDAMENTAL HUMAN RIGHTS PROVISIONS

We will now turn to a consideration of each of the foregoing provisions of the new constitution of Nigeria with a view to assessing the extent to which they are in form and content conducive to the establishment of the Rule of Law in this most populous of African States.

<sup>5</sup> These amplify and replace s. 135 of the existing Constitution which empowers the Governor-General in his discretion to ensure that the executive authority of a Region is not so exercised as to impede or prejudice the exercise of the executive authority of the Federal Government or to endanger the continuance of Federal Government in Nigeria. The other aspects of this subject will be dealt with later in more detail.

(1) **The right to life.** It is significant that the first of the human rights enshrined in the new Constitution is the guarantee of the life of the individual against any arbitrary deprivation. In this respect the framers of the Constitution appear to be at one with Dean Roscoe Pound, the American leader of the Sociological School of Jurisprudence, who made a similar choice when he set himself the task of erecting a hierarchy of interests which the law of a country ought to guarantee.<sup>6</sup> There is perhaps no better starting point than the security of life in any democratic scheme of specially guaranteed human rights. But the Constitution very properly exempts from judicial punishment the taking away of the life of an individual where the law permits it (a) in defence of any person from violence or in defence of property; or (b) in order to effect an arrest or to prevent the escape of a person lawfully detained; or (c) for the purpose of suppressing a riot, insurrection or mutiny; or (d) in order to prevent the commission of an offence. This is intended to ensure that the provisions of the Criminal Code of Nigeria with respect to the use of force by State agencies for the maintenance of law and order are not in any way affected by the constitutional guarantee of the individual's right to his life. We need hardly add that there is adequate provision in the Criminal Code for the infliction of the penalty of death upon a murderer.

(2) **Freedom from inhuman treatment.** This provision is designed to ensure that no citizen of Nigeria is in any way subjected to any form of bodily or mental torture, whether in the extraction of confessions from an accused person or from a witness in a judicial proceeding or whether in any other circumstances of domestic life. There is a further guarantee against all inhuman or degrading treatments of individuals, and any form of punishment that is considered to be wicked or unnatural or humanly abhorrent.

(3) **Freedom from slavery or forced labour.** The existing laws of Nigeria already forbid all forms of slavery or human bondage, including the customary practices of pawn or pledge of persons for debt, so that the constitutional position is merely declaratory of these laws.<sup>7</sup> But the provision against forced or compulsory labour, which the existing laws also guarantee, recognised certain forms of essential labour as still permissible. Thus labour ordered by a court as part of a convicted person's punishment, or any personal service of a military character or one exacted from a conscientious objector in lieu of compulsory military service, or labour demanded of a

<sup>6</sup> See his "A Theory of Social Interests" in Jerome Hall's *Reading in Jurisprudence*, p. 238 ff., and *Proceedings of the American Sociological Society*, Vol. 15.

<sup>7</sup> See T. O. Elias; *Groundwork of Nigerian Law* (1954), pp. 47, 70, 312.

person in a national emergency or other calamity threatening the life or well-being of the community, or any form of service or labour ordered as part of the traditional communal or other civil obligations, is rendered lawful under the Constitution. The last alternative is the recognition of the customary obligation which a chief may impose upon individuals from time immemorial for the performance of such local services as the clearing of bush-paths or the maintenance of footbridges over neighbouring streams and rivulets, or even the construction of the defence wall of the town.

**(4) The right to liberty.** This is one of the most crucial issues of parliamentary government, especially under a federal constitution for a newly emerging country like Nigeria with an acute problem of minorities. Most of the provisions of the English Common Law concerning the guarantee of the personal liberty of the subject already form part of the law of Nigeria, and have been buttressed here and there by local legislation. Thus, the writs of *habeas corpus*, *mandamus*, prohibition and *certiorari*<sup>8</sup> exist to secure respectively that a person being illegally detained should be released, that those bound by law to perform certain functions and refusing to do so could be made to perform their duties to the person likely to be damnified by such refusal, that those about to act in a manner likely to prejudice an individual's right might be prevented from so acting by a court order, and that those who have acted from bias or fraudulently or for want of authority so that an individual's rights have thereby been prejudiced could have their action nullified. Similarly an individual already enjoys the right to bring an action for false imprisonment against anyone who has unlawfully restricted his personal freedom of movement in all directions,<sup>9</sup> and an action for malicious prosecution against anyone who has caused him to be unlawfully tried in a court of law if he could show (a) that he had been illegally subjected to a judicial trial, and (b) that the trial has ended in his favour, (c) that the prosecutor has been actuated by malice in the sense of improper motive, and (d) that there was no reasonable or probable cause for the institution of such proceedings against him in the first place.<sup>10</sup>

It is interesting, therefore, to note that the new Constitution of Nigeria expressly provides that 'everyone has the right to liberty

<sup>8</sup> The writs of *mandamus*, prohibition and *certiorari* were converted into Orders by the Administration of Justice, Miscellaneous Provisions Act, 1938, in England. It would seem that they are still referred to as writs in Nigerian procedure. See, e.g., *In re Umuolu Village Group Court* (1953) 20 Nig. L.R. 111, *Eshugbayi Eleko v. The Officer Administering the Govt. of Nigeria* (1931) 8 Nig. L.R. 1, *R. v. Magistrate Grade I, Jos* (1954) 21 Nig. L.R. 28.

<sup>9</sup> See, e.g., *Onitiri v. Ojomo* (1954) 21 Nig. L.R. 19.

<sup>10</sup> See, e.g., *Nzekwu v. Onowu* (1932) 9 Nig. L.R. 70.



and security of person.' It then goes on to specify these exceptions in which a person may suffer restriction of his personal liberty: (i) imprisonment in consequence of a conviction by a court of competent jurisdiction; (ii) the lawful arrest or detention of a person either for non-compliance with an order of a court or to make him fulfil a lawful obligation; (iii) lawful apprehension or detention of a criminal or suspected criminal; (iv) lawful detention of a minor in a house of correction or with a view to securing his appearance before the court; (v) the lawful detention of lunatics, alcoholics, drug addicts, vagrants or persons suffering from infectious diseases; and (vi) the lawful arrest and detention of prohibited immigrants either to prevent his entry or to effect his deportation or extradition. In all these cases, a person so arrested must be informed promptly of the reasons therefor and of any specific charge he has to meet. He must also be promptly brought before the court and tried within a reasonable period or released on the usual conditions of bail pending trial. Compensation is payable as of right to anyone illegally arrested or detained. There is an implied reference to the right of the accused to resort to the common law remedies of *habeas corpus*, *mandamus*, etc. already mentioned.

**(5) Rights concerning civil and criminal law.** Under this head have been stated the already established principles and practice of the fair and impartial administration of justice in open court. Thus it is emphasized that everyone charged with a criminal offence must be presumed innocent until proved guilty according to law. An accused person is also entitled (a) to be informed promptly in a language which he understands and in detail of the specific charge against him; (b) to be given adequate time and facilities to prepare his defence; (c) to defend himself in person or, in all courts other than native or customary courts, through counsel of his own choosing; (d) to examine, or have examined, witnesses for and against him; and (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court. All trial courts are enjoined to keep records of proceedings of which an accused person is entitled to keep a copy on payment of any legally prescribed fee.

It is also provided that it is unlawful for anyone to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor may a heavier penalty be imposed in such a case than the one that was applicable at the time that the criminal offence was committed. No one may be tried again for an offence of which he has previously been convicted or acquitted, unless it is on the order of a superior court. A person is not a compellable witness against himself. Finally, in order to make it illegal for the customary law of crime to continue to be

applied in certain parts of the country, especially where these conflict with the provisions of the Criminal Code of Nigeria,<sup>11</sup> there is an express provision in the new Constitution to the effect that no person may be "convicted of a criminal offence other than an offence defined by written law."<sup>12</sup>

(6) **The right to private and family life.** Of the provisions so far considered, those under this head are probably some of the most difficult, not only to define in objective legal terms, but also to apply to specific situations of family life. The first arm provides: Everyone has the right to respect for his private and family life, his home, and his correspondence. As if this were not vague enough, the second arm proceeds to provide as follows: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is reasonably justifiable in a democratic society in the interest of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others." The intention behind these provisions for the preservation of private and family life was no doubt a good one. But the vagueness of the wording reflects something of the difficulty which the courts would have to face in dealing with allegations of the violation of the sanctity of a home or of correspondence, to take only one or two examples. Besides, it is hard to see how an individual's private and family life could lawfully be interfered with in the interests of national security, public safety, or the economic well-being of the country, without the danger that such rights might easily be trampled upon by a would-be oligarchy.<sup>13</sup> Yet some such exemption seems inescapable once one grants the writing into the Constitution of a provision for the guarantee of private and family life in those terms.<sup>14</sup>

(7) **Rights concerning religion.** The provisions under this heading have been borrowed partly from the Convention on Human Rights<sup>15</sup>

<sup>11</sup> As happened in *Tsofo Guba v. Gwandu Native Authority* (1948) 18 Nig. L.R. in which there was a conflict between the Islamic Law of murder and the relevant provision under the Criminal Code, and it was held by the West African Court of Appeal that Islamic law must prevail. But the position was reversed by the Native Courts (Amendment) Ordinance 1948, and another amending Ordinance of 1951.

<sup>12</sup> The Conference agreed to recommend that this provision should become effective in the Northern Region only after the proposed revised Criminal Code on the lines of the Sudanese Criminal Code had come into force there.

<sup>13</sup> Even if we leave aside the very important question of who came within 'the family' in Nigerian law, customary as well as statutory. See Elias, *op. cit.*, pp. 287 ff.

<sup>14</sup> It is worthy of note that these provisions have been taken word for word from the Convention on Human Rights, Article 8.

<sup>15</sup> Article 9.

and partly from the last Constitution of Pakistan.<sup>16</sup> The first part guarantees freedom of thought, conscience and religion, including freedom to change one's religion or belief and, either alone or in community with others, to manifest and propagate any religion or belief in worship, teaching, practice and observance – so long as the exercise of these rights does not in any way infringe any law respecting the maintenance of public order, health or morals, or the equal rights of others lawfully to observe and practice their own religion. The second part provides that no one may be compelled to receive in any educational institution religious instruction or participate in religious ceremonies other than his own, although every religious community or denomination is entitled to provide religious instruction for its pupils in an educational institution which is maintained entirely from funds provided by that community or denomination.<sup>17</sup>

These provisions are naturally of great importance in a country the size of Nigeria with its 35 million people composed of a Muslim majority, a large Christian minority and a decreasing number of followers of indigenous religions. All these elements live cheek by jowl in many urban areas of the country and, what is more, the task of building a Nigerian nation out of the predominantly Muslim North and the predominantly non-Muslim South requires the express entrenchment of guarantees on such delicate subjects.

(8) **The Right to freedom of expression.** It is a well-established principle of the English Common Law, which is also applicable in Nigeria, that everyone is free to say or write what he likes so long as the same is not defamatory, seditious, obscene, or blasphemous. But the State may require that a licence be first obtained for the printing and circulation of newspapers, as well as for broadcasting, cinema or television enterprises. The new Constitution affirms all these, and provides further that the State has the authority to impose reasonable restrictions of freedom of expression in the interests of national security, of public safety, health or morals, and of judicial authority and impartiality.

(9) **Freedom of peaceful assembly and association.** Again, this freedom is already safeguarded by detailed provisions in the Criminal Code of Nigeria.<sup>18</sup> But many delegates at the Constitutional Conference thought it right and proper that the Constitution should

<sup>16</sup> Article 13 (1) & (2).

<sup>17</sup> The substance of this concessive clause was written into the Constitution at the express request made to the Minorities' Commission by certain Christian bodies in Nigeria.

<sup>18</sup> See ss. 62-88 of Cap. 42 of the 1948 edition of *The Laws of Nigeria*, and T. O. Elias: *Groundwork of Nigerian Law*, pp. 201-202.

also entrench it, including the right "to form and to join trade or other unions for the protection of his interests." There follow the usual exemption clauses permitting the State to regulate or restrict the exercise of this freedom in the interests of law and order, or in the case of members of the armed forces or of the police.

(10) **Freedom of Movement and Residence.** The specific provision is that every citizen has the right to move freely throughout Nigeria and to reside in any part of it, but the right of residence does not in itself carry any right to acquire land or other property. This is because the land legislation relating to Northern Nigeria<sup>19</sup> forbids non-indigenous Nigerians, especially those from the other Regions of the Federation, from holding any right in the land of Northern Nigeria other than a right of occupancy, that is, a form of leasehold interest. But there is no similar restriction of Northern Nigerians in the Southern areas of the country.<sup>20</sup>

It is suggested that the Constitution should not have entrenched the continued discrimination against Southern Nigerians in this respect. This is all the more so in view of the express provision in the next clause but one of the Constitution which says: "The enjoyment of the fundamental rights set forth in this Constitution shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."<sup>21</sup> Here then is a clear case of inconsistency, unless words have lost their meaning. But the issue is a sensitive one for the Northern leaders who fear the possible expropriation of many peasant land-holders by sophisticated property speculators. Yet the same might justifiably be said of some Northern merchants and property dealers in relation to land in certain areas of the South.<sup>22</sup>

Under the same heading of 'Freedom of Movement and Residence' occurs the very important provision that no citizen of Nigeria may be deported from Nigeria. It will be seen later that this provision is expressly repeated in the citizenship laws which form part and parcel of the constitutional guarantees of fundamental human rights.

<sup>19</sup> The Land and Native Rights Ordinance, 1916, of the 1948 Edition of the Laws of Nigeria.

<sup>20</sup> See T. O. Elias: *Nigerian Land Law and Custom* (1953, 2nd edn.), pp. 35-6 and 194-5, where the whole subject has been fully discussed.

<sup>21</sup> This is No. 12 of the original list given above (p. 32).

<sup>22</sup> In this respect, due note must also be taken of the "Right to Compensation for the Compulsory Acquisition of Property" (No. 11 of my original list above), as to which the Constitution Conference agreed to recommend that the existing provision in s. 223 of the Nigerian (Constitution) Order in Council, 1954, as amended, should remain. (See *Cmnd.* 569 of 1958, p. 8).

(13) **Freedom from Discriminating Legislation.** Neither the Federal nor any of the Regional legislatures can pass any law or exercise any executive or administrative power which either favours or discriminates in any way against a person or group of Nigerian extraction on the ground only of religion, political opinion, community or ethnic origin or place of birth. But laws may be enacted prescribing specific qualifications for the public service or the service of a duly established public corporation.

As a temporary concession to expediency, latitude is given to any Region that may wish to protect its own inhabitants' right to employment and to land within its borders as against those who hail from other Regions.<sup>23</sup> Under the policy of Northernisation of the civil service of the Northern Region, the Government there had in the last decade concentrated on recruiting new staff as far as possible from among candidates of Northern origin, the declared intention being to try to redress the balance against the long established preponderance of southerners in the Northern public service which the much better developed modern educational system of the south has hitherto encouraged for well over a quarter of a century.

In the result, this exemption clause has been written into the new Constitution:

"Nothing in this provision shall prevent the Legislature or Government of a Region from imposing restrictions on persons from outside the Region with regard to employment in the public service of the Region, or the service of a body corporate directly established by Regional law, and the acquisition of land in the Region. This restriction on the provision shall be subject to review by the Regional Governments five years after its coming into force and thereafter, if it is retained, every five years."

Although the drafting of this proviso might have been much more careful and clearer, yet the need for review is obviously stressed, if only to emphasize that this area of discriminatory legislation is intended to be eliminated eventually when the balance has been fairly and safely redressed as between the constituents of the Nigerian Federation. The Rule of Law has perforce to suffer this temporary setback in order to realise itself in the fulness of time.

(14) **Powers to safeguard the Nation.** In order to ensure strong and orderly government of the country after independence, powers are expressly reserved to the Federal Government to enact legislation, whether *ad hoc* or general, to enable it to declare that a state of war or other public emergency exists or, on a two-thirds majority resolution of both Houses of the Federal Legislature, that democratic

<sup>23</sup> But the Northern Region is not alone in this practice of preferring local candidates to those from elsewhere.

institutions are threatened by subversion, and to take all appropriate measures effectually to deal with the situation. Such resolution is to remain in force for any stated period up to two years, and may be extended from time to time by a further similar resolution for not more than two years at a time.

Where, in consequence of such a declaration or such a resolution, a person is ordered by the Federal Government to be detained or for his movements to be restricted, is entitled to require that his case should be periodically referred to an independent tribunal under a legally qualified chairman appointed by the Federal Chief Justice. The Federal Government may, after reviewing the case, accept or reject the recommendations of such a tribunal.

If the Federal Government certifies that it is not in the public interest for a matter respecting an alleged derogation from fundamental human rights to be publicly disclosed, the trial court is required to hear the evidence in private and ensure that there is no disclosure.

Since the existing Emergency Regulations which deal with these matters under the authority of the Governor-General will cease to have effect from October, 1960, the date of Nigeria's independence, it has been thought absolutely necessary for alternative emergency powers to be assured to the Government of the Federation. It is important to note that the conditions for their exercise are such as to reduce the chance of executive arbitrariness to the minimum compatible with the Rule of Law and fundamental freedoms.

(15) **The enforcement of fundamental rights.** It was early realised on all sides at the Conference that the entrenchment of all the foregoing fundamental rights would be futile unless provision was also made in the constitution for specific means to enforce them. The problem, debated at length, was to decide whether original jurisdiction in these matters should be vested in a Regional High Court or in a Magistrate's court. Everyone agreed that the Native and Customary Courts were out of the question, chiefly because they would almost certainly lack the necessary technical competence to construe the relevant constitutional provisions.

A Regional High Court usually sits in a necessarily limited number of Divisions and, in the case of the vast distances in Northern Nigeria, such a court would not be readily accessible to complainants from many a remote area. The Minority Commission had recommended<sup>24</sup> that a parallel right be given to such a complainant to apply to a Magistrate's Court to enquire into his allegation and to submit a report on his enquiry to the High Court. This seems a sensible and proper suggestion. The Conference,

<sup>24</sup> See *Cmnd.* 505, p. 103, 1958.

however, rejected it and contented itself with recommending that the High Court should have 'power to make all such orders as may be necessary and appropriate to secure to the applicant the enjoyment of any of these rights.' There is a further provision for a right of appeal from a High Court to the Federal Supreme Court.

In the absence of any widespread system of Legal Aid in Nigeria, it is submitted that these enforcement provisions are inadequate. The existing power of the High Court to assign counsel to an accused person in criminal proceedings or to arrange a "dock brief" for a litigant in civil proceedings is no doubt a useful remedial measure in cases of ordinary law-suit, *once it has already been brought before a Court*. But the real need in cases of allegations of derogation from fundamental human rights is to make it possible and cheap for genuine complaints to reach the court for judicial scrutiny. Some of the entrenched rights, being quasi-political, must often be difficult to bring to the attention of impartial organs of investigation and redress.

It would seem that three things have yet to be done: (1) Magistrate's Courts should be given jurisdiction to hold preliminary investigations in these matters; (2) their number should be greatly increased; and (3) a proper system of efficient and cheap Legal Aid should be established throughout the country, with of course necessary limitations and safeguards to prevent abuse.

### OTHER CONSTITUTIONAL SAFEGUARDS

As indicated at the beginning, there are other constitutional devices for ensuring fundamental freedoms for all and sundry within the Nigerian Federation. We will deal with the principal ones briefly as follows.

(1) **The Federalisation of the Police Force.** There were two divergent ideas at the Constitutional Conference, about the organisation of the Police Force: one was that each Region of the Federation should have complete control over all its Force, while the other was that the entire Nigeria Police Force should be placed under the ultimate control of the Federal Government. The majority favoured the latter in that it would avoid the danger of a Regional Government largely based on a regional political party using the Police Force under its exclusive control to oppress political opponents within the Region. The former view would, if adopted, weaken the Federal Government so much that it would not be capable of exercising the express powers given to it to safeguard the nation in times of national emergencies like war or threatened subversion.

In these circumstances, the Constitution provides that there should be only one Police Force for the country, and that sections of it should be located in all the Regions under Regional Commissioners who consult with the Regional Governments in exercising their powers in cases of regional emergency but who are made directly responsible to the Federal Inspector-General at headquarters in Lagos, the capital of Nigeria. This officer is himself responsible to the Federal Government. There are detailed provisions for the recruitment, training, promotion and discipline of the Force on a more or less uniform basis. But it is expressly provided that, in stationing police constables for duties in particular areas of the country, regard should be had to their ability to understand and speak the language prevalent in such areas. This arrangement would facilitate the maintenance of law and order by reducing chances of friction due to language difficulties between the constable and local people.

(2) **Reorganisation of the Judiciary.** The constitutional provisions regarding the independence of the Judiciary will after October be modelled, as far as local circumstances would permit, on those in s. 3 of the (British) Act of Settlement, 1701. The salaries of judges of the superior courts are not to be subject to debate in the House of Representatives, judges can only be dismissed by a majority vote in both Houses of the Nigerian Federal Legislature on the ground of proved misconduct or physical (or mental) disability, and judges will not hold their offices at the pleasure either of the Crown or of the Governor-General.<sup>25</sup> But these provisions will not affect the position of judges who are members of the Colonial Legal Service or of the Overseas Service of the Crown. These retain their character of being civil servants dismissible at the pleasure of the Crown.<sup>26</sup> There is a Judicial Service Commission in every Region and in the Federal Territory.

An impartial Judiciary is one of the best guarantees of individual liberty and respect for the fundamental rights so elaborately entrenched in the Constitution.

With regard to the judges in the Native and Customary Courts, the new Constitution provides: (i) that their appointment, dismissal and disciplinary control throughout the country should as far as

<sup>25</sup> Under the existing Constitution of 1954, s. 142(2)(d) makes High Court Judges in the Northern Region hold their offices during Her Majesty's pleasure, while s. 142A(2) merely prohibits the abolition of a High Court Judge's office during his continuance in office and s. 142 A (8 & 9) places their salaries on the Consolidated Revenue Fund of the Western and Eastern Regions. In the two latter Regions also High Court Judges are only removable after the Judicial Committee of the Privy Council has confirmed the findings of a local Judicial Tribunal set up for the purpose by the Regional Governor [s. 142 (c)].

<sup>26</sup> See *Terrell v. Secretary of State for the Colonies* (1953) 2 Q.B. 482.



possible be divorced from political and executive control; (ii) that each Regional Government should enact legislation prescribing those Customary and Native Courts whose members should be appointed by or through the Judicial Service Commission; (iii) that Customary and Native Court judges (other than Emirs) having power to impose more than six months' imprisonment or £ 50 fine should do so only on the recommendation or under the supervision of the Judicial Service Commission; (iv) that the appointment of Emirs as judges should be by the Governor of the Northern Region in his discretion after consultation with the Judicial Service Commission.

**(3) A Common Nigerian Citizenship.** The Constitution provides for a common citizenship law for all Nigerians, thus abolishing the existing distinction of the denizens of the country into British subjects and British Protected Person according as these were born in the Colony or in the Protectorate of Nigeria. This distinction has become largely academic since the constitution of 1951 first introduced the Ministerial System into the government of the country. All Nigerians have since voted and been voted for, and have accepted offices, irrespective of whether they were British subjects or British protected persons. The new citizenship law is a long over-due declaratory measure. It should assist in the task of building a Nigerian nation.

It is provided that the existing position concerning nationality and citizenship should remain unaltered until independence; that these should be provisions governing the qualifications and dis-qualifications of citizenship of Nigeria; and that the independence constitution should guarantee that no Nigerian citizen should be liable to deportation or exclusion from Nigeria. We have seen above that this is already entrenched as a fundamental human right.

**(4) The Composition of the Senate.** To ensure adequate and fair representation of all shades of political and other opinions in the Upper House styled The Senate, it is provided that each Region should elect 12 Senators in the proportion of the numbers of seats held respectively by the Government and Opposition parties in the Region,<sup>27</sup> while for the Federal Territory of Lagos (which possesses no Government or Legislature of its own) the holder of the traditional office of Oba (King), one of his traditional chiefs, two persons selected by the Lagos Town Council<sup>28</sup> and two other persons appointed by the Governor-General on the advice of the Federal Prime Minister take their seats as Senators. In this way, some 40 – odd

<sup>27</sup> Many of the 12 are expected to be traditional rulers in the Region.

<sup>28</sup> The two persons must each be nominated by the majority and minority parties on the Lagos Town Council.

members represent the three Regions on the basis of equality, with a total of 6 to represent the Federal Territory of Lagos. The House of Representatives has 312 members on the basis of one member per 100,000 people throughout the Federation.

The Federal Electoral Commission is given wide powers to organise, supervise and conduct General Elections throughout the country, and is required to work in close liaison with the established Regional Electoral Commissions which function as its local agents. In the General Elections held on December 12, 1959, the Federal Electoral Commission worked hard and well to ensure a fair and efficient election poll, though not without some incidents.

**(5) The Committee on the Prerogative of Mercy.** Since 1951, a Privy Council has been established to advise the Governor and (since 1954) the Governor-General on his exercise of the Prerogative of Mercy in the case of a murderer duly convicted by a court of law. Between 1951 and 1954, this body at the Federal Government level also dealt with all matters affecting senior and largely expatriate civil servants under the Colonial Legal Service system. After the agreement between the Nigerian leaders and the British Government to pay lump sum compensations for loss of career to those expatriates who might want to retire or leave, the Privy Council confined itself since 1954 mainly to the issue of the Governor-General's exercise of prerogative of mercy on behalf of Her Majesty in the United Kingdom.

After independence, responsibility for the exercise of the prerogative of mercy will be vested in the Minister for Home Affairs assisted by a new body, the Advisory Committee on the Prerogative of Mercy, consisting of members appointed for three years by the Governor-General on the advice of the Federal Prime Minister. The appointment is renewable, and no member may be removed except for misconduct or inability to perform the duties of his office.

The chairman of the Committee is the Minister himself, and the Attorney-General is also a member. Besides, there are not less than five nor more than seven other members, not holding Ministerial office and not being members of the Legislature. At least one of these members should be a doctor, preferably the Head of the Government Medical Service. The Director of Public Prosecutions should not be a member, though he may be co-opted if and when considered necessary. The Committee is required to record its advice by vote and to maintain a permanent record of its proceedings. Where the Minister rejects the Committee's advice, he must record his reasons for so doing. In making his recommendation to the Governor-General he must submit the record of the Committee's proceedings together with his own written reasons for refusing the particular advice.

All these detailed provisions are intended to ensure that public opinion is left in no doubt that the highest qualities of impartiality and balanced judgment are always brought to bear on the part of those responsible for the exercise of the prerogative of mercy. It is also in keeping with the first and most important provision guaranteeing the individual Nigerian's right to life.

(6) **Amendment of the Constitution after independence.** The principle adopted here is that no single unit, including the Federal Government, should be able to amend its constitution in a manner contrary to the general interests of Nigeria as a whole. Those parts of the Federal and Regional Constitutions which are primarily of internal interest should accordingly be amendable by a comparatively easy procedure not requiring the concurrence of any other unit of the Federation. But the parts of the Federal and Regional constitutions which are of general concern should be entrenched and the procedure for their amendment should require the concurrence of other units of the Federation.

Accordingly, any proposed amendment of the *entrenched* provisions of the Federal Constitution requires a two-thirds majority of all the members in each House of the Federal Legislature and the concurrence by simple majority of each House of the Legislatures of at least two Regions. But, in the case of *ordinary* provisions, an amendment requires a two-thirds majority of all the members of each House of the Federal Legislature.

In order to amend a Regional Constitution, however, it is necessary that an entrenched provision be amended by at least a two-thirds majority of all the members of each House of the Legislature of the Region concerned, with the concurrence of a two-thirds majority of all members of each House of the Federal Legislature. An ordinary provision may, however, be amended by a two-thirds majority of all the members of each Legislative House of the Region concerned.

The main point here is that the entrenched provisions of the Fundamental Human Rights and Freedoms cannot be easily or casually altered under the procedure laid down in the new Constitution.

Similarly, the provisions for the creation of new States out of the existing Regions of the Federation and those for the alteration or extension of Regional boundaries are made very rigid, too rigid perhaps, on account of the mutual suspicion between the Regions and their political leaders around the Conference table. Some amount of redrawing of boundaries is necessary, and rather more States would seem essential to the promotion of a more balanced federation and national unity in Nigeria. In this respect, the analogous provisions of the Indian Constitution since 1947 have been kept more

flexible, and these have facilitated all the subsequent boundary changes and States re-organisation.

## CONCLUSIONS

There are no Directive Principles of State Policy in the Nigerian Constitution, as there are in the Indian one.<sup>29</sup> On the other hand, there has been no demand on the part of the predominantly Muslim North now in control of the Federal Government for making Nigeria an Islamic State, as there was in Pakistan until recently. The programme of the Federal Government of Nigeria has been more pragmatic than doctrinaire. Without any express provision in the constitution, social and economic trends are along the lines of the Welfare State, as the inherited system has already placed much of the most important industries and economic enterprises under State care.

If the aim of democratic government is the eternal aspiration after the ideal of social justice for all members of the community, the entrenchment of the fundamental human rights and freedoms augurs well for the future of the young Federation. It may well be worth the while of other territories in Africa to follow this Nigerian example by incorporating similar provisions in their independence constitutions so far as local conditions should warrant. This is probably desirable, not only in multi-racial territories, but also in multi-lingual and poly-ethnic communities. The mere entrenchment of provisions of fundamental rights in a constitution does not in itself guarantee that they will necessarily be enforced after independence, but, since they are not easy to amend or remove, they constitute a warning and a challenge to those who might later want to set the law at naught. The provisions may also be seen as one of the most suggestive means of political education in the subtle and civilised ways of democracy, not only for the new leaders, but also for the people at large.

The new Constitution for independent Nigeria has yet to prove its resilience and efficacy in the days that lie ahead, but its citizens can look forward with sober confidence and restrained optimism.

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<sup>29</sup> See ss. 36-51 of the Constitution of the Union of India.

# LAW, BENCH AND BAR IN ARAB LANDS

## INTRODUCTION

### I. Legal Background of the Arab Middle East

The Arab Middle East is heir to two systems of law: the Shari'a or Muslim law, and Roman law which is the basis of the codified law of Western Europe. While the Shari'a is a legal system which is essentially religious, Roman law, the heritage of civil law countries, represents a "law made by men for men". However, in the formative period of Muslim law, the jurists of the second and third centuries of the Hijra (eighth and ninth centuries A. D.) who elaborated it were undoubtedly influenced by Roman law. Since the days of the Prophet, the Arabs came in contact with the Eastern Roman Empire. The Meccan yearly trading expedition to Syria, which was then a province of Byzantium, was one of the two caravans referred to in the Qor'an.<sup>1</sup> The first generation of Muslims also came in touch early in the day with Christian and Roman civilization in Iraq and Egypt.<sup>2</sup> Consequently when, twelve centuries later, the Arabs in Egypt, Iraq, Syria, Lebanon and North Africa "received" Western legal institutions which had their origin in Roman law, they felt on somewhat familiar ground. It was relatively easy for modern legislation and the new judicial organization modeled on Western patterns to strike roots in Arab lands and to develop in more or less harmonious coexistence with the religious law and the Qadi courts of Islam. It was not a complete dychotomy. In adopting European legal institutions, modern jurists in Arab lands have more or less succeeded in bridging over the gap which had separated their past from the present. They have rediscovered and revived part of their old heritage.

### II. Factors of Unity and Diversity in Modern Arab Legal Institutions and Judicial Organizations

In an area of more than three million square miles extending across two continents from the Persian Gulf to the Atlantic Ocean,<sup>3</sup>

<sup>1</sup> Chapter CVI, *Surat Quraish*, verse 2. See Bell's translation of the *Qor'an*, Edinburgh, 1939, Vol. II, p. 679.

<sup>2</sup> See *Mohammedanism* by Gibb, Oxford University Press, p. 88.

<sup>3</sup> Sir Reader Bullard puts the combined area of the countries of the Middle East, including Turkey and the Republic of the Sudan, at a figure of 3,730,000 square miles. See *The Middle East, a Political and Economic Survey*, Third Edition, edited by Sir Reader Bullard, Oxford University Press, 1958, p. 1.

with a population of some fifty million inhabitants, no homogeneity in legal institution and judicial organization is to be expected. The different countries of the Middle East have pursued independent courses in their social and economic development, and naturally, this is reflected in the manner in which they administer law and justice. While the member nations of the League of Arab States,<sup>4</sup> with which we are concerned here, have become increasingly important in their relations with the West, especially after the discovery of their vast oil resources, the stages of evolution which they have reached vary from country to country. Consequently, in any attempt to present a picture of the Bench and the Bar in Arab lands, the distinctive features of their national systems of law and their judicial organizations have to be borne in mind. However, they have enough in common to warrant a comprehensive presentation of their legal and judicial institutions. The factors of unity which keep them together can be briefly summarized as follows.

With the exception of the Republic of Lebanon, where Christians of various denominations are generally considered to be slightly ahead of the Muslim population in numbers,<sup>5</sup> the vast majority of the inhabitants of Arab countries are Orthodox Muslims who follow one or the other of the four Schools of Muslim Law,<sup>6</sup> with a small minority of heterodox Shi'a. It will be recalled that Islam is a religious faith, a way of life and a system of ethics and law all in one. From the point of view of their legal institutions, all Arab countries share a common background. Their starting point was the Shari'a or Sacred Law of Islam. In relations between man and man, some Arab states have been gradually introducing positive legislation and judicial procedures borrowed from the West. Nevertheless, in the language of one of the most learned oriental scholars, Sir Hamilton Gibb:

"In spite of these derogations from its authority, the Shari'a remained in force as an ideal and a final court of appeal, and by its unity and comprehensiveness it formed the main unifying force in Islamic culture . . . It permeated almost every side of social life and every branch of Islamic literature,

<sup>4</sup> At the time of writing these States are, in alphabetical order, Iraq, Jordan, Lebanon, Libya, Morocco, Saudi Arabia, the Republic of the Sudan, Tunisia, the United Arab Republic and Yemen.

<sup>5</sup> Lebanon has a population of about one and one half million inhabitants. No census has been taken in recent years, but the population is probably equally divided between the two main religions of Christianity and Islam.

<sup>6</sup> These are the Hanafi, the Maliki, the Shafe'i and the Hanabali Schools, named after the four eminent jurists who were their founders, namely Abu Hanifa (died 767 A. D.), Malik Ibn Anas (died 795 A. D.), Al Shafe'i (died 820 A. D.) and Ahmad Ibn Hanbal (died 855 A. D.). See for the sources of Muslim law Maurice Gaudetroy-Demombynes, *Muslim Institutions*, London, George Allen, Chapter V, pp. 61-69.

and it is no exaggeration to see in it, in the words of one of the most penetrating of modern students of the subject, the epitome of the true Islamic spirit, the most decisive expression of Islamic thought, the essential kernel of Islam."<sup>7</sup>

In most Arab countries the same economic causes have produced and are still producing the same legal effects. Greater and closer cultural and economic intercourse with the West has led several Arab States to go beyond Islamic law in search for legal institutions and judicial organizations better adapted to the new needs. None of them has gone as far as the modern Republic of Turkey, which has achieved complete separation of Church and State. Nevertheless, in the majority of Arab States, the Shari'a's domain and the jurisdiction of the Qadi courts have been gradually narrowed to matters of "personal status" or family law, and Waqfs or religious endowments. Codes of civil, commercial, maritime and criminal law have been "received" from France, Germany, Switzerland, and Italy. New tribunals and new orders of lawyers brought up in Western legal educational institutions have been set up for the administration of civil, commercial and criminal justice. Nevertheless, the Shari'a is still the common law and the "Ulamas" and Qadis are still the only jurists and judges who apply the sacred law in the Arabian Peninsula. Saudi Arabia, Yemen and the Arabian principalities are to this day typical examples of traditionist countries which have preserved practically intact the purity of the Sacred Law and the traditional judicial organization of "Mahakim Shari'a" or Qadi courts. At the opposite end of this legal spectrum, we find another Muslim country, namely Turkey, which has operated practically a complete dichotomy of its legislative and judicial institutions from its legal past. In between are countries which maintain a "mixed" system of traditional and modern laws and dual jurisdictions, where the old and the new are to be found side by side in a complex mosaic pattern. Such is the state of affairs in North Africa, Jordan, Lebanon, the Syrian Region of the U.A.R. and Iraq. In the Egyptian Region of the U.A.R., the Shari'a courts and other Christian and Jewish tribunals of "personal status" have been abolished by Law No. 462 of 1955, and their jurisdiction has been transferred to the National Tribunals. However, the Shari'a is still applied to Muslims in matters of family law; while systems of Canon and Talmudic law govern the family relations of Christian and Jewish minorities respectively. The Qadis who used to sit on the Shari'a Courts have become judges of the National Tribunals; while lawyers who had belonged to the Bar of the Mahakim Shari'a have been admitted to the same duties and privileges of their colleagues of the National

<sup>7</sup> *Mohammedanism* by Gibb, *op. cit.*, p. 106.

Bar. Thus, Egypt has now a unified Bench and Bar, but not yet a unified system of law.

The foregoing summary had to be brief. However, the complicated legal and judicial institutions of the Middle East have been treated in a masterly manner in a recent book in the Arabic language by Professor Sobhi Mahmassani of the University of Beirut, Lebanon, entitled *Legal Systems in the Arab States, Past and Present*. For a detailed study of this subject, reference is made to this remarkable, scholarly work which we owe to the pen of an honorary president of the Court of Appeal of the Republic of Lebanon, a member of the Arab Academy of Damascus and a practicing lawyer of the Lebanese Bar.<sup>8</sup>

For the purpose of the present study, the different Arab states will be divided, according to their orientation, into two groups: The traditionalists, who maintain the Shari'a and the Qadi courts, where justice is still dispensed today in the same manner it used to be administered in the classical period of Islam, and the modernists who have adopted westernized systems of law and judicial organizations.

Lack of space makes it impractical to review the national systems and the organization of Bench and Bar in every Arab state individually. The limited objective of this study is to give a general idea rather than a detailed account of Arab judicial organization. Attention will be focused on Saudi Arabia as a typical Traditionist Arab state, and on the United Arab Republic as a representative of modernist tendencies and Western orientation. What applies to these two countries is, more or less true, *mutatis mutandis*, of other Arab lands which can be identified with either of the two groups. There is no need for a separate treatment of family law still within the domain of the Shari'a and the jurisdiction of Qadi courts in countries with "mixed" systems of law and a dual judicial organization. The Bench and Bar of the Mahakim Shari'a in these countries are similar to those which render justice in the Arabian Peninsula where the anxiety to preserve the heritage of the "pious forebears"<sup>9</sup> (As-Salaf As-Saleh) is stronger than the desire to introduce innovations borrowed from the West.

<sup>8</sup> Beirut, 1957, *Dar El Elm Lil Malayin*. See also "Islamic Law in Contemporary States", by Professor Joseph Schacht of Columbia University in the *American Journal of Comparative Law*, Vol. 8, No. 2 (Spring, 1959).

<sup>9</sup> This expression occurs in the Fundamental Law of the Hijaz, Article 6 which provides that: "The regulations (Ahkam), in the Kingdom of Hijaz shall always conform to the Book of God, to the practice of His Prophet and to the conduct of the companions of the Prophet and the pious forebears". See Schacht, *op. cit.*, p. 137, and Henri Loust, *Essai Sur Les Doctrines Sociales Et Politiques De Taki-D-Din Ahmad B-Taimiya*, Cairo 1939. The author gives a French translation of the Fundamental Law, pp. 624-630.



## TRADITIONIST MUSLIM STATES IN THE ARABIAN PENINSULA: SAUDI ARABIA

### I. The Islamic System of Law

Law and justice in the Arabian Peninsula have been described in the following terms in an international award rendered in Paris on August 28, 1951, by Lord Asquith of Bishopstone in the arbitration between Petroleum Development (Trucial Coast) and the Sheikh of Abu Dhabi, a Principality on the Persian Gulf:

"The Sheikh administers a purely discretionary justice with the assistance of the Qor'an; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments."<sup>10</sup>

This harsh appraisal, which hardly does justice to the Shari'a law and the Qadi courts, is contradicted by a more recent international award given in Geneva on August 23, 1958, in the arbitration between the State of Saudi Arabia and the Arabian American Oil Company. That award found that:

"Saudi Arabia belongs to one of the great legal systems of the world, namely Muslim law, in which several rites or schools are distinguished. The principal Sunni Schools are the Hanafi, the Maliki, the Shafe'i and the Hanabali School; they do not differ in fundamentals but disagree in several points of detail.

"The Hanabali School is followed by the Wahhabis of Saudi Arabia."

Basing its decision on that system of law, the Arbitration Tribunal found that an oil concession agreement concluded between the State of Saudi Arabia and Aramco was valid and binding on the Sovereign because it was

"in conformity with two fundamental principles of the whole Muslim system of law, i.e., the principle of liberty of contract within the limits of the Divine Law, and the principle of respect for contracts . . . under Muslim law, any valid contract is obligatory, in accordance with the principles of Islam and the Law of God, as expressed in the Qor'an: 'Be faithful to your pledge to God when you enter into a pact.'"<sup>11</sup>

<sup>10</sup> See *International Comparative Law Review*, Vol. I, pp. 247-261.

<sup>11</sup> The Geneva Award of August 23, 1958, in the dispute which concerned a shipping concession granted by the Government of Saudi Arabia to Mr. A. S. Onassis, has been entrusted for safekeeping to the archives of the Republic and Canton of Geneva. It has not yet been published.

This more generous view of law and justice in Arab lands is endorsed by many learned Western scholars. Thus, Professor Joseph Schacht in his article referred to above writes (*op. cit.*, p. 147):

"Thanks to its lofty standards, Islamic Law still has an important part to play in providing legal stability and security in the Arab countries of the Near East, in the states of traditionalist orientation as an ideal inspiring their secular legislation."

## II. The Jurists, "Fuqahá", "Ulamas" and "Muftis"

While we are primarily concerned in this study with the judicial organization and the Bar, it should be borne in mind that the Shari'a is a "lawyer's law". Its teaching was elaborated by independent jurists who advised the Qadis and the faithful and gave guidance in the Divine Law. The "Fuqahá" or "Ulamas" learned in the Law of Islam were not a clergy,<sup>12</sup> but rather an unofficial order of lawyers before the letter. It was the consensus of the community or "Ijma" which gave recognition to their merits. The "Imams" who founded the four Orthodox Schools, discussed legal matters with an elite circle of disciples who preserved and spread their teaching later on. They also gave legal opinions or "fatwas" to their fellow Muslims. Sometimes they were consulted by the Caliphs and often assisted the judges when the latter were confronted with difficult legal questions, or when matters arose for which no precedent could be found. They exercised "ijtihad", or human endeavour to find the proper rule of law when the divine sources of Qor'an and Sunna were silent. Little by little, they gained recognition from secular rulers as guardians of the Law. A tradition which goes back to the early days of Islam makes the "Ulamas" the heirs of the prophets. Their learning and the religious character of the law they taught earned for them the respect of governors and governed alike. They jealously kept their independence and, in the majority of cases, refused to receive an honorarium for their services. With the notable exception of two distinguished Imams of the Hanafite School, namely Abou Youssuf and Shaibani, who accepted appointment as judges under the Abbasside Caliphs, they declined to hold public office and refused the gifts of secular rulers. The story is told of a colloquy between Abou Hanifa, the founder of the School which has the

<sup>12</sup> The expressions "Fuqahá", "Ulamas" and "Imams" are used here as synonymous. This is the way the Muslim jurists use them as meaning those who are learned in the Sacred Law. The more sophisticated distinction between "Ulamas" meaning those who possess "ilm" and are learned in purely religious matters and "Fuqahá" meaning those who are learned in "Fiqh" or the science of jurisprudence has not been adopted, since religion is part of the Shari'a law.

most numerous following in Islam today, and the Abbasside Caliph Al Mansour. The Caliph insisted with the Imam to accept a judgeship. The Imam refused, alleging his fear of error and his inadequate knowledge of the Divine Law. "This is a lie," said the Caliph. "You have settled the matter in my favour," retorted the Imam, "for you cannot nominate a liar to be your judge."

There were exceptions of course to this lofty independent attitude, and some "Ulamas" from time to time were tempted by the munificence of the temporal powers. On the whole, however, the religious and personal prestige of the "Ulamas" as guardians of the Sacred Law made them a power in the state with which the secular rulers and their Qadis had to count. The "Ulamas" were the champions of justice who upheld the rule of the Shari'a against injustice and oppression. They were the defenders of the poor and the weak against the rapacity and tyranny of the rich and the mighty. They spoke in the name of a Sacred Law, and more often than not, their argument was listened to for reasons of expediency, if not for considerations of equity. The history of the rule of the Mamluks of Egypt gives many illustrations of cases in which the common people laid their grievances against their rulers before the "Ulamas" of the Azhar University and appealed to them to present their case and plead their cause. Arab historians tell us over and over again that the "Ulamas" rode to the "Citadel",<sup>13</sup> as we would say today "they went to town" in order to make representations and to voice the complaints of the people to their rulers. Some instances are cited in which the "Ulamas" spoke in the name of the justice and clemency of Islam and succeeded in avoiding bloodshed.

In summary, the "Ulamas" exercised a restraining influence which was exerted on the side of the rule of law against oppression and injustice. But, like the Roman jurists, they did not merely uphold the law; they elaborated it. The "fatwas" they gave had the same role in building up the law as the *responsa prudentium* of the Roman jurists. The magnificent works which the "Imams" of the four Orthodox Schools bequeathed on posterity constitute the *Corpus Juris* of Islam. Where the divine sources of Qor'an and Sunna were silent, the "Imams", "Fuqahá" or "Ulamas" of the second and third centuries of the Hijra (eighth and ninth centuries A.D.) supplemented the law by their "Ijtihad" (endeavour) and their Ra'y (opinion or personal judgment). In this process, they used Aristotelian logic and "Qiyas" (analogy). Little by little, their Ijma (consensus) on a point of law came to be considered as tantamount to the consensus of the Muslim community.

<sup>13</sup> The Citadel of Cairo was the seat of Government under the Mamluks. Mohammad Ali also built his "Divan" and the famous Mosque where he is buried in the Citadel on the Mokattim Hills overlooking the City of Cairo.

After the Qor'an, the Sunna or Tradition of the Prophet and Qiyas or analogy, "Ijma" came to be recognized as the fourth source of Islamic law in the classical theory of "Usul-ul Fikh" (the roots of juridical methodology) or Muslim jurisprudence. Modern Western scholars testify to the lofty character of the system of law which they have devised. For instance, David De Sintillana writes in the *Legacy of Islam*<sup>14</sup> about the system of Muslim law that it

"may rightfully claim a high rank in the appreciation of experts."

Other experts have described the system as

"the most highly developed expression of the thought and activity of the Islamic community."<sup>15</sup>

Justice Abdel Hamid Badawi, Vice-President of the International Court of Justice, an Egyptian jurist who combines profound knowledge of the Shari'a with vast erudition in Western systems of law, was able to convince his colleagues who wrote the Charter for the United Nations and the Statutes of the International Court of Justice that the Shari'a, after thirteen centuries, was still among the principal systems of law in the world today.

### III. The Qadis

As the "Ulamas" and "Muftis" were the precursors of the order of Shari'a bar in Arab lands today; the Qadis were the fore-runners of the present "Mahakim Shari'a" in the Arabian Peninsula. This is also true of other modern Arab states with "mixed systems of law" and a dual judicial organization where family law and pious endowments are still governed by the religious law. However, the Qadis made their appearance in Islam at a later date than the "Ulamas" and the "Muftis". The "Ulamas" continued in Islam the tradition of the "prudent", or wise men who, in the "Jahilia" (or time of ignorance) before the advent of Islam were the arbitrators to whom the Arab tribes voluntarily submitted their disputes. The same procedure of settlement of dispute by arbitration was continued by Islam. The Prophet would have constituted Omar, the second Caliph as arbitrator between himself and a Jew to whom he owed money. Another important principle connected with the rule of law was followed since the early days of Islam: In the words of Professor Hamidullah of the University of Hyderabad, India, who quotes Al Muheet by the eminent Hanafi jurist Sarakhsy, "party and judge cannot be in one and the same person, not even

<sup>14</sup> See *The Legacy of Islam*, Oxford University Press, Islamic Law and Society by Sintillana, p. 309.

<sup>15</sup> Gibb, *op cit.* p. 88.

the Caliph." Cases were recorded where the four first Caliphs, Abu Bakr, Omar, Othman and Ali submitted disputes in which they were involved to arbitration.<sup>16</sup> This rule of Muslim law explains why Muslim states in oil-producing countries in the Arabian Peninsula agreed to submit disputes arising from concession agreements they had concluded with oil companies to neutral arbitral tribunals. Arbitration clauses in oil concession agreements were readily implemented and arbitral awards given were accepted and respected.

However, it was soon apparent to the Muslims of the first century after the Hijra that voluntary submission to arbitration was inadequate to enforce law and order. Following the example of the Prophet who was the supreme head of the community, the first Caliphs acted as judges and enforced the divine law. With the multiplication of their responsibilities, however, they soon found it necessary to delegate authority to "Qadis" or judges of their choosing. Omar, the second Caliph is usually credited with having been the first to appoint "Qadis" to assist him in his judicial duties.<sup>17</sup> The gradual systematization of the administration of justice in Islam was, no doubt, inspired by the example of the more highly organized legal institutions which the Arabs found in Persia and the Eastern provinces of the Byzantine Empire which they had conquered.

To begin with, the "Qadis" were not paid; and the dispensing of justice according to the divine law was looked upon as the fulfillment of a pious religious duty. However, without appointment by the Caliph or his representative, no "Qadi" had authority (Shirazi, in *Tanbih*, p. 313); but once endowed with it, he regarded himself as independent of any other control<sup>18</sup> under the Abbasside Caliphs. However, the "Qadi" became a paid judicial officer of the Muslim state,<sup>19</sup> and has remained so until the present day.

The functions of the "Qadi" in Islam are more extensive than those of a Western judge. Over and above the settlement of disputes, he acts as tutor of the orphan and guardian of the insane. He tends to the execution of the will of a deceased person and gives away in marriage women who have no legal tutor or guardian. He looks after the mosques, leads in prayer and pronounces the Friday Khutba (sermon). He checks on the management of religious endowments or Waqfs. In exercising these extra-judicial functions, the "Qadi" according to authorities on Muslim law, must be kind-

<sup>16</sup> See Professor Muhammad Hamidulah, *Muslim Conduct of State*, Lahore, third edition, 1941, pp. 134, 135, and Sarakhsy, *Mabsut* (in Arabic), vol. XVI, 73.

<sup>17</sup> See Reuben Levy, *The Social Structure of Islam*, Cambridge University Press, 1957, p. 338.

<sup>18</sup> Reuben Levy, quoting the Muslim jurist Shirazi, *op. cit.*, p. 338.

<sup>19</sup> See Sir Hamilton Gibb and Harold Bowen, *Islamic Society and the West*, Oxford University Press, Volume I, Part II, p. 82.

hearted, compassionate, benevolent and merciful to his fellow Muslims. He must combine magnanimity with learning. In sum, he must be a model of irreproachable conduct and must act towards the Muslim community as an indulgent father.

Since the Shari'a is the law of the land in Saudi Arabia, the jurisdiction of the "Qadi" in that country is all-embracing. It includes the trial of criminal offences as well as the settlement of civil and commercial disputes. Over and above a good knowledge of the law, the "Qadi" must satisfy the condition known in Islam as "adala", that is to say, he must be a just man.<sup>20</sup>

Muslim jurists go to considerable lengths in prescribing the rules of conduct by which the "Qadi" should be guided when he sits in court to render justice. In the words of Professor Reuben Levy<sup>21</sup> who bases his statement on Shirazi's *Tanbih*, pp. 315 f. and Shafe'i's *Umm*, IV, 201:

"Strict rules of procedure are enunciated by the law books for the trial of cases before him. Thus it is laid down as desirable that he should sit for judgment in a spacious and open place in which he is readily accessible to all, and he should not seclude himself except for a good reason... He should not deliver judgment except in the presence of witnesses and learned lawyers, whom he should consult in difficult cases... He may not depute another to make the decision. "...To the two parties in a dispute he must accord equal treatment in their entering, the place accorded to them for sitting, their presentation and the hearing accorded to them...

The Qadi must not defend either party. When the parties are seated before him, he shall decide when they are to speak, and he should keep silence while they are speaking."

Muslim law follows the Semitic tradition of attaching great importance to oral testimony. "At the mouth of two witnesses, or three witnesses shall the matter be established."<sup>22</sup> In Muslim law, the usual number of witnesses in ordinary cases is two just men or one man and two women. "Either of the two women," says the Qor'an "will remind the other." In exceptionally heinous offences, such as adultery, four witnesses are required.

A rule of procedure which Islamic law inherited from the "jahiliya", or pre-Islamic period of ignorance, provides that "evi-

<sup>20</sup> See for more details, on the functions and qualifications of the "Qadi", the monumental work of Emile Tyan of the Lebanese Bar, *Histoire de l'organisation judiciaire en pays d'Islam*, t. I, ed. du Recueil Sirey, Paris, 1938; t. II, Harissa, (Liban), 1943.

<sup>21</sup> *Op cit.*, p. 343.

<sup>22</sup> Deuteronomy, 19 : 15.

dence is required from the plaintiff; while from the defendant is required a decisive oath."

Muslim judicial organization is based on the rule that disputes are decided by a single judge assisted by just witnesses as to points of fact and by learned "Muftis" as to points of law. His decision is without appeal.<sup>23</sup> However, the Abbasside Caliphs instituted an executive office under the name of "Diwan Al Mazalim" for redress of injustice. That "Diwan" was competent, among other things, to review decisions of "Qadis" and to correct miscarriage of justice. This practice was continued under the Ottoman Empire which considered itself as the legitimate heir to the Abbasside Caliphate. The institution of "Mazalim" persists in Saudi Arabia until the present day as we shall see later on in this study.

In imitation of the hierarchical organization they found in their Christian conquered provinces after the fall of Constantinople in 1453 A. D., Muhammad II created the office of supreme judge or "Qadi-l-Qudat", and the office of Grand Mufti, who became known later on as "Sheikhu-l-Islam", the greatest religious authority in the Muslim world. Each of the chief cities of the Empire had its official "Mufti" appointed by Sheiku-l-Islam.<sup>24</sup> After the disintegration of the Turkish Empire, the judicial organization they had instituted was maintained by Arab states which have achieved their independence of Ottoman rule. The "Qadi-l-Qudat" of Mecca is the Supreme Judge in Saudi Arabia; while the Grand Mufti, a descendent of the great reformer, Sheikh Mohammad ibn Abdel Wahhab, lives in Rhiyad; the capital of the Kingdom.

The public law, institutions and judicial organization of Saudi Arabia conform strictly to the teaching of the Hanabali School and more specifically to the doctrine of Ibn Taimiya expounded in his work "*Siyasa Shari'a*".<sup>25</sup> That work was the main inspiration of the Wahhabi renaissance and of the Fundamental Law of the Hijaz of August 31, 1926. A Royal Order approving the Regulations governing Pleadings before the Shari'a courts was issued on 11 Safar 1355 A.H., corresponding to May 4, 1936. While these Regulations have been adapted to present day needs, they hardly constitute a departure from the letter or the spirit of the Shari'a. The pro-

<sup>23</sup> See Louis Gardet, *La Cité Musulmanne, Vie Sociale Et Politique*, Librairie Philosophique, Paris, 1954, p. 138.

<sup>24</sup> Gibb and Bowen, *op. cit.*, Chapter IX, pp. 81-114, the Ulama, and Chapter X, pp. 115-138, the administration of justice.

<sup>25</sup> See the Introduction by Henry Laoust of the "Institut De Damas" to the French translation of the "*Traité de droit public d'Ibn Taimiya*", traduction annotée de la *Siyassa Sar'iya*, for the influence of that work on Muhammad Ibn Abdel Wahhab, originator of the Wahhabi reform movement, and on the Fundamental Law of the Hijaz of August 31, 1926; Beirut 1948, pp. XLII to XLIV.

ceedings before the "Qadi" have preserved their original simplicity. A session is fixed for the hearings, at the request of the plaintiff, and notice is served on the defendant to appear in order to answer the complaint. "In fixing the session," says Article 4, "the distance the notification must cover and the defendant or his attorney must travel in order to attend shall be taken into consideration." However, says Article 10:

"When two litigants appear before the Qadi requesting a hearing and determination on their case, inasmuch as it is a simple one, the Qadi must hear it immediately, if he is not occupied with another case for which that time was set."

One is reminded of Saint Louis, King of France, rendering justice under an oak tree in the Bois de Vincennes. The only change in the old pattern in Arabia was that the dispensation of justice became more systematic with the unification of the state and the stabilization of government under the House of Saud.

The Fundamental Law of the Hijaz barely refers to law and justice as applied by the Qadis according to the Shari'a.<sup>26</sup> That Law has left them alone in the way it has found them. However, the more recent Regulations of the Council of Ministers issued by Royal Decree No. 380 of 22 Shawwal 1377, corresponding to May 11, 1958,<sup>27</sup> provide in Article 66 that:

"The Grievance Board (Diwan Al Mazalim) and the staff of the office of the Comptroller General of State Accounts come under the President of the Council of Ministers."

This too is no innovation, since, as has already been mentioned, the institution of an agency for redress of injustice (Mazalim) goes back to the Abbasside Caliphate. As recently reorganized by Royal Decree published in *Umm al-Qura*. No. 1577 on August 12, 1955, the Grievance Board is one of the more successful divisions of the Council of Ministers. In the words of Mr. Charles W. Harrington, a political scientist with the Arabian Research Division of Aramco:<sup>28</sup>

"There are several reasons for its success. It serves a definite need. It is ably administered. It has been active. It appears to have public support . . .

"The Grievance Board is a highly placed group which is a source of equity for anyone who has a complaint. Its opera-

<sup>26</sup> See Article 10 of the Fundamental Law of the Hijaz of 31 August 1926.

<sup>27</sup> Published by the Official Journal of Saudi Arabia, *Umm Al-Qura*, No. 1717 of 27 Shawwal 1377, corresponding to May 16, 1958.

<sup>28</sup> See Article by Charles W. Harrington entitled "The Saudi Arabian Council of Ministers" in the *Middle East Journal*, Winter, 1958, Volume 12, No. 1, pp. 1-19, specially pp. 17 ff.



tion appears to be set in motion when it receives such a complaint. A committee gathers the facts of the case and presents them to the Board which makes its decisions. Neither the case being worked nor the decisions are published. The King then issues an order settling the grievance. Accusations submitted to the Board which fall within the scope of the Shari'a law are transmitted to a 'Qadi' (religious judge or magistrate) for regular trial."

Thus it will be seen that the action of the Grievance Board supplements but does not supersede the jurisdiction of the "Qadis". The Board has "taken the place of the famed accessibility of the present King's father as a source of equity."<sup>29</sup> This is in the best tradition of the early Caliphs who sat in person to examine grievances.

#### IV. The Legal Profession

The first lawyers in Islam were the "Ulamas" and "Muftis" who performed the functions which the Roman jurists summed up under the expressions "*respondere, agere*". They succeeded the wise men of the pre-Islamic days of "Jahilia" (ignorance) who defended their tribes and sometimes acted as arbitrators in inter-tribal disputes. However, there was this important difference between these wise men and the "Ulamas" and "Muftis" of Islam: While the former applied tribal law, the latter taught and practiced the divinely inspired Shari'a law. At the beginning of Islam, it was public recognition which singled out the rightful "Ulamas" and "Muftis" for their piety, their knowledge of the Shari'a and their capacity to give guidance and legal assistance to their fellow Muslims. Later on, the centers of learning in Muslim capitals, specially the Azhar Mosque, the oldest university in the world, put its stamp on a growing order of "Ulamas" whose members were given certificates on graduation.<sup>30</sup> The "Qanunname's" of the Turkish Empire organized the "Ulamas" in an official administrative hierarchy. At the summit was the Sheikhu-l-Islam or Grand Mufti who became officially recognized as the head of an official order of "Ulamas" or "Muftis".

Some of the "Ulamas" and "Muftis" assisted governors, "Qadis" and litigants in matters of Shari'a law. As time went on,

<sup>29</sup> Charles W. Harrington's Article already referred to; *op. cit.*, p 19.

<sup>30</sup> The Azhar University celebrated its millenium a few years ago. It is the oldest in the world. The Azhar Mosque was built by Gawhar, the General of the Fatimide Caliph Al Mu'iz as a center of Shi'a learning. It became and still is the most important Islamic cultural center where the doctrines of the four Orthodox Schools are taught. Students from all over the Muslim world come to the Azhar to earn and obtain the coveted title of "Alem".

Muslim states came to recognize their responsibility to make available to Muslim citizens the advice, guidance and legal assistance of "Muftis". This, however, did not preclude other "Ulamas" who were not paid officials of the state from giving "fatwas" (legal opinions) and assisting litigants.<sup>31</sup> Thus, the "Muftis" became legal practitioners alongside the "Qadis". They acted either as consultants to the "Qadis" or represented litigants in disputes submitted to them. These independent "Muftis" charged fees for their professional services proportioned to the wealth of their clients. However, there were rare examples of "Muftis" or "Ulamas" who consistently refused any fees for their services.<sup>32</sup> Whether these independent "Ulamas" were paid, or whether they gave their services gratis out of a sentiment of piety, they were what we would call in modern parlance members of an unofficial order of lawyers. Their position has been compared by Hammer Purgstall (trad. Hellert iii, 431 No. vii) to that of counsel in English legal practice.<sup>33</sup>

Representation of parties in a lawsuit before the "Qadi" has been facilitated by the highly developed theory of the Muslim law of mandate or agency. Furthermore, Muslim law makes it imperative that the rights and interests of minors and insane persons who cannot act for themselves in a court of law should be represented by a tutor or guardian. In the absence of a tutor or guardian, the duty of safeguarding the rights of incapable persons falls to the "Qadis" themselves. As for full-grown persons who can take care of themselves, they can either plead their cause in person or appoint a "Wakil" or an attorney. Such a "Wakil" has to submit his power of attorney or "Tawkil" to the "Qadi" before he is allowed to plead for his client. At the present day, and even before the secular courts in modernist Arab states, the Arabic word "Wakil" is often used as synonymous to the word "Muhami" (advocate or trial lawyer). A member of the bar will often describe himself as the "Wakil" or mandatory of the plaintiff or of the defendant whom he represents. The survival of this expression constitutes a link between the present of the legal profession in Arab lands and its past.

In Saudi Arabia, however, "Ulamas", "Muftis" or lawyers have not been incorporated in an order of the bar. However, the

<sup>31</sup> See for the administrative hierarchy of "Ulamas" and the two groups of official and unofficial "Muftis" Louis Gardet, *op. cit.*, pp. 139, 140.

<sup>32</sup> Such was the case of Sheikh Al Mahdi, one of the eminent "Ulamas" of Cairo in the nineteenth century. See Lane, *Manners and Customs of the Modern Egyptians*, Chapter IV; Everyman's edition, p. 121, where we read: "This Mufti was a rare example of integrity. It is said that he never took a fee for a fetwa." Under the Mamluk Sultans of Egypt "Muftis" of each of the four Orthodox Schools sat in a judicial college called "Dar El Adl" or "Hall of Justice", see Gibb and Bowen, *op. cit.*, Part II, p. 134.

<sup>33</sup> See Gibb and Bowen, *op. cit.*, Part II, p. 134, footnote 4.

Regulations for Shari'a Pleadings approved by Royal Decree dated 11 Safar 1355 (May 4, 1936) have a section on attorneyships (Articles 97-104). Article 97 of that section provides that "any person has the right without restriction to appoint an attorney." But not any person can be an attorney at law. The "Qadi" court will not recognize an attorney in a legal dispute unless he carries a license certifying that he is qualified to practice the legal profession (Art. 98). Attorneys' licenses are issued by a committee of the "Ulamas" selected by the highest "Qadi" in the community of the applicant for license (Art. 99). The qualifications required are set forth in Article 100 which provides as follows:

"Attorneys' licenses may be issued only to one who fulfills the following conditions:

- "a. He must be at least twenty one years old.
- "b. He must be of good character and conduct.
- "c. He must be subject of His Majesty's Government.
- "d. He must have gained a final certificate from the Saudi Arabian Institute or from the advanced class of Al Falah Schools, or a certificate equivalent to one of these two, granted by the Directorate of Education.
- "e. (or he may be) one who had practised the profession of a 'Qadi' or one who has a teaching certificate."

Although the Hijaz was the cradle of Islam, yet it must be recognized that at the present time there is a dearth of legal talent in Saudi Arabia. This is remedied by borrowing jurists from other Arab countries, mainly Egypt. However, a Saudi Arabian university has been inaugurated a few months ago at Jeddah, and it is hoped that this gap will soon be filled.

An example of the way the system functions in Saudi Arabia is afforded by a recent case of some importance in which two of the eminent members of the Egyptian Bar were retained respectively by the plaintiff and defendant. As I write, I have before me the record of the hearings which compare favorably with a modern trial before a modern court. There is this difference however. In the West generally "Nul ne plaide par procureur hors le roi," a barrister or an advocate pleads in the name of his client. In Saudi Arabia, however, once the power of attorney is legally established, the lawyers on both sides are required to present the case in their own names as if they were the plaintiff and defendant respectively. Consequently, the Regulations for Shari'a Pleadings provide that in order to be acceptable, a power of attorney must be broad enough to authorize the lawyer to answer all questions that the "Qadi" might have put to his client.

## **THE LAW, THE BENCH AND THE BAR IN COUNTRIES WITH MODERNIST TENDENCIES; SECULARIZATION AND MIXED SYSTEMS OF LAW AS EXEMPLIFIED BY EGYPT**

### **I. Split in the Legal Systems; Dual or Multiple Jurisdictions**

In modernist Arab states a distinction between "personal" and "real" status has split the law and created double and sometimes multiple jurisdictions. On the one hand, the religious law has been maintained in matters of family relations and charitable endowments. On the other hand, codes of positive legislation were copied from the West to govern property, contractual rights and commercial transactions. This is reflected in a complex system of multiple jurisdictions. National courts apply secular law in matters of real status, while religious tribunals apply Muslim, canon or community law in matters of family relations or personal status. Nowhere is this multiplicity of benches and bars more apparent than in the small Republic of Lebanon today. In family matters, each religious community of Orthodox and Shi'a Muslims, Christians of various denominations, Jews and Druzes has its own ecclesiastical tribunals. Since the abolition in 1955 of the "Mahakim Shari'a" or "Quadi" courts for Muslims and of the "Majalis Milliyya" or religious community councils for Christians and Jews in matters of personal status, Egypt has unified its Bench and Bar, but not its system of law which is still "mixed", i.e., partly religious but mostly secular. In order to understand the legal position and the trends in a modernist state, a brief review of the movement of judicial reform in Egypt is called for.

That movement started in 1875 with the successful negotiations carried out by Egypt's Prime Minister Nubar Pasha with the Capitulatory Powers. Before that date, Egypt's common law was the Shari'a and its ordinary tribunals were the "Mahakim Shari'a". But the judicial pattern was more complex than that. Under the Capitulations, there grew a customary law of extraterritoriality for foreigners residing in Egypt. The consular courts claimed jurisdiction over foreigners. In the words of Nubar Pasha in a report he submitted to the Khadive Ismail:

"The jurisdiction which determines the relations between Europeans and the Government of Egypt and the inhabitants of the country, is no longer based on the Capitulations. The Capitulations exist only in name. They have been replaced by an arbitrary law of custom, varying with the character of each

new diplomatic chief – a law based upon precedents frequently abusive, which has been permitted to take root in Egypt through force of circumstances and constant pressure and a desire to make easy the lot of the foreigner.”<sup>34</sup>

## II. The Mixed Courts of Egypt

In order to put an end to this unsatisfactory state of affairs, the Mixed Courts of Egypt were established in agreement with the Capitulatory Powers by the “Règlement” of 1875 and began to function in 1876. Apart from their jurisdiction in matters of minor offences which fall in the category of contraventions, the Mixed Courts were competent to decide civil and commercial disputes between Egyptians and foreigners, and between foreigners of different nationalities. They were to apply Mixed Codes of Civil Law, Commercial Law, Maritime Law, Penal Law, Civil and Commercial Procedure and Penal Investigation compiled in a hurry. These Codes were based on French legislation, with vestiges of Shari’a law mainly in the Civil Code.

The “Règlement” of 1875, as subsequently amended, set up three (District) Tribunals of First Instance at Alexandria, Cairo, and Mansurah, with a Court of Appeal at Alexandria. At the time of the conclusion of the Treaty of Montreux in 1937, the composition of these Mixed Tribunals was as follows:

|                     | Egyptian<br>Judges | Foreign<br>Judges |
|---------------------|--------------------|-------------------|
| Court of Appeal     | 6                  | 10                |
| Cairo Tribunal      | 8                  | 17                |
| Alexandria Tribunal | 6                  | 10                |
| Mansurah Tribunal   | 3                  | 7                 |
| Total               | 23                 | 44                |

The Powers that proposed the foreign judges on the Mixed Court for nomination by the Egyptian Government vied with each other in choosing from among their citizens able jurists of outstanding integrity and wide judicial experience. On the other hand, the Egyptian judges equally distinguished themselves. A “Mixed” Bar of eminent legal practitioners from Egypt itself and from various foreign countries helped to make Nubar Pasha’s venture truly

<sup>34</sup> Cited by Judge Brinton, former American President of the Mixed Court of Appeal of Alexandria (see *the Mixed Courts of Egypt* by J. Y. Brinton, New Haven, 1930, Yale University Press), p. 14. See also *Survey of International Affairs*, 1937, Vol. I, by Arnold J. Toynbee, Oxford University Press, p. 586.

worthy of its name of "Tribunaux de la Réforme". Although they were Egyptian Tribunals operating under Egypt's sovereignty, they constituted in a way "the most successful experiment in international justice." They also gave Egypt and the Arabs their first organized Association of the Bar, with a president, a Council of the Order, a General Assembly and a Code of ethical standards in the exercise of the legal profession.

### III. The National Tribunals

The next step in secular legal reform and judicial organization in Egypt came in 1883. Encouraged by the success of the Mixed Courts, the Government of Egypt introduced the same reforms in the administration of justice to Egyptian citizens by creating the present organization of the National Tribunals. Similar codes were adopted, modeled again on French law and a secular Bench and Bar were created. The judges and lawyers were no longer "Ulamas" steeped in the tradition of Muslim law, but graduates of French and other European Universities and of the newly created School of Law at Cairo. That School eventually became one of the faculties of the Egyptian University. However, while the Mixed Courts used the French language,<sup>35</sup> proceedings before the National Tribunals were conducted in the language of the country, namely Arabic.

The organization of the National Tribunals, like that of the Mixed Courts, also followed the French pattern. The judicial hierarchy consisted of summary tribunals in each Markaz, or county, a tribunal of first instance in each Mudiriya (province) or governorate and three courts of appeal in Cairo, Alexandria and Assiut. One judge sits on a summary tribunal. In criminal matters, he is assisted by a representative of the public prosecutor. Ordinarily, an appeal against his decisions can be filed with the tribunal of first instance of the Mudiriya (province) or governorate. Three judges sit on the tribunal of first instance. They review decisions of summary judges on appeal and decide in first instance all disputes which are beyond the competence of summary tribunals. Their decisions in the latter category of cases are submitted on appeal to one of the three appellate courts. These courts are composed of three higher magistrates (counsellors). Assize courts composed of three counsellors belonging to one of the courts of appeal and a representative of the public prosecutor sit periodically in each province or governorate to deal with crimes of a more serious nature. There is no appeal against their decisions, which can only

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<sup>35</sup> According to the *Règlement* of the Mixed Tribunals, French, English, Italian and Arabic were official languages. In practice, however, French became the *Lingua Franca* of the Mixed Courts.

be reviewed for errors of law by the Court of Cassation. That last Court was instituted in 1931 by Decree-Law dated May 2 1931,<sup>36</sup> as the Supreme Court of Egypt. However, it has no competence to decide on the constitutionality of any law; it only reviews the correct or incorrect application of the law to individual cases where final judgment has been passed on the facts.

Egypt has not introduced the system of trial by jury. It was thought that trial by professional magistrates offered more guarantees and presented less risks of miscarriage of justice than was the case in the jury system. In the Arab Middle East generally, the view is held that democratic institutions have not progressed far enough to warrant the introduction of trial by jury.

Since 1946, Egypt has a Council of State with practically the same composition and the same competence as the French "Conseil d'Etat".<sup>37</sup> The Egyptian Council of State has three sections. One section gives legal opinions when consulted by the different executive branches of the Government. The other section is responsible for drafting laws and regulations proposed by the Government in the proper legal language and form; while the third section is the Administrative Tribunal that decides disputes which arise between private citizens and Government departments out of administrative action alleged to be unlawful or damaging to the plaintiff.

#### IV. Personal Status; "Mahakim Shari'a" and other religious Jurisdictions

As a corollary to the deeply rooted belief in Arab lands that matters of personal status and family law have a religious character, the "Qadi" courts had been maintained in Egypt until 1955 to settle disputes in such matters among Muslims. Christian and Jewish communities had their own ecclesiastical tribunals or religious councils. Since the second half of the nineteenth century, the "Mahakim Shari'a", whose competence was once all-embracing, have been losing to the secular Mixed and National tribunals in matters of real status, property and contract. "Qadi" courts had not functioned satisfactorily in Egypt, and were under severe criticism. In the period of decadence which ended in the downfall of the Turkish Empire, it became the usual practice in Constantinople to sell yearly the office of "Quadi-l-Qudat" or chief justice of Egypt to the highest bidder. Venality naturally spread among lesser "Quadis". In *Manners and Customs of the Modern Egyptians*, Lane gives us a colorful picture of the highest Turkish official who headed Egypt's religious judicial organization in the following terms:

<sup>36</sup> *Official Journal of the Egyptian Government* No. 44 of 1931.

<sup>37</sup> Law No. 112 of August 7, 1946.

"The 'Kadee' (or chief judge) of Cairo presides in Egypt only a year, at the expiration of which term, a new Kadee having arrived from Constantinople, the former returns. It was customary for this officer to proceed from Cairo, with the great caravan of pilgrims, to Mekkah, perform the ceremonies of the pilgrimage, and remain one year as Kadee of the holy city, and one year at El-Medeenah. He purchases his place privately of the government, which pays no particular regard to his qualifications; though he must be a man of some knowledge, an Osmanlee (that is, a Turk), and of the sect of the Hanafees. His tribunal is called the 'Mahkemeh' (or place of judgment). Few Kadees are very well acquainted with the Arabic language; nor is it necessary for them to have such knowledge."<sup>38</sup>

Under these conditions, it was no wonder that corruption would permeate the judicial organization. Again to revert to Lane's description of the way the system worked:

"The rank of plaintiff or defendant, or a bribe from either, often influences the decision of the judge. In general the Na'ib (associate judge) and Muftee takes bribes, and the Kadee receives from His Na'ib. On some occasions, particularly in long litigations, bribes are given by each party, and the decision is awarded in favour of him who pays highest."

Of course, there remained in the body of "Qadis" and "Ulamas" men of integrity, piety and learning who deplored and endeavoured to correct these failures of the "Qadi" courts. Such was Sheikh Al-Mahdi to whom Lane refers in connection with miscarriage of justice in a case involving Al-Mahrouqi, head of the order of merchants of Egypt in the time of Muhammad Ali.<sup>39</sup> Though Arabic literature is replete with scandalous stories of improper conduct of judicial officers, the mere fact that corrupt practices were resented and ridiculed and that they were called by their name showed that they were the exception rather than the rule. But the Arabic saying became familiar: "Out of three judges, one goes to paradise and two go to hellfire". It was this discredit of religious Islamic justice which caused the modernist movement – to secularize the law and the judicial organization – to gain momentum. Gradual encroachment on the jurisdiction of the Mahakim Shari'a ended in their total abolition some years after the disappearance of the Mixed Courts.

<sup>38</sup> Lane's spelling of Arabic names is used as he gives it. I am adopting the modern and more usual spelling.

<sup>39</sup> See Lane, *op. cit.*, pp. 115-121.



## V. Unification of the Courts and the Law

The Mixed Courts have rendered a great service to the cause of justice and the rule of law in Egypt. But, although they were Egyptian tribunals in a legal sense, they were associated in public opinion with the Capitulations and the Consular Courts. They were resented as symbols of extra-territoriality and consequently of infringement of national sovereignty. In 1937, Egypt successfully negotiated the Treaty of Montreux with the Capitulatory Powers. That treaty abolished the jurisdiction of consular courts and fixed an interim period of twelve years after which the regime of Mixed Tribunals would end. On October 15, 1949, the Bench, the Bar and the personnel of the Mixed Courts were incorporated in the National Tribunals, which, since that date, had full jurisdiction over all those who lived on Egyptian territory, whether they were citizens or foreigners.

"Thus," says Arnold Toynbee, "four hundred and two years after the Ottoman Padishah Suleyman the Magnificent's treaty with King Francis I of France, the Capitulations were abolished in respect of Egypt, after having been extinguished thirteen years earlier in their application to Turkey."<sup>40</sup>

There remained the "Mahakim Shari'a" for Muslims and the ecclesiastical tribunals for Christians and Jews, which continued for some time to deal with matters of personal status. In 1955, however, a scandalous affair involving two "Qadis" of the "Mahkamah Shari'a" of Alexandria in corruption and immorality received wide publicity. It eventually motivated the abolition of all religious courts and the transfer of their jurisdiction to the National Tribunals. The "Qadis" and the "Shari'a" Bar were integrated into the Bench and Bar of the National Tribunals. Thus, the diversity of jurisdictions of Tribunals and the multiplicity of tribunals has disappeared. Henceforward Egypt has a unified judicial organization and a unified Bar.

The abolition of the Capitulations and the disappearance of the Mixed Tribunals called for unified codes of civil, commercial and penal law to replace the dual set of Mixed and National Codes. This was done more successfully than the hurried reforms of 1875 and 1883. Special mention must be made of the new Egyptian Civil Code which came into force on October 15, 1949. That code is among the most modern and progressive of its kind. As its Explanatory Note points out, it is based on comparative law, Egyptian case-law and Shari'a law. Other Arab countries, such as Syria, Iraq

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<sup>40</sup> *Survey of International Affairs, op. cit.*, p. 604.

and Libya have adopted it with minor changes. It has served as an important factor of legal unity among Arab nations; and is looked upon by them as model legislation. Thanks to the indefatigable industry and the legal vision of its chief architect, Professor San-houri, former president of the Egyptian Council of State and Member of the National Bar, it ranks high among modern civil codes.

However, in spite of the present modernist trends towards secularizing the law and the judicial organization, the unified National Tribunals of Egypt still apply the Shari'a law in matters of personal status. Furthermore, even in matters of real status, according to Article 1 of the new Civil Code,

"In the absence of a provision of a law that is applicable, the judge will decide according to custom and in the absence of custom in accordance with the principles of Muslim law. In the absence of such principles, the judges will apply the principles of natural justice and the rules of equity."

The Shari'a still preserves its validity in all Muslim Arab countries as a system of ideal justice and a final resort in case the secular legislation fails to provide a solution.

## **VI. The Organization of the Bar and the Rules Governing the Exercise of the Legal Profession in Egypt**

Egypt used to have three different Bar Associations, belonging respectively to the "Mahakim Shari'a", the Mixed Courts and the National Tribunals. After the disappearance of the Mixed Courts in 1949 and the abolition of the "Mahakim Shari'a" in 1955, the members of the two Bars who had belonged to those two former judicial organizations have been integrated in the unified Order of the National Bar.

At the present time, the exercise of the legal profession in Egypt and the organization of the Egyptian Bar Association are regulated by Law No. 96 of March 30, 1957, which was published in the *Official Journal of the United Arab Republic* No. 28 bis B of April 4, 1957.

In order to be able to practise law before the newly unified Egyptian courts, a lawyer's name must be entered in a special register of Egyptian lawyers (Article 1). To be so registered, a person must: 1) be of Egyptian nationality; 2) be in full possession of his civic rights; 3) be graduated from a law school belonging to one of the Egyptian Universities, or from a foreign law school of similar academic standard; 4) be of good conduct and reputation, in keeping with the dignity of the profession, having not been condemned

to any penal or disciplinary measures for reasons implicating his honesty or integrity (Article 2).

Copies of the register of the legal profession are kept both by the Bar Association and the Courts. It includes separate lists: a) of lawyers admitted to plead before the Court of Cassation and the Supreme Administrative Tribunal of the Council of State; b) of lawyers admitted to plead before the Courts of Appeal and the Administrative Tribunal; c) of lawyers authorized to appear before Tribunals of First Instance and other lower administrative tribunals; d) of lawyers under training and finally e) of lawyers who are not exercising the profession (Article 3).

Registration is entrusted to a committee composed of the President of the Court of Appeal of Cairo as chairman, the Attorney-General or his representative and three lawyers admitted to plead before the Court of Cassation to be designated by the Council of the Order of Lawyers from among its members (Article 4).

A lawyer whose name is entered in the register should take the following oath before one of the Courts of Appeal: "I swear to perform my functions with integrity and honour, to respect professional secrets confided to me and to abide by the laws and traditions of my profession" (Article 9).

A junior lawyer must spend two years in training in the profession in the law office of a senior lawyer (Article 10). After that period, the junior lawyer is admitted to plead in his own name before Summary Tribunals and Tribunals of First Instance. Three years more of practice of the legal profession before Tribunals of First Instance are required for admission to the bar of a Court of Appeal or before the Administrative Tribunal of the Council of State. As for pleading before the Court of Cassation and the Supreme Administrative Tribunal, a special selected body of lawyers is admitted from among lawyers who have passed a period of practice of at least seven years before a Court of Appeal or before the Administrative Tribunal. There is a constant interchange between the Bar, the Bench and the Law Faculties of Egyptian Universities. A period spent on the Bench, in the Office of the Attorney-General or in teaching law at one of the Universities is counted as equivalent to a period of training in the legal profession (Articles 17 and 18).

A practising lawyer cannot fill at the same time a public office or act as the director of a company or engage in any business activity. He should refrain from any occupation which is below the dignity of his profession (Article 19). Each lawyer should pay a registration fee on his admission to plead before any of the courts of law. This fee varies according to the rank of the court in the judicial hierarchy. He must likewise pay an annual subscription to

the Bar Association. This also varies according to the lower or higher order-of the court before which the lawyer is allowed to plead (Article 23). A lawyer should have an office in the circumscription of the court to which he belongs.

High ethical standards are prescribed by law in the exercise of the legal profession (Articles 35-37). The *honorarium* due to a lawyer can be fixed in advance by mutual agreement. Unless an *honorarium* is agreed upon after the case is terminated, its amount is subject to review by the courts. A *pactum de quota litis* is not allowed. It is also unlawful for a lawyer to buy rights under litigation (Article 44). In the absence of agreement on the *honorarium* between the lawyer and his client either of them can appeal to a special committee of the Bar Association to fix an appropriate fee (Article 46).

Disciplinary measures are taken against a lawyer who fails to live up to the required ethical standards of his profession by a judicial committee of the court before which he is accredited. These may involve reprimand, suspension for a period of not more than three years or final cancellation of the lawyer's name from the register (Articles 53-69).

The Order of Lawyers is a corporate body which has juristic personality. It is represented by its president (le bâtonnier) who is elected for two years by secret ballot in the annual meeting of the members of the Bar. The Council of the Order of Lawyers over which he presides is composed of seventeen members representing the different groups of lawyers admitted to plead before the courts according to their seniority (Articles 74-88).

One of the duties of the Council of the Order of Lawyers is to give financial assistance to needy and less fortunate colleagues. A special fund for subventions and pensions is instituted for this purpose (Articles 89-109).

Finally, it should be remarked that in the organization of the legal profession in Egypt, the English distinction between solicitors and barristers is unknown. An Egyptian lawyer prepares the briefs, submits the documents and exhibits, and pleads the case of his client before the court. He also drafts contracts, legal agreements, deeds and wills, and settles successions. He often succeeds in avoiding litigation by negotiating and concluding a compromise transaction) and by arranging an arbitration. It is not infrequent for the parties to designate their respective lawyers as arbitrators or "*amiables compositeurs*". Failing agreement on a solution or an award, it is the customary practice for the two arbitrators to designate a referee or "*surarbitre*".

Furthermore, an Egyptian lawyer carries out most of the extensive functions which tradition has assigned to the French "*notaire*".

The function of a notary public in Egypt is merely to testify to the authenticity of deeds and legal documents usually drawn up by a lawyer and submitted to him for registration.

## **VII. Place of the Legal Profession in the Political, Social, Economic and Cultural Life of the Community**

The foregoing review of the status of the legal profession would be incomplete without some brief comments on its role in the political, economic and social structure of the Arab community. In the eyes of an Arab, the legal profession is the liberal profession *par excellence*. Those who exercise it are held in high esteem throughout the Arab world. Traditions which go back to Roman as well as Muslim concepts of law reflect a halo of glory on the lawyer and the "Mufti" or the "Imam". The Roman lawyers defined the science of law as the knowledge of things divine and things human. To the Muslim jurists, the origin of law is revelation. God is the Lawgiver. The "Ulama" or those learned in the law are heirs to the prophets. Consequently, lawyers who apply the new system of law, as well as lawyers who apply Muslim law occupy a privileged position. The new order of lawyers has given Arab States some of their most distinguished heads of government, cabinet ministers, legislators and diplomats. Whether in office or out of office, these lawyers maintain their registry in the Bar Association and cherish their affiliation to it. Alexander Millerand, one of the Presidents of the Third Republic in France, came to Cairo on two occasions to plead before the Mixed Courts of Egypt before they were abolished in 1949. He found colleagues in the Egyptian Bar and judges on the Egyptian Bench whose standards of learning and culture differed little from that of French or any other European lawyers and judges.

Since Egyptian lawyers occupy such an eminent place among their fellow citizens, it is natural that they should have great weight in shaping public opinion and in influencing the political, social, economic and cultural life of Egypt. In the period between the two wars, they were in the forefront of the movement which achieved independence for Egypt under its national leader Saad Zaghloul Pasha. Under different political regimes, they have given parliaments and other political assemblies of various description some of the best Egyptian legislators and public men. The Order of the Bar is often called upon actively to participate in drafting legislation. Its opinion is sought by the Government on proposed new laws which are communicated to it in advance.

The role of the Bar in politics did not come to an end when Egypt achieved her independence in 1922. The Order of Lawyers

constitutes an important segment of public opinion. In times of national crisis the Association of the Bar does not stand indifferent or inactive. Until the nineteenth century, the "Ulamas", who were the predecessors of the lawyers of today had considered themselves as the keepers of the Shari'a. The new Order of the Bar likewise looks upon itself as the guardian of the rule of law and the champion of human rights and political liberties. The views of the Bar have often clashed with those of the executive branch of the government. From time to time elections of the "*bâtonnier*" and of the members of the Council of the Order of Lawyers have acquired political significance and were not regarded with indifference by the ruling authorities.

The complex economic activities of a modern society are forcibly permeated by law – Egypt is no exception to this rule. Its recent emergence from a purely agricultural economy and its rapidly growing industries have opened new vistas for the legal profession. Some leading lawyers act as legal counsel for business corporations; and they often take an active role in their formation and functioning. Specialization in the practice of different branches of the law is rapidly gaining ground in the top echelons of the profession. While some have earned eminence as trial lawyers in criminal cases, the pattern of a body of corporation lawyers is gradually emerging. The recent laws on trade-marks, patent rights and intellectual property has created another group of specialized practitioners who deal with this branch of the law.

However, the prosperous conditions of the privileged few should not make us lose sight of the many who are less fortunate than the elite of their colleagues. The growing numbers of lawyers, specially in the two main cities of Cairo and Alexandria have far outstripped the need for their professional services. This has caused a grave social and economic problem of unemployment and is threatening to lower the standards of the profession. Several remedies have been proposed, such as closing the register of lawyers, or making examinations for admission to the Bar increasingly difficult. None of these solutions could hitherto be carried out effectively. They are objected to on the ground that they create a monopoly in favour of the lawyers now practicing the profession and deprive aspirants of their chance to compete with them one day. In the meantime, the flow of law graduates from the four Egyptian Universities continues to swell the ranks of briefless barristers.

A more cheerful aspect of the legal profession is its contribution to Arab culture, and more specially to Arabic language and literature. The following comments do not apply only to Egypt at the present time. They are equally true of every Arab nation at all times. Since law reflects the social, economic and cultural life of

the community, it is natural to expect a marked contribution to its intellectual life from those who practice it in one form or another. The writings of Shafe'i, one of the great four Orthodox Imams, on the science of pure law or jurisprudence, have rarely been excelled for their high quality as well as for their literary merit. There is no doubt that the extensive work of the Schools of Islamic law have enriched Arabic prose. They are among the most valuable elements of the legacy of Islam.

But more perhaps than the written word, the spoken word has been valued in every Arab land. Forensic oratory has had a place of honour in the annals of the Arabs. The modern expression of the "magic of the spoken word" is the modern counterpart of the Arabic expression "Sihr Al Halal", the "legal magic" so common in describing Arabic oratory. Multitudes in Mecca, Medina, Baghdad and North Africa listened spellbound to the wise men and the "Ulamas" who preached and taught the Islamic religion and law. The same is true of modern lawyers in Cairo, Alexandria, Beirut and Damascus. The setting has changed; but the substance is the same.

The *bâtonnier* Siré in his article in this series in the *Journal of the International Commission of Jurists* has likened French justice to a venerable old lady who has her attendants and retainers devoted to her service. The simile is equally true of justice in the Middle East. The old lady may live in a palace on the banks of the Seine or in the proximity of a mosque in the sands of Arabia. She is devotedly served by people who speak different languages and have different manners. Still, the objectives and the ideals are the same: the equitable settlement of disputes and the triumph of the rule of law.

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## JUDICIAL PROBLEMS IN THE "COMMUNAUTÉ"\* IN AFRICA

The judicial work accomplished by Overseas France is not sufficiently known. People often talk about the work done by its administrators, teachers, missionaries, doctors and engineers, but as a general rule the work of its judges is passed over in silence due perhaps to a lack of information on their achievements. And yet the full record constitutes a fine tribute to their activities.

Among the reforms carried out after the Second World War in the overseas territories, undoubtedly the one which made the greatest stir among the indigenous populations of Africa and Madagascar was that of the judicial organization. A Decree of April 30, 1946, which was the outcome of the recommendations of the Brazzaville Conference and to which M. Marius Mottet's name has been attached, has had widespread effects. By the terms of this basic text, it was decided that the indigenous inhabitants should be subject to the same criminal jurisdiction as the French, being governed by the same laws and consequently enjoying the same guarantees of personal liberty as citizens of metropolitan France.

Furthermore, it is highly gratifying to note that, on obtaining autonomy or independence, the majority of the States of the Community adopted in their Constitutions the same "notion of judicial authority" as the French Constitution of October 4, 1958.

In all these Constitutions a special point has been made of affirming the principle of the independence of the judiciary which Attorney General M. Besson described so accurately in a recent article as the "king-pin of the judicial organization".

The irremovability of judges is laid down everywhere; the Ivory Coast and the Upper Volta have even contemplated the

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\* The *Communauté* was established by the French Constitution of October 4, 1958; it consists of the French Republic (metropolitan France, overseas departments and overseas territories), and of those Republics which approved the new Constitution in the referendum of September 28, 1958, to wit Senegal, Soudan, Mauritania, Upper Volta, Dahomey, Ivory Coast, Congo, Niger, Gabon, Tchad, Central African Republic and Madagascar. Later developments brought about the foundation of the Federation of Mali by Senegal and Soudan. On April 4, 1960, Mali and Madagascar signed treaties with France enabling them to acquire full independence while remaining within the *Communauté*.



establishment of a higher council of judges. Statutes of the Cameroons and Togo have in turn guaranteed the independence and irremovability of judges. In taking over the same "Notion of Judicial Authority" as the heading for section 9 of its Constitution of November 10, 1958 and adopting the principle of the independence of the judiciary, Guinea has also followed the French Constitution in judicial matters.

What is more, despite the profound changes in institutions of the Community all the posts occupied before 1958 by French judges are still held by them, a number of additional posts have had to be established and a further pressing appeal has been made for French officials.

In the Far East, French judges performed the duty of expert advisers to the Cambodian and Laotian judiciaries.

Finally, the States of the Community, of the Cameroons and of Togoland have entrusted to the French establishments of higher education, the National Centre for Judicial Studies (*Centre National d'Etudes Judiciaires*), the National School of Overseas France (*Ecole Nationale de la France d'Outre-Mer*), and the Overseas Institute for Higher Studies (*Institut des Hautes Etudes d'Outre-mer*), the responsibility for training their future magistrates, a further tribute to the French school of law.

Consequently, the first part of this study will deal more particularly with the evolution of this judicial organization up to 1958. It will then be easier to understand the delicate problems which a number of young States have to solve today; the second part will be devoted to an examination of these problems.

## I. THE EVOLUTION OF THE OVERSEAS JUDICIARY UP TO 1958

In order to understand the judicial problems which now exist in the Community it is essential to review the earlier position in order to see what difficulties were encountered in the organization of the judiciary overseas and to assess the efforts French judges have been called upon to make in order to overcome these difficulties.

On their first arrival in overseas countries, Europeans found certain judicial institutions: the various ethnic groups had their own customs.

In Africa there were traditional jurisdictions, where arbitral functions were generally combined with those of the head of a family, head of a village or head of a province.

In Madagascar, in the Merina Kingdom, there was a more homogeneous judicial organization with a civil law and a criminal law, partly customary, partly codified. In other areas of the island, as in Africa proper, custom was the sole source of law.

The first problem which arose was that of the unity or duality of jurisdictions: was the best course to make a clean sweep of the existing organization and replace the native jurisdictions by French tribunals, bringing the indigenous inhabitants under French law? That would have been a radical solution but there was a risk of its upsetting the African social structure. Was the best course then to retain the internal organization, subject to possible modifications?

The French colonial legislation has adopted the second course with on the one hand, the institutions and tribunals of the French law and, on the other hand, the maintenance of tribunals of local law. This system of dual jurisdiction also had the advantage of corresponding with the dual civil status system, that is with French civil law status for citizens who came under French judicial administration and local civil law status or personal status for the indigenous inhabitants, without French citizenship.

### **1. Organization of French Courts in Black Africa and Madagascar before 1946**

Their organization was very similar to that prevailing in metropolitan France. There were the same courts: the local judge, courts of first instance, Court of Appeal and, in Paris, the Supreme Court of Appeal (*Cour de Cassation*). There were, however, a few differences: a single judge in courts of first instance instead of a bench of judges, local judges with wide powers combining the duties of president of the court, examining magistrate and prosecutor with the jurisdiction of a court of first instance, no juries in criminal courts, their place being taken by assessors, defence lawyers combining the functions of barristers and solicitors, a special cadre of magistrates enjoying a status based on that applying in metropolitan France but irremovable.

These courts all passed judgment in accordance with French law.

The main drawback to this organization arose out of infringements of the principle of the separation of administrative and judicial authority through the intrusion of administrative officials in judicial matters and the inadequacy of the safeguards afforded to judges vis-à-vis the Executive.

### **2. Organization of Local Law Courts**

This organization deserves fairly lengthy examination because it is still to this day applied to the indigenous population, at any rate in civil matters. Problems of custom are of considerable importance in Africa, whose population is essentially rural; indeed three-quarters of the African peoples live in the country. Big towns, despite the swift development of town planning, are an exception. The African

who lives in the bush, strongly attached to tradition and often unable to write, lives his life wrapped in a network of rules, the "customs" which constitute a body of rights, duties and prohibitions. These customs dictate his conduct in his daily relations with his fellow citizens.

From their first arrival in Africa, the French were quick to understand the importance of these problems and devoted a great deal of thought to the reorganization of customary justice.

The existing organization worked satisfactorily so long as the customary judges were persons with authority and high moral stature. They then gave decisions which were rarely questioned. Their authority enabled them to see that their verdicts were carried out. Nevertheless this form of customary justice gave rise to a good deal of abuse.

The legislature was then faced with the following dilemma:

- should the responsibility for performing customary justice and thus ensuring respect for local institutions be left entirely to the indigenous peoples?;
- or should these courts, for fear of their inadequacy, be put under the control of European judges?

It was felt that it would be more normal to set up special courts with native judges. A number of impressive arguments could be quoted in support of this view; since the native judges knew the language, habits and local customs perfectly, they were likely to dispense justice more equitably. They could do without interpreters, whereas Europeans could not. Finally it would be difficult for native judges to become accustomed to rules of procedure which were very different from their traditional rules. These arguments were, it must be admitted, quite strong; their impact however was decisively weakened by the growing disregard of the distinction between native justice and French justice.

After loudly proclaiming the principle of the maintenance of indigenous institutional systems and a respect for custom, those same advocates of indigenous justice were afraid of the mediocrity of native courts and the incapacity and corruption of certain judges. They thereupon felt it was essential that the native courts should be subject to supervision and that French citizens should be called in for this purpose to assist or even direct them.

One method of introducing such supervision would have been to make judgments of native courts subject to appeal to French law courts, another, to bring professional judges, French citizens, into native courts to sit alongside the native judges. Moreover, steps would have had to be taken right from the start to train indigenous judges who could then have become the nucleus of a body of African and Madagascar magistrates.

But an entirely different method was adopted and the task of

supervising and even of directing native courts was entrusted to administrative officials. Such a serious infringement of the principle of the separation of powers, whatever its justification overseas, could not fail to generate some friction between the administration and the French judiciary. To prevent any conflict, the legislator had tried to delimit everyone's powers: the Attorney General and the Governor had charge of customary courts, the higher Courts of Appeal and the Court of Cassation were presided over by judges, but again among the latter appeared a number of administrative officials.

Before the 1946 reform, native courts, now known as courts of the local law, dealt with all matters civil, commercial and criminal, concerning the indigenous inhabitants, except for a few special cases peculiar to natives possessing certain privileges.

The courts applied local law, that is to say, African or Malagasy customs, and in the case of the Merina people of Madagascar, the written law and edicts of the Hova sovereigns.

The organization of these native courts was and is still based on countless very old texts. In Madagascar for example the basic code goes back to May 9 1909, in West Africa to December 3 1931, in Equatorial Africa to May 29 1936 and in the Cameroons to July 31 1927. Furthermore the relevant legislation varies very considerably according to the territory, thus complicating the study of the subject matter considerably.

Suffice it to note here that the framework was comprised of courts of the first instance and of the second instance both in Africa and in Madagascar. These courts were presided over by administrators, assisted by two African or Malagasy assessors representing the ethnic group to which the parties belonged. In French West Africa and in Togoland, territorial Courts of Appeal sat in the chief township of each territory and heard appeals from judgments of second degree courts; they were presided over by the President of the court of first instance assisted by two administrative officials and two native notables.

The Court of Cassations did not hear appeals from decisions of local law courts, even in criminal cases involving the most severe penalties; this duty was performed by divisions of the Court of Appeal known as the annulment, confirmation or native civil divisions according to the territory, and composed of three judges, two administrative officials and two native assessors.

In 1944, "customary courts" had been set up in French West Africa, Togo, Cameroun and French Equatorial Africa, composed solely of African notables to which had been transferred some of the jurisdiction of the courts of first instances, but in civil matters only.

In 1945, by a decree of November 13, an important reform of native justice was initiated in Madagascar when career judges were appointed to preside over courts of second instance.

This organization of native courts prior to 1946 might at first sight appear sensible. In the customary courts which were set up in 1914, Africans appeared before their own nationals; in the other courts, the presence of assessors guaranteed respect for their customs. This two-tier jurisdiction was approved everywhere; the procedure was simple and rapid and the courts of first instance brought the administration of justice within the reach and understanding of the litigants.

Nevertheless, prior to 1946, the native courts were the subject of severe criticism from the indigenous inhabitants and are still so today, as will be seen later.

The customary courts, composed exclusively of natives, have failed to arouse great enthusiasm on the part of Africans subject to their jurisdiction; the notables who compose a court, being drawn from the same areas where they dispense justice and sometimes possessing important interests, are too involved in local life to be able to give judgment with the desired impartiality. In dispensing justice in place of the true traditional chiefs, they enjoy neither the authority nor the prestige necessary to ensure that their decisions are respected. They content themselves with conciliatory measures and their sentences are only executed to the extent that the parties concerned are willing to accept them. There is no doubt, however, that this institution is in keeping with the wishes of the representatives of the African peoples as is proved by their statements in the Assembly of the French Union and by the general trend of national policy towards ever broader participation by Africans in the administration of justice. The key to the problem is to be found, as we have already suggested, in the training of a cadre of indigenous judges carefully recruited, wellpaid, and entirely independent of the administration.

The courts of first and second instance, presided over by European officials, were just as severely criticized.

It would, however, be extremely unfair not to pay a tribute to the ability and devotion of large numbers of administrative officials who strove their utmost to maintain customary law. Some carried out valuable research and enriched our knowledge in this field by most useful studies, evidence of a laudable spirit of scientific enquiry, and it cannot be disputed that the administrative official attached a great deal of importance to his duties as customary judge. Dispensing justice was, in his eyes, one of the finest, if not the finest of all of his functions.

But it must be admitted that this duty assumed by administrative officials in judicial matters was tied up with an era of authority and organization. In a country where the traditional chiefs possessed religious, political and judicial authority, it was quite normal for the representatives of the developing new order to be invested with all

these attributes. That would be quite inconceivable today where the independent administration of justice can only be entrusted to professional judges.

The inhabitants of the bush seemed to resign themselves to this state of affairs, but the educated populations in the urban centres were very dissatisfied.

The penal system as supplemented by the native status system provoked even sharper criticism.

After the second World War, the organization of native courts no longer satisfied either the aspirations of the indigenous inhabitants themselves or the principles set out in the 1946 Constitution.

The advantages resulting from simple and speedy justice were counterbalanced by the drawbacks inseparable from such procedure.

In 1944 the Brazzaville Conference had formally recommended the progressive abolition of penalties associated with the native status as from the end of hostilities and had advocated the drafting of a special Penal Code which could be applied to the whole of the African continent.

In accordance with the recommendations of this Conference an indigenous Penal Code was prepared and promulgated by Decree of July 27 1944 and the native status system was abolished by Decrees of December 22 1945 and February 20 1946.

This indigenous Penal Code was based on the provisions of the French Penal Code with the elimination of certain offences and certain punishments which were hardly applicable to natives.

Up till then the native courts had applied customary law in criminal matters wherever it was not in conflict with the French concept of Justice.

The principal reform was carried out by a Decree of April 30 1946 wherein it was laid down that from July 1, 1946, in Africa and Madagascar, French courts, in conformity with the laws applicable to these courts and to the exclusion of all native courts, would deal with all crimes committed by natives. At the same time the Decree of July 17, 1944 instituting a native Penal Code in Africa was abrogated. (This Penal Code had not been extended to Madagascar).

Henceforth criminal justice was to be the same for Europeans and the indigenous peoples; in all cases it would be dispensed by professional judges in accordance with French law. The principle of the separation of powers would be applied in penal matters and the indigenous peoples would enjoy the same guarantees of personal liberty as the French.

This Decree of April 30, 1946 was of immense scope, a fact which cannot be over-emphasized; the reform excited the greatest enthusiasm among the indigenous peoples and established in the overseas territories a climate of confidence and tranquillity in the

expectation of other judicial reforms, particularly the reform of civil courts of local law. With the abolition of the native criminal courts the professional judges found themselves faced overnight with an immense task: in fact the number of persons subject to the courts suddenly swelled from some tens of thousands to more than thirty million.

Some of the often unjustified criticism levelled against judicial organization and criminal procedure in metropolitan France was equally applicable to the courts overseas.

Two most serious charges are those of delay and weakness. The criticism for delay is doubtless as justified overseas as it is in France. Delays and all the drawbacks which derive from it are nevertheless often preferable to the risks involved in over-hasty justice unworthy of a civilized nation.

It is quite certain that the procedure applied overseas in criminal matters, which is taken from the French Code of Criminal Procedure dating from 1808, is one of the primary causes of the slowness of criminal procedure. Very often sentence is not pronounced until so long after the commission of an offence that the prisoner is at a loss to understand what he is being punished for; public opinion on the other hand has forgotten about the crime and supposes that it has gone unpunished. There are many reasons for this delay: to mention only a few, there are the difficulties encountered by examining magistrates in tracing and hearing witnesses, having letters rogatory executed, or obtaining expert opinions, the necessity for interpretation which serves to drag out to enormous lengths the hearing of witnesses and interrogation of the accused, the lack of any civil registry, the defective state of the records in prisoners' files, the lack of facilities for examining magistrates such as a car to cover often great distances, etc.

The charge of excessive leniency is exaggerated. Often the victims of crimes are themselves responsible in that they hesitate to lodge a complaint and, once having obtained satisfaction for the wrongs done to them outside the criminal courts, they ask for the case to be dropped. Another obstacle to the speedy administration of criminal justice is the delay in the final disposal of the case caused by appeal proceedings.

To appreciate with proper impartiality the merits of the overseas penal system, one cannot do better than quote the following passage from a memorandum drawn up by an African, Mr. Bamba Nanlo, entitled "Africans and the Judicial Reforms of 1946".

"Some thought that this separation of powers was inadvisable in Africa; that to apply the Code Napoléon which had been drafted for Frenchmen to peoples of different customs, mentality and status, would create insurmountable difficulties, and they promptly decided that the reform would be a failure. But it has now been in force

for more than ten years and experience has not confirmed this pessimistic forecast."

Admittedly it would be rash to state that in the Community in Africa everything is for the best in the field of criminal justice. There are, and will continue to be, plenty of difficulties: investigations are impeded by a refusal to talk, due to solidarity of feeling among the natives even when they know their compatriots are guilty; superstition aids and abets the work of sorcerers and witch-doctors who are thereby enabled to escape prosecution; liberal measures such as suspended sentences and conditional release do not always achieve their aim; the slowness and formality of court procedure, the sentences imposed, sometimes considered by the natives too severe, sometimes too lenient or ineffective, provoke unfavourable comment or give rise to reactions which Europeans find surprising.

Obviously, difficulties do exist and it would be useless to deny them; the very extent of the reform carried out in 1946 rendered some difficulties inevitable. However having regard to the aim of the legislator, these difficulties do not justify the pessimism with which the reform has been received in certain quarters.

From 1946 to 1958 few changes took place in the organization of the Overseas courts. Mention must, however, be made of the law of December 15 1952 under which a Labour Code based on French legislation was introduced. Under this code the Overseas countries had been endowed with very modern social institutions, one of the most remarkable of which is the Labour Court presided over by a judge assisted by representatives of the workers and employers. This court dispenses justice swiftly and economically.

## II. THE SITUATION AFTER 1958

Under Article 77 of the French Constitution of October 4 1958, the States of the Community enjoy autonomy; they are self-governing and manage their own affairs democratically and freely.

Henceforth, they have the power to organize the administration of justice as they wish: they can establish courts, enact legislation, fix the status of judges, etc.

However, the Constitution laid down that "the supervision of justice" falls within the competence of the Community.

The supervision of justice was defined by a decree on June 12, 1959 of the President of the Community in the following terms: "The supervision of justice shall be understood to mean a higher duty entrusted to the Community to see that the ideal of justice and freedom to which the peoples of States members have subscribed is followed".

The same decree lays down that members States shall ensure



the exercise of the rights and freedoms of the individual as mentioned in the Constitution of 1958. They guarantee the right of every citizen of a member-State of the Community to have his personal status respected.

The function of the Arbitration Court of the Community is to ensure respect for these principles.

The general conditions for the implementation of this supervision of justice were laid down in a second decree of June 12, 1959.

Under Article 1, each State organizes and administers its own courts. Justice is rendered in the name of the people of the State in which the court sits.

It was carefully provided in the Constitutions of the States that Parliament should be entrusted with the creation and organization of the administrative and judicial courts as well as with the establishment of the procedure to be followed before these courts, together with the appropriate civil, commercial, criminal and social legislation.

Up till now, a distinction has been maintained in civil matters between courts of the French or modern law and courts of the local law.

Ministries of Justice have been established in the majority of the States. These States have control of the courts of first instance and appeal which they have full authority to organize, subject only to the guarantee of public freedom and individual rights.

Furthermore, the decision of June 12, 1959, declares that in each State the independence of magistrates is guaranteed by law as is also the irremovability of judges. As was mentioned at the beginning of this study, these principles of independence and irremovability were enshrined in the majority of the Constitutions.

Judges are appointed in the States by the authorities of each State, after approval by the President of the Community.

In matters of joint interest the President of the Community is entitled through his representative to urge the public prosecutor concerned to do whatever is necessary to bring cases before the courts and, when necessary, to appeal against the verdict.

It has been laid down moreover in the same decision that the supervision of decisions of the courts, except in matters of customary law, is exercised by appeal either to the *Conseil d'Etat* or to the *Cour de Cassation*.

Decisions of the judicial authorities given in the States of the Community are, under Article 6 of the decision of June 12, 1959, applicable to the whole of the territory of the Community by ways and means to be fixed by conventions.

Finally, the jurisdiction of military courts is governed by principles based on considerations of defence.

Although the States had received full freedom to organize and

administer their courts, it was difficult for them to do so unaided, at least so far as concerns modern law courts. Until that time, practically all judges serving overseas were of French origin. Since the enactment of the Basic Law (*Loi-cadre*) of 1956 a certain number of Africans and Malagasy had been trained in the National School of Overseas France, but by reason of the requirement of a law degree for the exercise of judicial functions, the number of candidates has been fairly limited.

The States have therefore had to call on French judicial staff and for this purpose judicial Conventions have been signed with each of them.

The result of all this is that the judicial problems with which the Community is now faced are extremely complicated – training of judges, assistance with staff, organization of modern law courts, special training for the *Conseil d'Etat* or *Cour de Cassation*, the execution of judicial decisions by States throughout the whole territory of the Community, new legislation in civil, commercial and criminal matters and the reform of customary courts.

### III. TRAINING OF JUDGES

Since the States are responsible for organizing their own judiciary it is incumbent on them to recruit highly qualified staff.

The judicial Conventions have laid down that the Governments of Overseas Republics should undertake to appoint to modern law courts only candidates holding a law degree who have undergone the vocational training which the Government of the French Republic undertook to provide for them.

Special training was also provided for judges or local law courts.

The States of the Community have fully understood the importance of this problem of the training of judges, which can be regarded as the keystone of the judicial organization. The French Government in turn has made every effort to ensure, by providing the necessary technical assistance, that future judges of the Community are properly trained.

It is appropriate at this juncture to point out that France has always promoted the training of its overseas judicial personnel. As early as 1905 the serious difficulties confronting judges serving in the colonies who had not been prepared for their duties by special studies were fully realized. Unlike judges in France, they often worked alone, far from older and more experienced colleagues, with no textbooks to refer to, and so were obliged to depend entirely on their personal knowledge. On top of that, they were obliged to dispense civil or criminal justice with due regard for race, custom and local tradition.

The young lawyer who had taken his degree at a French law

school was likely to be somewhat taken aback when, immediately after his appointment, he was abruptly transferred to an area where so many things were new and different.

It was these considerations which led in 1905 to the establishment of a special section for the recruitment of colonial judges at the Colonial School, which in 1934 became the National School for Overseas France.

Candidates had to pass an examination open only to holders of a law degree in which they had to demonstrate that they possessed a thorough knowledge of law, political economy, colonial history, as well as of English and German. During their stay at the Colonial School they attended lectures for a doctor's degree and learned the management of judicial affairs by taking a course of training in the Public Prosecutor's Office for the Department of the Seine and at the local Bar. This training, which was both theoretical and practical, constituted a valuable guarantee of the good administration of justice in Overseas France.

The National School for Overseas France actually trained more than fifty classes. In 1956, as a result of the emphasis on African judges provided for by the Basic Law, a considerable number of African and Malagasy magistrates, the elite of the students and officials of the countries of the Community, underwent training.

The National School for Overseas France ceased recruiting after 1959 following the establishment of the National Centre for Judicial Studies for which it provided the pattern. The last classes are due to complete their studies in 1961.

By the ordinance of December 22 1958, which reorganized the status of the French judiciary, a National Centre for Judicial Studies was established for the recruitment of the whole of the judiciary. It will henceforth be the duty of this school to train judges for service in France, Algeria, the overseas departments and territories and the States of the Community. Candidates who are citizens of the Community can gain admission to the Centre by one of the two following means:

- 1) By normal examination, like future French magistrates, provided they hold a law degree ("licence"). Once they have passed the examination, they are admitted to the Centre as "probationers" (*auditeurs de justice*) for a training period of three years. At the end of their stay they are appointed to some French judicial post and may be called on to serve either in France or in the Community.

- 2) On qualifications, as probationers, again with a law degree and for the same period of study.

However, as a temporary measure, and in order to enable the States to obtain quickly the numbers of judges they need, it has been arranged that for a period of some years the above-mentioned rules should be relaxed if necessary. Probationers recruited on qualifications

may have their training period reduced to eighteen months. Candidates holding only two or three *licenciate* certificates may be admitted to the Centre where they have to complete their *licenciate* course while following the same lectures as other probationers. Once they have obtained their diploma, they take the eighteen months' training course provided for those who fulfil the conditions for admission.

As regards the normal training period, the three years are divided into two parts:

The first is devoted to training courses in the courts and tribunals where probationers have to familiarize themselves with court procedure and learn to appreciate, through contact with judges, the social importance of the administration of justice as well as the obligations it imposes.

The training period in the major courts is fixed at about ten months; the probationer is shown how the various sections of the public prosecutor's department work and in particular the procedure in cases of *flagrante delicto*. He is allowed to examine police and *gendarmerie* reports, to attend the preparation of prosecutions and learns how to handle files.

He is also being familiarized with the realities of prison life through a training course in prison establishments so that he can get a proper understanding of what sentences involving deprivation of liberty really mean, since he will later on be called on either to ask for or to pronounce such sentences. Finally a period of training with juvenile courts and reformatories will make probationers aware of the manifold problems raised by juvenile delinquency and the remarkable methods which are being developed in France for their solution. The probationer will next be assigned to the various sections of the civil courts and the Court of Appeal. There he will study the functions of the President of a civil tribunal, will take part in the work of the registrar's division of the public prosecutor's department as well as of the senior President, and will attend hearings and meetings and assist in the drafting of judgments.

It should be noted that as a preliminary to any work of this kind probationers have to take an oath before the Paris Court of Appeal in these terms: "I swear not to disclose any of the discussions or judicial acts of which I may have acquired knowledge in the course of my training at the National Centre for Judicial Studies".

The second period is devoted to an extension of legal knowledge through appropriate courses and lectures. In addition, through hearing speeches by distinguished speakers not connected with the judiciary, by systematic visits to large undertakings such as insurance companies, industrial and commercial establishments, banks, etc., probationers will acquaint themselves closely with the man in the street, his surroundings, his work and his aspirations.

The first class for French judges was admitted to the Centre in 1959, the number of probationers admitted on qualification and who are citizens of the Community is at present 28. Cameroun and Togo have also designated candidates.

The States of the Community, having also had the responsibility of finding judges sufficiently qualified to perform judicial functions in local law courts, have asked the French Government to arrange for the training of local justices of the peace (*juges de paix*). These would constitute a body of local or cantonal judicial officials with a triple function:

1) in customary law cases, they would be judges of first instance;

2) in civil modern law cases, their jurisdiction would be similar to that of the old French local justices of the peace (*juges de paix*);

3) in criminal cases, they would have jurisdiction in cases of minor offences and certain misdemeanours.

The Overseas Institute for Higher Studies (*Institut des Hautes Etudes d'Ouvre-Mer*) has been entrusted with the task of arranging for the training of these judges under the heading of technical assistance. They are recruited on qualifications from candidates with some professional experience of judicial functions such as registrars, clerks of courts, etc.

The study period is fixed at one or two years according to the requirements of the respective States. Trainees are first given theoretical instruction at the Institute in criminal procedure, general and special criminal law, civil law and civil procedure, customary law and overseas labour law.

They then take a practical course in the lower courts of Metropolitan France under conditions similar to those described previously for probationers at the Centre.

On leaving the Centre or the Institute, magistrates are given diplomas of qualification for judicial functions and are then appointed to judiciary of a particular State in accordance with the rules fixed by the State itself.

#### **IV. CO-OPERATION BETWEEN FRANCE AND THE STATES OF THE COMMUNITY IN MATTERS OF JUDICIAL PERSONNEL**

The States of the Community, being free to organize their courts as they desire, could have appointed Africans or Malagasies to judicial posts in place of the French judges. They realized, however, that if they were to have an effective Bench, it was essential that judges should possess certain basic qualifications, and recognized that a law degree (*licence en droit*) was a minimum requirement.

Since the number of Africans who hold such a degree and are attracted by a judicial career is still very small, the States could not hope to run their courts without the services of French judges.

In order to enable the Governments of the Overseas Republics to provide for the administration of justice, the French Government undertook to put at their disposal the necessary judges as well as registrars and clerks of courts.

These arrangements are governed by judicial Conventions which have been signed between the French Government on the one hand and the States of the Community on the other hand.

Cameroun and Togo have also signed similar Conventions.

These Conventions have fixed the terms on which French judges are seconded, the obligations of the Governments towards them, and the conditions on which their secondment to a State is brought to an end.

### 1. Conditions of Secondment

The two Governments draw up a list of the judicial posts to be filled in a given State and the French Government submits to the Government of the State the name of a judge for a particular post. For example, if the Congo Government needs an examining judge (*juge d'instruction*) at the Brazzaville court, the French Government, through the Secretary of State for Community Relations, will submit the name of a judge to the Prime Minister of the Congo Republic. As soon as his agreement has been given, the judge who is available to the Secretary of State is placed by the latter at the disposal of the Government by means of a ministerial decision. This decision defines the functions (in the example quoted above, *juge d'instruction* at the Brazzaville court) which the magistrate will perform so long as he is at the disposal of the State. This decision is extremely important because it constitutes an essential guarantee for the judge who thereby knows, before leaving for overseas, the exact post he is to occupy. The duration of his stay overseas is fixed at two years, automatically renewable by tacit consent subject to six months' notice by either Government.

### 2. Obligations of Governments Towards Magistrates Seconded to Them

Magistrates seconded for duty for a given post cannot be assigned to another post without their consent. In order to ensure a proper respect for the seniority of French judges as between themselves, no judge may accept a post which would give him authority over French judges of a higher grade than his own.

The Government of the State undertakes that seconded

magistrates shall enjoy the same independence, immunities, guarantees, privileges, honours and prerogatives as they would enjoy if exercising the same functions in France.

In addition, it undertakes to protect them against any threat, abuse, insult, defamation, attack or restraint of whatever kind which might be directed against them in the course of the exercise of their duties. Should the necessity arise, the State undertakes to make reparation for any resulting damage.

Judges may not be troubled in any way as a result of any decisions in which they take part, or of anything they may say in Court, or of any act arising out of their duties.

No prosecution on a criminal charge or for misdemeanour may be started against a judge except with the consent of a Commission whose composition is described below.

The appointment of judges is the responsibility of the French Government, but the States pay them a lump-sum allowance. They also undertake to provide housing.

### **3. Re-Transfer of Judges to the French Government**

A judge may be transferred back to the French Government before the expiration of the normal period of two years in any of the following three cases:

At the request of the Government of the State, but only with the approval of a Commission of:

- (a) Six members, three to be judges designated by the Minister of Justice of the State concerned and three to be French Government judges put at its disposal, where the number of French judges exceeds 40;

Four members, two to be judges designated by the Minister of Justice of the State concerned and two French Government judges, where the number of French judges is less than 40.

The Commission shall always be presided over by the senior and highest-ranking French Government judge; if a vote is equally divided, the President shall have a casting vote.

In the case of a prosecutor the Commission shall advise the Government of the State whether he should be re-transferred; it should be emphasized that a decision to end a judge's secondment should in no case be regarded as a disciplinary measure.

- (b) At the request of the French Government under the same conditions.
- (c) At the request of the judge himself for, in exceptional cases, personal or family reasons. His request is then

submitted to the Commission, which sends its written recommendation with reasons to the French Government for the decision of that Government.

The purpose of these judicial Conventions is to supply the States with the judges they need, at the same time ensuring the protection of the judges themselves in the exercise of their functions.

It should be pointed out that judges serving in Morocco or Tunisia who sign contracts before being posted enjoy slightly different status. Judges on technical assistance posts in the States of the Community may be appointed without their consent, but wherever possible their wishes are consulted.

The other judicial problems to be solved by the States of the Community give rise to a good deal of preparatory work on the part of organs of the Community and of the States themselves.

#### **V. SPECIAL DIVISIONS OF THE CONSEIL D'ETAT AND OF THE COUR DE CASSATION**

The decision of the President of the Community of June 12 1959 provides that appeals to the Supreme Court against decisions of African or Malagasy courts must be submitted to a special division of the *Conseil d'Etat* or the *Cour de Cassation* composed of judges appointed by the President of the Community on the proposal of the Governments of the States.

No decision has yet been taken regarding the organization of these special divisions, but it is already known, as a result of the official statements published at the close of the meeting of the Executive Council of Saint Louis in December 1959, that a Community Section and a Community Division Chamber will be established at the *Conseil d'Etat* and the *Cour de Cassation* respectively.

Each of these special divisions will comprise three judges belonging to the court and three judges appointed on the proposal of the States. Some will be appointed to the *Conseil d'Etat* and others to the *Cour de Cassation*, but all will be entitled to sit in either court.

Judges appointed on the proposal of the States will be selected on the basis of criteria more or less similar to those required for judges of the lower tribunals.

No study of these divisional courts or of the special procedure to be followed before them can be made until the implementing decision of the President of the Community has been issued.

#### **VI. EXECUTION OF JUDICIAL DECISIONS IN THE COMMUNITY**

Under article 5 of the decree of June 12, 1959, "decisions of the judicial authorities rendered in the members States of the Com-



munity shall be executed throughout the whole territory of the Community in accordance with ways and means to be fixed by a Convention”.

The Executive Council has decided that these ways and means shall be determined by a multilateral Convention to be based on the following principles:

### **1. In Civil Matters**

Since the usual procedure by *exequatur* has had to be discarded in view of the links between the States of the Community, which cannot be assimilated to foreign States, final decisions will be executed after affixing of the writ of execution of the State in which it is to take place. This measure will be ordered by the President of the Court of the place of execution whose duty it will be to verify the authenticity of the decision submitted to it and its executory character.

### **2. In Criminal Matters**

Judgments will be executed at the request of the Public Prosecutor of the Republic sitting with the court which gave the decision. States, however, will retain absolute discretion as to whether or not to consent to execution on their territory of decisions in cases relating to political offences, a list of which will be set out in the conventions.

## **VII. ORGANIZATION OF COURTS**

The States having maintained the distinction between French or modern law courts and customary courts, only a few reforms of minor importance have been carried out.

As regards courts of modern law, they have retained the French organization based on the decree of August 22 1928 as last amended by the decree of December 19 1957. The judicial reform carried out in Metropolitan France by the ordinance of December 22 1958 has not been adopted by the States of the Community. Courts of Appeal do therefore still survive, as well as courts of first instance with sections operating generally as local courts of justices of the peace (*juges de paix*) with wide jurisdiction, and simple police courts.

The judicial Conventions made it compulsory for the States to consult the French Government on any change in judicial organization; it should, however, be noted that this does not imply any restriction on the powers of the States but is merely to allow the French Government to give its views on possible effects on the participation of French judges.

The only changes made by the States relate to the establishment of Courts of Appeal. Actually each State, being self-governing, wished to have its own Court of Appeal. Thus Courts of Appeal have been established in Ichad and Dahomey, while so called higher Courts of Appeal have been set up in Mauritania, Upper Volta and Niger, and are about to be set up in the Central African Republic and Gabon.

In addition, a number of courts of justices of the peace (*juges de paix*) with wide jurisdiction have been re-opened in several States.

### VIII. LEGISLATION

The drafting of civil, commercial, criminal and social legislation is henceforth a responsibility of the States, and more precisely of their legislative assemblies.

Before they can enjoy legislation suited to their needs, their customs and their traditions, the States will face a major task complicated by the continued distinction between French law and local law.

The former, which is nowadays referred to as modern law, applies to all citizens who are subjects of Metropolitan France and to those of the States which have abolished personal status. It is also applied whenever there is an option or where customary law is non-existent, as for example in matters of written obligations.

The Labour and Penal Codes apply to citizens covered by either set of laws.

Since French laws can no longer be extended overseas, any improvements or innovations will have to be made by the States themselves, which can take as a basis either French law or modern legislation such as the Swiss Code of Obligations or the Italian Civil Code.

Local law, known also as traditional law, applies to all indigenous peoples who are not subject to modern law; it is entirely unwritten except in central Madagascar. There are great many gaps in this customary law; it has no general principles and its effectiveness is impaired by the lack of means of enforcement.

The Constitutions of the States contemplate a codification of customs; it would appear that what is intended is rather a compilation of customs. Once the customs have been listed, guiding principles will have to be derived from them and an appropriate procedure, accompanied by effective sanctions organized.

Once the local law courts have been reorganized and the judges responsible for stating the law in them have been trained under the conditions described above, the States will have carried out a complete reform of indigenous justice.

The final aim to be achieved is a renovated and re-cast African law which will then be applicable over the whole of the territory. This will be accomplished when the majority of Africans has adopted modern legal procedures.

It appears certain that the member States of the French Community are in a position to promote new, bold legislation, which can serve as an example to numbers of other countries.

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# LEGAL AID AND THE RULE OF LAW: A COMPARATIVE OUTLINE OF THE PROBLEM

## I. INTRODUCTION

The Committee on the Judiciary and the Legal Profession at the New Delhi Congress of the International Commission of Jurists had before it,<sup>1</sup> among other matters, the following tentative resolution suggested in the *Working Paper*:

"An obligation rests on the State to provide adequate legal advice and representation to all those threatened as to their life, liberty, property or reputation who are not able to pay for it. This obligation may be carried out in different ways and is on the whole more comprehensively observed in regard to criminal as opposed to civil cases. It is necessary, however, to assert the full implications of the principle, in particular in so far as "adequate" means legal advice and representation by lawyers of the requisite standing and experience, a question which cannot altogether be disassociated from the question of adequate remuneration for the services rendered."

The Committee which had to consider this question included a number of eminent judges, practising and academic lawyers of the Common Law and Civil Law systems in many parts of the world. There was a long and keen discussion in which the main protagonists were, on the one hand, lawyers from the United States (including two past Presidents of the American Bar Association) and lawyers from Asian countries, particularly India. It was generally assumed that there was an obligation to provide legal aid for those unable to pay for it if the rights and remedies of the individual under the Rule of Law were to be given practical reality. The real point of difference lay in the emphasis to be put on the responsibility of the State for the provision of legal aid. The American point of view was that the primary obligation rested on the legal profession; it was felt that any substantial intervention by the State in the free functioning of legal advice and representation would in the long run undermine the independence of the legal profession as a whole which, it was emphasised, was one of the pillars of a free society under the Rule of Law. On the other hand Asian participants considered that,

<sup>1</sup> See this *Journal*, Vol. II, No. 1 (Spring-Summer 1959).

without State assistance, in the actual conditions of their countries it would be impossible to provide an adequate system of legal aid. In the event a compromise was reached which found expression in the following resolution:

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

The discussion in the Committee at New Delhi served a valuable purpose but the members of the Committee would probably agree that the question of legal aid is sufficiently difficult and important to deserve further study particularly in the light of more detailed material than could be conveniently included within the Working Paper. A recent Colloquium organized by the United Kingdom National Committee of Comparative Law provided an opportunity for a more extended study on a comparative basis of the problems of legal aid and the Colloquium was fortunate in securing, through the good offices of the International Commission of Jurists, the presence of Mlle. Jacqueline Rochette of the Paris Bar and of M. René Helg of the Geneva Bar, Head of the Department of Justice and Police of the Canton of Geneva.<sup>2</sup>

<sup>2</sup> Apart from the contributions of the above mentioned, papers were submitted to the Colloquium by Mr. H. L. Christiansen of the Danish Ministry of Justice, by Messrs. Per Stavang and Ramund Stuhau of the Norwegian Department of Justice and Police (through the courtesy of Professor Torstein Eckhoff), by Professor Ekelof of the University of Upsala, Sweden, by Mr. H. H. Marcus (on the German Legal Aid system), by Dr. Z. Szirmai (on Legal Aid in the Soviet Union), by Professor Leonard Oppenheim of Tulane University, New Orleans (on Legal Aid in the United States) and by Mr. T. Sargent, Secretary of "Justice", the British Section of the International Commission of Jurists, (on Legal Aid in the Dependent Commonwealth). A comprehensive paper on Legal Aid and Legal Advice in England and Wales was provided by Mr. E. J. T. Matthews, Under-Secretary of the Law Society, and there were further papers on Legal Aid in the United Kingdom by Miss Antonia Gerard (on Legal Aid before the Legal Aid and Advice Act, 1949), by Mr. Peter Benenson (on "The Future of Legal Aid"), by Mr. J. N. Dandie, President of the Law Society of Scotland (on Legal Aid in Scotland) and by Dr. A. G. Donaldson (on Legal Aid in Northern Ireland). The Chairman of this Colloquium was Dr. Andrew Martin. The present

## II. THE DIFFICULTIES OF COMPARISON

It is clear from even the most superficial survey of the material presented to the Colloquium that the extent to which "equal justice for all" is achieved in different countries does not only depend on the formal systems of Legal Aid which may or may not exist in those countries. Among the factors which also have to be taken into account may be mentioned the following:

### 1. Legal Costs

These may be considered from two aspects. Firstly, there are the formal rules which govern costs. An important point of difference, for example, between the *United Kingdom* and the *United States* is that in the latter country the successful party does not, as is normally the case in the former, obtain his party and party costs from the unsuccessful litigant. There would seem little doubt that the risk of having to pay the costs of both sides deters litigants and itself emphasises the necessity for a system of legal aid. Secondly, there is the question of the burden of costs in relation to the amount or importance of the matter in litigation against the background of the general living standards of the country concerned. In *Germany*, for example, it would seem that legal charges even in non-assisted cases are substantially lower than they are in the *United Kingdom*. However, a further factor which has to be borne in mind is that in the *United Kingdom*, in contrast with some other European countries, court fees, as opposed to the charges of legal advisers and advocates, are more or less negligible. Where court fees are considerable an important aspect of the system of legal aid is the power of an administrative authority or of a court dispense with the necessity for the payment of fees.

### 2. The Position of the Legal Profession

It is clear that in *France*, to take one example, an extraordinarily heavy burden, in regard to legal aid, falls on the legal profession; it would seem that assistance is given in approximately 50 per cent of all the cases in which a claim for assistance is made and that it is the French legal profession which has to undertake this

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writer contributed a comparative paper of which this article is an expanded and corrected version taking into account the oral discussion at the Colloquium. The authors of all the above mentioned contributions, with the exception of the Norwegian and Swedish contributors, were personally present at, and took part in, the discussion. The other members of the Colloquium were academic and practising lawyers, including a number with close experience of the working of the Legal Aid system in the *United Kingdom*. It is hoped that the various contributions to the Colloquium will be published in book form.

responsibility without payment. In the *United States*, although there is a greater variety of systems of legal aid, some involving the employment of paid counsel, there is also a wide measure of voluntary unpaid work by the legal profession. The same was true of legal aid in civil cases in *Great Britain* before the passing of the Legal Aid and Advice Act of 1949 and it remains broadly true of *Northern Ireland*, although in 1958 the Government of Northern Ireland appointed a committee to consider whether legislation authorizing a scheme of legal aid and advice should be introduced. It is, however, particularly in regard to the territories of the *Dependent Commonwealth* that the varying attitudes, capacity and indeed availability of the legal profession is of the greatest importance, as it is clear that in such territories official provision for legal aid is the general rule only in respect of the most serious criminal charges (often confined to capital offences) and is fragmentary or non-existent in respect of civil cases.

Two questions suggest themselves: firstly, whether in modern conditions the legal profession can continue adequately to make the degree of personal financial sacrifice necessary to maintain a satisfactory system of legal aid: secondly, how far the burden is fairly distributed within the legal profession itself and, from the point of view of the litigant, whether those who in fact bear the main burden (it would seem, for example, to be the *stagiaires* in *France*) can properly carry out the tasks allotted to them.

### 3. The Character of the Legal System

In a case-law system, with its accompanying complications and, particularly, in a system where the judge traditionally assumes a more or less passive role during the hearing of the case legal aid may be more important than in a code-covered system with a judge who takes an active part in the case. On the other hand, it is no doubt true that in some parts of the *Dependent Commonwealth* which in theory belong to the former system of law there is a certain tradition of sympathy and help for the unrepresented litigant although at best this can only offset to some extent but seldom fully compensate for the lack of counsel.

### 4. The Attitude of the Public towards Litigation

In some countries there is a greater tendency than in others to settle disputes by litigation. No doubt the fear exists in the "litigious" countries that a too general system of legal aid might flood the courts with cases. Moreover, even in very poor countries the general acceptance of litigation as an essential part of everyday life may be accompanied by a strong family or group obligation to provide the means for legal aid and there may, therefore, be rela-

tively few cases where poverty actually prevents a case from coming to the courts. In *India*,<sup>3</sup> for example, where formal legal aid is very limited (in criminal trials where a death sentence may be imposed and in some States where life imprisonment may be involved, a system supplemented to only a limited extent by Legal Aid Societies) and by actions *in forma pauperis* there is nevertheless much litigation often by very poor persons. On the other hand, the strain on the poorer classes of the community to provide the means for such litigation may be very heavy and lead to long standing indebtedness. Where there is this fear that further organized legal aid might swamp the courts and where the traditional restraints of the legal profession are less fully developed than in some other countries it may be necessary to envisage any extension of legal aid as the responsibility primarily of the Court or of the State rather than to leave it to the legal profession itself.

### III. LEGAL ADVICE AS OPPOSED TO LEGAL REPRESENTATION IN LITIGATION

The need for legal aid, especially in the complex environment of the modern State, arises not only in regard to litigation but also in regard to the citizen's general rights and duties quite apart from any question of pending litigation. Such advice, indeed, at a sufficiently early stage may result in an economy of money and manpower and avoid ultimate resort to the courts which in a sense deal only with the pathological cases of the legal system. In this respect the legal advice scheme which has been in force in *England*<sup>4</sup> since March 2, 1959 (under the provisions of Section 7 of the Legal Aid and Advice Act of 1949 and the Legal Advice Regulations, 1959) appears to be more comprehensively organized, to give the person seeking advice a wider choice of legal adviser and to make better provision for the remuneration of the adviser than the systems in force in most other countries. Briefly, a member of the public may

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<sup>3</sup> But see the interesting note in *Bulletin* No. 10, p. 23 of the International Commission of Jurists which describes further measures taken by Indian State Governments and the recommendations regarding legal aid of the Indian Law Commission.

<sup>4</sup> It may be said here of legal aid in general in civil cases that it is administered in Scotland (in spite of a differing legal system) on the same lines as in England. In criminal cases there is a very old tradition of legal aid superior to anything formerly available in England; today, while the poorer accused person is well served, the advocate or solicitor in Scotland (who gives his services gratuitously) is subject to an onerous burden. The position is now under the consideration of a committee under the chairmanship of Lord Guthrie. In this article to simplify our comparisons we confine our observations henceforward to England (and Wales).



receive legal advice from any solicitor on the Legal Advice Panel maintained by the Law Society provided he satisfies a fairly severe standard of minimum income and capital.<sup>5</sup> This service, which is virtually free apart from a nominal charge, in any event remitted in the case of persons on public assistance, extends to the whole field of English law, including matters (e.g., proceedings before Administrative Tribunals) in respect of which legal aid and litigation is not available. Moreover, Section 5 of the Legal Aid and Advice Act, 1949 (which is expected to be put into effect in 1960) will cover not merely advice but also the writing of letters, the preliminary investigation of a case and the conduct of negotiations. In addition to this State-sanctioned scheme the Law Society has organized a Voluntary Legal Advice Scheme which entitles any member of the public, irrespective of means, to obtain from a solicitor on the Legal Advice Panel (i.e., more than one half of the solicitors practising in England and Wales) oral advice on the application of English law to any one legal question at a fixed charge of £ 1 for an interview not exceeding thirty minutes.

In *France* there is the institution of *Consultation de Charité* going back to the Middle Ages, entitling indigent persons who produce a certificate of exemption and who pay a small fee, to legal advice. In Paris there are two offices for consultation sitting twice a week under the supervision of a senior member of the Bar, assisted by four *stagiaires*. In *Germany* there would appear to be a somewhat similar system, although perhaps more highly developed. Members of the Bar serve on a rota for this purpose which it would seem is not necessarily confined to junior lawyers. Much work is done, apart from giving advice, in drafting letters and negotiating on behalf of the persons who thus consult lawyers on the rota.

In *Denmark*, although there is no general system of legal advice, Section 135 of the Administration of Justice Act requires all lawyers to help poor persons referred to them by the local Chief of Police in drawing up complaints against the authorities and in making applications for legal aid in criminal or civil cases. A modest fee is paid by the State. In Copenhagen, however, this function has been taken over by an institution, receiving some help from the State and local authority, based on the unpaid help of about 130 lawyers and law students, giving advice to 25,000 persons yearly and open five evenings a week. In *Sweden* no general system of poor persons' legal advice exists, but in some towns local authorities maintain institutions for this purpose; in other districts the local authority makes an

<sup>5</sup> His income must be such that if bringing a case, as distinguished from asking for advice, his contribution towards the cost (as to which see Section VI of this article *infra*) would not be more than £ 25. He cannot get advice however if he has more than £ 75 capital.

agreement with ordinary lawyers who are paid for their work by the authority. In *Norway* there are municipal offices in Oslo, Bergen, Trondheim and Stavanger for legal advice by way of consultation before legal proceedings are initiated.

It should be said finally under this heading that any assessment on a comparative basis of the relative hardship resulting from a lack of formal facilities for free legal advice would be difficult and probably misleading. Much depends on the standard of living of the country concerned and the sense of obligation which lawyers feel towards the public. In *Switzerland*, for example, or at all events in the canton of Geneva on which the Colloquium was particularly informed, it was emphasised that although there were no facilities provided by the authorities for obtaining free legal advice this created no particular problems. Lawyers conceived it as a point of honour to give advice where needed (although some "commercialization" of standards had to be conceded) and in any event private industry provided a variety of social welfare services including the giving of legal advice. On the other hand, it would seem that in the *Dependent Commonwealth* (and, it need hardly be said, in some territories outside the Commonwealth) the lack of legal advice owing to a lack of means or sometimes simply of lawyers to provide it must be reckoned a serious hardship and to this extent a limitation on the practical operation of the Rule of Law in those territories.

#### IV. THE DISTINCTION BETWEEN LEGAL AID IN CRIMINAL AND IN CIVIL CASES

As indicated in the passage from the New Delhi *Working Paper* and in the resolution of the Committee on the Judiciary and the Legal Profession, which have been cited above, legal aid in criminal cases is in most countries more readily given than in civil cases. This used to be the position in *England* before the Legal Aid and Advice Act of 1949 but it may be doubted whether today legal aid in criminal cases is any more readily granted than in civil cases. However, a distinction remains between criminal and civil cases in that in the former a certificate is granted at the discretion of the magistrates or judge of the court where the case is to be heard. Such a certificate can only be granted when (1) it is desirable in the interests of justice that the prisoner should have free legal aid and (2) it appears that his means are insufficient to obtain this aid. There is no formal machinery for investigation of means or determination of what an "insufficiency of means" implies, but the Legal Aid and Advice Act of 1949 provided that where there is a doubt as to means or as to the desirability in the interests of justice of issuing

a certificate it should be resolved in favour of the accused. The accused person to whom a certificate is granted makes no contribution to the cost of his defence, the solicitor and barrister (if any) being paid a modest fee out of public funds. The system has been criticized<sup>6</sup> on the ground that (1) the criteria on which legal aid is given by different courts differ widely, (2) legal aid in criminal cases should be combined with the now more highly organized and efficient system for the granting of legal aid in civil cases, (3) the fees paid to solicitors and barristers in criminal cases are quite inadequate and it is difficult to get the very best lawyers except in cases likely to attract wide publicity and therefore to compensate for the inadequate fees involved, and (4) it should be possible for the court to include in the sentence of the accused an obligation to pay in whole or in part the cost of the defence which has been granted to him.

The distinction between civil and criminal cases which, in regard to legal aid is as we have seen a subject of some criticism in England, nevertheless exists in many other countries. Thus, in *France* legal aid in criminal matters now rests on Article 114 of the Code of Criminal Procedure and gives the accused a right, irrespective of means, to a lawyer nominated by the Court or by the *Bâtonnier* of the Bar. The services of the lawyer are rendered gratuitously. In *Germany* practice appears to lie between England and France. As in France poverty is not the ground for giving legal aid which is however provided by the Court according to Article 140 of the Code of Criminal Procedure, when the offence is grave and the trial will be before a superior criminal Court. However, unlike France the advocate is paid and the Court may condemn the defendant in certain circumstances to pay the cost of his defence.

In *Denmark* in the more serious criminal cases and in all criminal appeals the accused will, unless he has engaged counsel for the defence have counsel appointed for him by the Court. As in Germany the accused may be sentenced to pay the cost of the lawyer's fee which is fixed by the Court and for this reason the system is not regarded as coming within the general scheme of legal aid. In appeals which are decided in favour of the accused the public has to meet the cost of the appeal including the fee paid to the appointed counsel. In *Norway* there is also a distinction between civil and criminal cases. In criminal cases the person charged must have the assistance of defence counsel unless otherwise specifically provided, at the main hearing, during the preliminary judicial examination and when evidence is being recorded if it is to be used at the trial. Defence counsel has to be briefed by the Court at the

<sup>6</sup> Peter Benenson, *The Future of Legal Aid*, 1951, published as No. 191 of the Fabian Research Series by the Fabian Society, 11 Dartmouth Street, London, S.W. 1.

public expense and any counsel already briefed or chosen by the accused will obtain the status of State appointed counsel. In *Sweden* the main difference between legal aid in civil and in criminal cases lies in the fact that the obligation on the accused, if he is found guilty, is to repay the cost of the evidence put forward by the prosecution although not the cost of the counsel for the defence. This obligation exists in theory up to five years after the case is closed. In civil cases on the other hand the assisted person does not contribute to the cost.

In the *United States* there appear to be three main methods of defending poor persons: (1) unpaid counsel assigned by the Court, (2) assigned paid counsel with the fee fixed by Statute or by the Court, (3) the services of a "public defender", publicly or privately financed. In the past it would appear that rather less has been done in the *United States* for legal aid in criminal than in civil cases but there has been in recent years a rapid increase in the number of "defender" offices although there remain large areas without such a service.<sup>7</sup>

In the *Dependent Commonwealth* the general rule is that legal aid is provided automatically with paid counsel only in capital cases. In some territories legal aid may be given in other cases. In *Northern Rhodesia*, for example, under an Ordinance of 1957 the Court has power to grant legal aid in any case where, in the opinion of the Court, it is required. In *Nyasaland* there appears to be rather wider provision in criminal matters and defending counsel are supplied by a firm of advocates who are paid an annual fee for their services. Two matters were raised at the Colloquium in regard to African territories which, to a different degree in different areas limit the effectiveness of legal aid particularly in criminal or quasi-criminal cases. Firstly, it was pointed out that legal action in respect of political detainees who are not actually charged with a criminal offence does not necessarily qualify for legal aid and action on their behalf may have to depend on public charity. Secondly, there are in some areas very few lawyers to deal with the cases; this is, for example, true of *Nyasaland* and of the *Northern Region of Nigeria*.

<sup>7</sup> The Colloquium was informed that at the end of 1958, although there were 87 organizations of public and voluntary defenders handling approximately 226,000 cases, in the 52 counties in the *United States* with populations of over 400,000 only 48 % have organised "defender" services; and of the 106 cities in the *United States* with populations of over 100,000 only 35 % have defender offices.

## V. THE CHARACTERISTICS OF THE MACHINERY WHEREBY LEGAL AID IS ADMINISTERED

The outstanding feature of the legal aid system now in force in *England* is that it combines, at all events as far as civil cases are concerned, a considerable degree of administration by the legal profession itself (through the Law Society) with State assistance and some degree of lay co-operation, the latter being given by service on an Advisory Committee which comments and make recommendations on the Annual Report of the Law Society to the Lord Chancellor. Applications for legal aid are made either to Local Committees or to Area Committees, the latter serving as a tribunal of appeal from decisions of the local Committees and as a tribunal of first instance when the application is itself in respect of appeal proceedings in the courts. The Committees consist of members of the legal profession (predominantly solicitors, with some barristers) and the administrative staff for the whole system are organized by and under the direction of the Law Society. The Law Society manages the scheme on behalf of the State which pays the cost in so far as it is not met, as explained below, by contributions from the assisted persons and by costs recovered from the parties with whom the assisted persons have been in litigation. From figures given at the Colloquium it would appear that rather less than 50 % of the total cost of the legal aid scheme is in practice met by the State, the rest being divided between the contributions of assisted persons and the costs recovered from the other parties to litigation. The total cost to the State in the first eight and a half years of the operation of the Legal Aid Scheme was approximately £ 10,000,000.

In *France* there are *Bureaux d'Assistance Judiciaire* governed by Article 12 of the Law of 10 July 1901. A Bureau is attached to each Tribunal, to the *Cours d'Appel*, to the *Conseil d'Etat*, to the *Tribunal des Conflits* and to the *Cour de Cassation*. Broadly speaking the *Bureau* consists of certain *ex officio* members who belong to the Administration with other members appointed by the appropriate court or designated by the Bar or by the *Chambre des Avoués*. In larger centres, as in Paris, the *Bureaux* are divided into several sections. They sit at fixed dates and require the majority of the members (five to seven) to be present. Decisions are made by majority vote with a casting vote of the Chairman. Normally the expenses of the *Bureaux* are met by the appropriate court.

In *Germany*, as in *Switzerland* and *Sweden*, legal aid is granted by the Court. Applications are made under Section 118 of the German Code of Civil Procedure. It may be of interest at this point to draw attention to the remarks which were made about this aspect of the German system which may have significance for other

similarly situated countries. It was said that the application for the grant of legal aid to the Court has some of the characteristics of a pre-trial which on the one hand has the advantage of discouraging frivolous litigation but on the other tempts the judge to form a view of the case before the issues have been fully debated. As a rule the Court appoints the advocate, but the assisted person can state his wishes in the matter and the Court will usually accept them. This contrasts in theory, although not perhaps to so serious a degree in practice, with the principle enforced in Great Britain that the assisted person should have a free choice as to his legal adviser from the majority of practising solicitors who are enrolled on the Legal Aid panel.

In *Denmark* in civil cases of first instance free legal aid is granted by the chief administrative officer of the State in a district, appeal may be made to the Ministry of Justice, which is the authority directly responsible for application for legal aid in appeal cases. If free legal aid is granted the presiding judge of the appropriate court appoints a lawyer to conduct the case from a list of lawyers engaged by the Ministry of Justice to perform this task but if the applicant wishes for a particular lawyer he is usually appointed even though he is not on the list. In *Norway* also in civil cases applications for free legal aid are made to and granted by the Executive, i.e. by the Ministry of Justice, but in matrimonial cases the decision is to a large extent left to the Court.

In the *Dependent Commonwealth* there is, as we have seen, more general, although by no means comprehensive provision for legal aid in criminal than in civil cases. Where there is some provision in civil cases (in *Southern Rhodesia*, for example),<sup>8</sup> the granting authority is normally the Court. In the *West Indies*, in *Trinidad* and *Jamaica*, there is a greater degree of co-operation between the practising legal profession and the Court in the provision of legal aid in that the local Law Society may assign a solicitor to an applicant and the Registrar may assign counsel. It is said, however, that litigants, even with little or no means, prefer to raise money from their friends to obtain the services of lawyers of their own choice.

In the *United States* it is not possible to give any general answer regarding the type of organization which administers legal aid. Of some two hundred bodies, however, five main types which deal with civil cases may be broadly distinguished: (a) an independent society

<sup>8</sup> A person with less than £ 10 may, supported by a certificate of counsel that, on the facts as sworn by the petitioner, there is a probable cause of action or defence, ask the Court to appoint counsel and solicitor to act on his behalf. The latter acts without remuneration, but can recover taxed costs from the other party, if the poor person wins his case, but if the poor person loses his case, his counsel and solicitor get nothing and he himself may be ordered (for what it is worth) to pay the taxed costs of his opponent.

supported by public subscription. The Legal Aid Society of New York founded in 1876 is an outstanding example of this type; (b) an office operated as a community service or as a department of a social agency. Chicago has an office in this category; (c) which is similar to the foregoing type but is supported by public subscription; (d) an organization supported by a Bar association. The American Bar has shown an increasing interest in the problems of legal aid. In 1922 the American Bar Association recommended that every State and local Bar Association should appoint a standing committee on legal aid and this recommendation has been largely followed, Bar associations in some cases giving financial support to legal aid societies. The American Bar Association has its own Standing Committee on Legal Aid Work and this body has given a strong lead to the development of legal aid throughout the country; (e) a law school legal aid clinic. The Harvard Legal Aid Bureau founded in 1913 has been followed by the establishment of similar institutions in at least nine other law schools; students do the preliminary work but court appearance is in the hands of a qualified lawyer. Although generalization is thus impossible about the way in which legal aid in the United States is organized one fact stands out clearly, namely, that there is a predominating emphasis on private initiative and in particular on the initiative of the Bar. The amount of money which can be raised in this way is very striking. The Colloquium at Oxford, for example, was told that already in 1951 the Legal Aid Society of New York, referred to above, had a budget of about half a million dollars.

## **VI. FINANCIAL ELIGIBILITY FOR LEGAL AID IN CIVIL CASES**

We have already made some reference above to the difficulty of comparing financial conditions in, for example, a country of Western Europe or the United States with a relatively high standard of living and in a country where the average income is extremely low. But even between countries, the economic conditions of which if not identical are at least not wholly incomparable, there are interesting contrasts with regard to financial eligibility for such legal aid as may be provided.

In *England* eligibility for financial aid is regulated in some considerable detail. Indeed, it was a general impression at the Oxford Colloquium that at least in some countries of the European Continent there was rather greater flexibility with regard to the limits of financial eligibility for legal aid; and the criticism that litigation was possible for the very rich and the very poor but a heavy burden for those of moderate financial means was for this reason less frequently voiced in those countries. However, at the time of writing a Bill is before the British Parliament raising the relevant figures of

outside income and capital (Legal Aid Bill, 17 December 1959) and this will go some way to meet the criticisms which have been made in this respect in Great Britain. In the account given below the new proposed figures are set out in brackets after the figures applicable under the existing scheme.

In *England* the means of each applicant are assessed by the National Assistance Board, after certain permissible deductions and allowances are made, to arrive at what is called his "disposable" income and capital. An applicant whose disposable income does not exceed £ 156 (£ 250) per annum and whose disposable capital does not exceed £ 75 (£ 125) receives free legal aid. Those applicants whose disposable income exceeds £ 420 (£ 700) per annum are not entitled to legal aid. Those whose disposable capital exceeds £ 500 cannot be granted legal aid unless the estimated costs of the proceedings are likely to exceed their maximum contribution according to the system now to be described. Those applicants who have more than the maximum, qualifying for entirely free legal aid, either by way of income or capital have to make a contribution to the cost. This contribution, however, cannot exceed one half (one third) of the amount by which his disposable income exceeds £ 156 (£ 250) per annum. He is, however, required to pay by way of contribution the whole of the amount by which his disposable capital exceeds £ 75 (£ 125) per annum. Contributions from capital have normally to be paid as a lump sum before issue of a certificate of legal aid whereas contributions from income are normally paid by twelve monthly instalments. In the year ending March 31, 1958 contributions of assisted persons amounted to rather less than one third of the total income of the Legal Aid Fund, the other main sources of income being costs recovered on behalf of assisted persons and a grant from the State amounting, as already stated, to rather less than one half of the total income of the Fund.<sup>9</sup> The contributions levied (amounting in total to nearly £ 600,000) undoubtedly constitute some deterrent to potential litigants especially when it is borne in mind that we are only speaking here of those whose income and capital lie between modest limits. It remains to be seen what effect will be made by the proposed increases in the permitted limits of disposable income and capital.

In *France* there is no fixed maximum of income or capital but it appears that the usual maximum for a single person is 40,000 francs per month. There is, however, no contribution by the applicant. Persons of middle income are the hardest hit but it should be borne in mind that most lawyers are willing to allow long credit in the payment of their fees and that in certain matters provision for

<sup>9</sup> The Fund also recovered damages on behalf of aided persons amounting to more than 1¾ million pounds. Many cases (e.g. divorces) do not necessarily involve the recovery of damages.



legal aid irrespective of means is provided by Statute. Thus, Statutes cover in this respect military pensions (Law of April 9, 1898 and July 1, 1938), mine workers in respect of accident arising out of the *Caisse de Retraites* of miners (Law of June 29, 1894, s. 27), demands for damages in respect of dismissal in cases of pregnancy (Law of January 4, 1928) and – no doubt in practice a very important provision – victims of accident at work (Law of April 9, 1898 and July 1, 1938).

In *Denmark* the authority granting legal aid asks the police to give the necessary information. There is no fixed maximum income or capital limit necessary to qualify for free legal aid although the present general limit in practice in Copenhagen is about £ 1,000 per annum of taxable income with allowances for children. Capital assets are taken into account but there is a good deal of discretion in discounting capital which is locked up, e.g. in a house or a business, as well as in the case of capital of elderly persons or invalids. A person granted free legal aid does not have to contribute to the cost. In *Sweden* there is no fixed maximum of capital or income but the limits in practice seem fairly low (about 700 kronor \* per month for a married man with two children) and there have been criticisms on this score and a State committee has recommended a system with fixed monetary limits and contribution. Under the proposed scale a person with no one to maintain would begin with a contribution of 50 kronor if he was earning more than 7,000 kronor per annum and end with a contribution of 1,800 kronor for a person earning 25,000 kronor per annum. It does not, however, seem intended in special cases absolutely to exclude legal aid in cases outside the higher limit where the legal costs are likely to be so high as to preclude a party from taking action. Finally, in *Norway* the system of legal aid is very flexible, aid being sometimes given to persons with substantial financial resources where the case is of great importance or where the opponent is an especially powerful party such as the State or a great corporation. There is discretion to require the successful assisted person to make good the cost of the aid in part or in whole.

In *Germany*, as in the Scandinavian countries, there is a wide discretion to give aid, as the financial criterion is whether the applicant would be able to meet the costs without detriment to his livelihood, some recognition being given of the expenses of the "station of life" of the applicant. The authority granting legal aid (which, as we have seen, is in Germany the Court) may, in effect, order a contribution from the applicant by making only a part grant towards the costs and if the assisted person later becomes able to pay the costs, or part of them, he will be ordered by the Court so to do.

\* 1 £ is 14.5 Kronor.

It does not seem possible owing to the wide variety of organizations through which legal aid is organized in the *United States* to generalise on its financial aspects but it may be convenient at this point to draw attention to a factor which has an important bearing on the availability of legal aid and advice to persons of limited means in the United States and which does not operate in most other countries. We refer here to the "contingent fee" system which is referred to in the following way in "The Rule of Law in the United States", a Report prepared for the International Commission of Jurists by the Committee to Co-operate with the International Commission of Jurists of the International and Comparative Law section of the American Bar Association.<sup>10</sup> The Report points out: "Persons of modest means or none at all who have occasion to institute a civil action for recovery of money damages habitually enter into arrangements with Counsel for representation on a contingent fee practise. This practise is recognized by Bar associations and the courts as wholly legitimate, up to a maximum limited percentage in relation to the amount actually recovered by the client."

#### VII. THE REMUNERATION OF LAWYERS EMPLOYED IN SCHEMES OF LEGAL AID

The legal profession as such is perhaps in a rather difficult position in urging that the public interest requires that lawyers engaged in legal aid should be adequately paid. Nevertheless, it remains true that the problem of obtaining legal advice and representation by lawyers of the requisite standing and experience "cannot altogether be disassociated from the question of adequate remuneration for the services rendered". This was the specific finding of the Committee on the Judiciary and Legal Profession at the New Delhi Congress and was endorsed in the Plenary Session of that conference.

In *England* in criminal cases where legal aid is granted the solicitor and barrister (if any) concerned is paid a very modest fee out of public funds. In civil cases where legal aid is granted the solicitors and barristers employed receive normal remuneration less a deduction in certain cases of 15 %. But the Bill before Parliament, which has already been referred to, would give power to increase the percentage of the normal remuneration.

In *France* lawyers give their services in legal aid cases gratuitously both as regards civil and criminal matters. This is a very heavy burden and by a decree of December 22, 1958 it is now permitted for a lawyer who has acted gratuitously for an assisted person to recover from him the fees which would normally have been payable if the person assisted recovers in his case a sum which

<sup>10</sup> Obtainable from the American Fund for Free Jurists, 36 West 44th Street, New York, U.S.A., or from the International Commission of Jurists.

would, if he had possessed it before the case, been large enough to exclude him from legal aid.

In *Germany* fees are payable to the lawyer engaged in legal aid cases but in a reduced scale. On the other hand, in contrast with Great Britain, the lawyer of the assisted party can enforce the full fee (as opposed to the reduced fee payable under the legal aid scheme) against the unsuccessful non-assisted party. There appears to be some feeling in the profession that the fees payable are too low.

In *Denmark* the lawyer is granted a "reasonable" fee by the Court which is, however, seldom less than what he would receive in a non-assisted case. In *Norway* much the same is true. The Court's decision is, however, subject to revision by the Ministry of Justice. In *Sweden* lawyers in assisted cases are remunerated at normal rates.

We cannot generalise, for reasons already given, about the remuneration of lawyers in legal aid cases in the *United States*. While it is clear that some are paid from public funds or by private or semi-private bodies, many more offer their voluntary unpaid services.

### VIII. THE COST OF LEGAL AID TO THE COMMUNITY

In countries with limited or undeveloped financial resources there is the natural fear that the introduction of any comprehensive system of legal aid would impose an impossible financial burden on the community. It is, however, easy to exaggerate this misgiving and the experience of countries with fairly fully developed systems of legal aid does not suggest that the total cost is high either in relation to the national income or even in absolute terms. Moreover, it has to be borne in mind that in most systems, although not in the *United States*, the costs of the successful party are normally recovered from the losing party; and in fact in legal aid cases the preliminary enquiries into the chances of success mean that a very high proportion of the cases brought are successful. In *England* during the period October 2, 1950 to March 31, 1958 the proportion of successful (including settled) cases amounted to 89 % of the total of cases brought.

The position in *England* is that the State makes a yearly grant towards the cost of legal aid. In the year ending March 31, 1958 it was £ 1,350,000. The rest of the costs of administering legal aid are met by contributions from the assisted persons and by costs recovered from unsuccessful unaided persons on the other side of the litigation.

In *France* the State pays the cost of legal aid, but can recover from the non-assisted losing party on the same footing as if the case was not an assisted one. It must, however, be borne in mind that these costs are mainly those of administering the *Bureaux*

*d'Assistance Judiciaire*. The foregoing observation must, however, be qualified to the extent that the Treasury of the appropriate Bar can sue the non-assisted losing party for the advocate's fee which would have been paid in a normal case, not for the benefit of the advocate personally but for the general charitable purposes of the Bar.

In *Germany* the legal costs are paid by the appropriate court fund, whether of the Federation or of the Land. The Court will recover costs from the unsuccessful non-assisted party but only, as far as the advocate's fees are concerned, at the legal aid rate, leaving the advocate himself to recover the difference between the normal and the reduced rate from that party.

In *Denmark* the legal aid scheme is financed by local authorities. The authority can only recover from the unsuccessful non-assisted party what is actually disbursed. In *Norway* the system is financed by the State. In the budget year 1959/60 a sum of 750,000 kronor (£ 37,750) has been voted, exclusive of grants to municipal legal aid advice offices mentioned above. In *Sweden* also the cost of legal aid is met by the State. In civil cases the non-assisted unsuccessful party is usually required to pay what the State has advanced. An assisted party can be called upon to repay costs up to five years, but this is not usually enforced.

As has sufficiently appeared above there is no single major source of finance for legal aid in the *United States*. Public subscription on the part of the charitably inclined appears to play a rather more important role than it does in most other countries and there is considerable hesitation, at all events on the part of the Bar, to rely too heavily on subventions from State or Federal authorities for fear of endangering the independence of the legal profession.

#### **IX. THE POSITION OF THE SUCCESSFUL NON-ASSISTED PARTY IN LEGAL AID CASES**

It is important to approach the problem of legal aid not only from the standpoint of the poor person but also with due regard to the rights of those against whom the poor person may be assisted in bringing legal proceedings. It is true that in some countries where legal aid is only given after careful enquiry by competent lawyers not only into the means of the poor person but also into his chances of success (as in *England*, for example) there are very few successful non-assisted persons in legal aid cases. But they do exist and their position may in some cases involve considerable hardship.

In *England* the unassisted opponent of an assisted person is liable to full costs if he loses his case but if he wins he can only recover (or try to recover) from the assisted person such costs as the Court considers reasonable, having regard to the means of the parties

and their conduct in the proceedings. This means in effect that a limit is set to the costs payable on the part of the assisted person by the amount of contribution he has had to pay (if any). The successful unassisted party cannot, as might seem logical, sue the legal aid fund which has been ultimately responsible for bringing him into court to vindicate his rights.

Nevertheless much the same hardship or potential hardship seems to exist in other European countries. In *France*, it is true, the unaided successful party has a theoretical right to recover all his costs from the aided party, and this right remains open for thirty years; but in many cases it will be clearly of little practical importance. The position in *Germany* seems similar, as there is no possibility for the successful unassisted party to recover his costs from the Court, and he seems to be in the same disadvantageous position in *Denmark*, *Norway* and *Sweden*.

It is interesting to consider the reasons for this general failure to deal with what is at all events a potential injustice. Perhaps the fact that legal costs are probably lower in most Continental countries than they are in Great Britain makes the injustice seem more acute in Great Britain than elsewhere. It may also be that bodies granting legal aid would hesitate to finance cases if they felt that a wrong decision to the chances of success might put an additional burden on the tax payer. And it may be that reformers have, therefore, been forced to remain content with bringing some assistance to poor persons even at the cost of doing some injustice to others. In this connection and for wider reasons connected with the whole topic of legal aid it is relevant to refer here to the possibility of insurance against the costs of litigation. If permissible such insurance could cover not only the case of the plaintiff of moderate means but also that of the defendant irrespective of means who is suddenly faced with heavy legal expenditure even in a case in which he is ultimately successful. Such insurance, although subject to criticism (e.g., that it encourages litigation and that it may limit the freedom of the litigant in the conduct of his case) is permissible in Germany whereas in Great Britain, for example, it would at present, in any general form, run the danger of being condemned as "maintenance". Maintenance has been judicially defined as "intermeddling with litigation in which the intermeddler has no concern". One English writer on legal aid<sup>11</sup> has claimed that at least some of the dangers of a system of legal insurance (for example, conflict of interests between the insurance company and their clients) might be eliminated by a State-run or State-sponsored scheme, financed by a small levy on litigants.

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<sup>11</sup> See note 5 *supra*.

## X. SUBJECT MATTER EXCLUDED FROM LEGAL AID

In *England* a number of matters cannot form the subject of a claim for legal aid. Some of these are hardly likely to involve a party who is prevented from going to law by lack of means (for example, election petitions) and there are others which may give rise to a claim in law but which the courts are not anxious to encourage (for example, suits for breach of promise of marriage). One striking exclusion, however, is of "proceedings wholly or partly in connection with . . . defamation". It is perhaps arguable although, it is submitted, not really defensible that a man ought not to be sensitive as to his reputation, but it is hard to see any real justification for refusing aid to the poor defendant in a defamation case especially when the rather severe English law of civil defamation is taken into account. The most that can be said is that suits for defamation are seldom brought against defendants who have not substantial means; but this is a cynical generalization to which there are certainly exceptions. Apart from the topics dealt with by the ordinary courts which are excluded from legal aid it must also be borne in mind that such aid does not apply to proceedings frequently involving legal assistance before private arbitrators or administrative tribunals. The latter in Great Britain now deal with a very wide range of topics which closely affect the ordinary citizen in his daily life. On the other hand the recently introduced system of legal advice does in matters stopping short of actual proceedings before tribunals cover questions which may ultimately come to decision before them.

In *France*, where in some respects the legal aid system is less fully developed than in England, the assistance is at least available before every kind of jurisdiction and the same seems to be broadly true of *Germany*. But the rules regarding free legal aid in *Denmark* do not apply to appearances before administrative tribunals and it appears that in *Norway* free legal aid is seldom granted except before the ordinary courts, as is also the case in *Sweden*. In making this comparison, however, we have to bear in mind the relative importance in different countries of administrative jurisdictions and the extent to which legal counsel are employed even by non-assisted persons.

It is clearly impossible to generalize about the matters excluded from legal aid in the *United States* where, as in England, the jurisdiction of administrative agencies plays an important role. It would seem, however, that for the most part legal aid facilities are fully occupied with cases before the ordinary courts. This would be even more true in most countries of the *Dependent Commonwealth*. In this connection we drew attention at an earlier point to the fact that, where there is provision for legal aid in some criminal cases, such assistance does not necessarily apply to preventive detention,

or other less extensive deprivation of liberty, if no actual criminal charge is brought.

## XI. CONCLUSION

With so wide a field to review any comparative survey must necessarily be summary, highly subjective and to some extent unconsciously, even if not intentionally, directed to those points which appear of interest in regard to the particular legal system of the writer. It must also be emphasized that in this survey the material under review has for the most part been limited to that which was presented at the Oxford Colloquium. And it is here convenient to emphasize the writer's indebtedness to the written and oral observations of the contributors to that Colloquium. For the purposes of a comparative survey it has not even been possible to take into account all the material which was before the Colloquium. The most important omission in this respect is in regard to legal aid in the *Soviet Union*. The basic regulations governing legal aid in the Soviet Union were before the Colloquium, but it has been felt that in this article the comparative technique followed could not be easily applied to the circumstances of that country, differing in many political, social and economic conditions from the countries here principally under review.<sup>12</sup>

With these important qualifications the following tentative generalizations might be made: (1) there is a comparative lack of criticism in Norway, Denmark and to some extent in Germany that civil litigation is impossible (or at least possible only with considerable hardship) except for the very rich or the very poor. It would require further investigation to establish how far this result may be due to the system of legal aid operating in those countries and how far it must be attributed to other factors (general standard of living, moderate cost of litigation, etc.); (2) the potential hardship

<sup>12</sup> Under decrees dating from 1939 the consultation offices in which lawyers are organized in the Soviet Union give legal aid free of charge to plaintiffs claiming maintenance, State pensions and other benefits of social insurance or damages caused by industrial accidents; it also has to prepare free of charge petitions, appeals and other documents for officers and other ranks of the armed forces. Oral information and advice is given free of charge to any person consulting the office. In criminal cases under Section 55 of the Code of Criminal Procedure of the RSFSR and under corresponding provisions of the Codes of other Union Republics, as well as by decision of the Supreme Court of the USSR, the cases in which participation of counsel for the defence is mandatory are defined. If in such a case the defendant appears without counsel the Court will require a consultation office to send a member to act as counsel for the defence. The Court can order the cost of the defence to be paid by the defendant to the consultation office or he can be excused so paying if he is without means. This summary account has been taken from Dr. Z. Szirmai's paper at the Oxford Colloquium.

on a successful unassisted person in a legal aid case exists in a number of countries, although the number of persons actually affected may be relatively small. (3) in countries of the Dependent Commonwealth (and in other countries with limited or undeveloped economic resources) it cannot be said that legal aid even in criminal cases generally meets a minimum requirement consistent with the assertion of an individual's fundamental right to life, liberty, property and reputation. But there are considerable differences even between territories with no great and obvious disparity of living standards; (4) the last point suggests that it is a considerable simplification to attribute the lack of legal aid solely to the economic condition of the country concerned. Such figures as are available in countries with fairly advanced systems of legal aid do not give the impression that the cost is very high either in absolute or relative terms; (5) there are admittedly other concerns of public policy than the desirability of enabling everyone to have their "day in court". There is the public interest (which may conflict at first sight with the claims of a legal aid system) to limit the number of legal disputes. But this only suggests that after the primary needs of legal aid in criminal law, where life and liberty are concerned, have been met, it is even more important to provide adequate facilities for legal advice to those who have not the means to pay for it. Such advice, if given in good time, may reduce rather than increase the incidence of disputes in the courts; (6) the machinery of legal aid varies widely in different countries. An English writer can only put on record that the English system involving the practical administration of the legal profession with the financial backing of the State works extremely well in civil cases whatever the defects (for example, in the scope of the subject matter covered by legal aid) in the system as a whole.

NORMAN S. MARSH



## NOTES

### THE "GENERAL SUPERVISION" OF THE SOVIET PROCURACY

#### I. Introduction

Within the Soviet Union subordinate legislation, for the most part, is not subject to challenge in the courts. The only manner in which most administrative enactments and official actions may be challenged is through the exercise of the "general supervision" function of the Soviet Procuracy, an arm of the Executive itself.<sup>1</sup> However, considerable confusion prevails in Soviet legal literature concerning the jurisdiction of the Procuracy in exercising this function. Conflicting statements are made regarding the authority of the Procuracy to challenge the official acts of various organizations, and it is evident that the Procuracy occasionally oversteps its limits and investigates the legality of enactments and actions which are not within its purview and should come within the jurisdiction of other agencies. Furthermore, the Procuracy is authorized not only to ascertain the *conformity* of various enactments with higher laws and decrees, but to verify the legality of the *execution* of the laws by subordinate agencies and officials. This has raised many problems of jurisdiction and the practical limits of this vaguely-defined power of the Procuracy. These problems are important to consider precisely because the Procuracy is the only channel available in most instances for challenging the actions of governmental agencies and other organizations; vagueness surrounding the "general supervision" function means that not even the governmental authorities are agreed as to the competence of the Procuracy in this area, with resulting confusion in the exercise of this supervision. It is the purpose of this note to outline some of the jurisdictional problems involved in the exercise of this function, with an indication of the suggested expansions and contractions of its limits which have been advanced by Soviet legal writers and Procuracy officials.

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<sup>1</sup> For an excellent description and analysis of the structure and functions of the Soviet Procuracy, see Dietrich A. Loeber, "The Soviet Procuracy and the Rights of the Individual Against the State", *Journal of the International Commission of Jurists*, Vol. 1, No. 1 (Autumn 1957), pp. 59—105.

## II. Jurisdictional History of General Supervision

The mission of general supervision has shifted considerably over the years. According to the first statute on the Soviet Procuracy, that of May 28, 1922, the Procuracy was invested with "exercising supervision in the name of the State over the legality of the actions of all governmental bodies, economic establishments, public and private organizations and private persons . . ." <sup>2</sup> The subject of general supervision <sup>3</sup> was defined in the same manner as supervision over the legality of "actions" by the statutes on procuracy supervision of the Ukrainian, Belorussian and Azerbajdzhan Republics and also by the laws on the Procuracy of other constituent republics. <sup>4</sup>

"Actions" comprehended those which "received written, documentary formulation." The list of documents over which the Procuracy exercised supervision was a broad one and included not only the enactments of local authorities and administrative acts, but also various kinds of contracts, agreements, records of meetings of various governmental and co-operative organizations, etc. <sup>5</sup>

The Decree of June 20, 1933 which established the Procuracy of the USSR provided that the Procurator of the USSR was to exercise supervision "over the conformity of the decrees and regulations of individual departments of the USSR and constituent republics and local governmental bodies with the Constitution and decrees of the government of the USSR." <sup>6</sup> These provisions were repeated almost verbatim by the Statute on the Procuracy of the USSR of December 17, 1933, with the addition of procuracy supervision over the conformity of the various enactments with the Constitution, decrees and *regulations* of the government of the USSR. <sup>7</sup>

However, a shift in emphasis in supervision over legality was contained in Article 113 of the Constitution of 1936 which provided that:

<sup>2</sup> *Sobranie Uzakonenij i Rasporyazhenij Rabochego i Krest'yanskogo Pravitel'stva* (Collection of Laws and Decrees of the Worker and Peasant Government) 1922, No. 36, text 424.

<sup>3</sup> It should be noted that although the term "general supervision" is widely used by Soviet legal writers in discussing this function of the Procuracy, it never appears in the statutes setting forth the structure and duties of the Procuracy.

<sup>4</sup> S. G. Berezovskaya, *Prokurorskiy Nadzor v Sovetskom Gosudarstvennom Upravlenii (Obshchij Nadzor)* [Procuracy Supervision in Soviet State Administration (General Supervision)] (Moscow 1954), p. 51.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Sobranie Zakonov i Rasporyazhenij Raboche-Krest'yanskogo Pravitel'stva Soyuza Sotsialisticheskikh Respublik* (Collection of Laws and Decrees of the Worker and Peasant Government of the Union of Soviet Socialist Republics; hereafter cited as *SZ SSSR*) 1933, No. 40, text 439.

<sup>7</sup> *SZ SSSR* 1934, No. 1, texts 2-a, 2-b.

"Supreme supervision over the strict execution of the laws by all ministries and establishments subordinate to them, as well as by individual officials and also citizens of the USSR is vested in the Procurator of the USSR."

No longer was the Procuracy supposed to be merely watching over the conformity of local enactments with central laws and decrees. Its official task had now become checking on the observance of the laws by all organizations, officials and citizens. It had retained its role of ascertaining the legality of governmental enactments and actions, but had also been assigned the much more positive function of checking on performance.

In the Second Federal Conference of Managerial Officials of the Procuracy, held in April 1948, the procurator of the Uzbek SSR (Soviet Socialist Republic) commented that "there is no clear-cut statute on the Procuracy and this leads to a plurality of procuracy supervision."<sup>8</sup>

The Procurator of the Kazakh SSR observed in his speech to the Conference that the lack of limits of general supervision engendered a "gap between the all-embracing tasks of general supervision and the actual capabilities of the Procuracy." Therefore, the time had come legislatively to vest responsibility for the observance of legality in the heads of ministries, "to raise the responsibility of the control and inspection agencies, and not shift it to the Procuracy." As checking on the execution of the laws was quite superficial, he advocated a "sharp contraction" in the range of supervision work which would reduce to checking "the observance of the laws by local governmental bodies, ministries and other establishments."<sup>9</sup>

Lastly, Al'bitskij, the chief of the Department of General Supervision of the Procuracy of the USSR, stated that the primary task of the Procuracy in the field of general supervision was checking the official acts (*pravovye akty*) issued by governmental bodies.<sup>10</sup>

In February 1951 a training and methods conference on general supervision was held in the Procuracy of the USSR. The chief of the department of general supervision of the Procuracy of the Kazakh SSR said that the cause of overloading the field agencies of the procuracy was that "up to now the limits of general supervision have still not been defined."<sup>11</sup>

<sup>8</sup> "Vsesoyuznoe soveshchanie rukovodyashchikh rabotnikov prokuratury" (The federal conference of managerial officials of the Procuracy), *Sotsialisticheskaya Zakonnost'* (Socialist Legality, organ of the Procuracy of the USSR; hereafter cited as *Sots. Zak.*), No. 6, 1948, p. 31.

<sup>9</sup> *Ibid.*, pp. 32-33.

<sup>10</sup> *Ibid.*, pp. 34-35.

<sup>11</sup> "Uchebno-metodicheskaya konferentsiya nachal'nikov otdelov obshchego nadzora prokuratur respublik, kraev i oblastej" (Training and methods conference of chiefs of departments of general supervision of the procuracies of republics, territories and regions), *Sots. Zak.*, No. 4, 1951, p. 79.

In his speech to the conference the Deputy Procurator General of the USSR, K. A. Mokichev, noted that "some comrades" believed that general supervision should be restricted to checking the legality of decrees, regulations, decisions, instructions and orders. He merely commented that "this is basically incorrect."<sup>12</sup>

The wish expressed by the participants of the 1948 Procuracy Conference for a new statute which would bring up to date and specify powers and jurisdiction was finally realized with publication of the "Statute on Procuracy Supervision in the USSR" of May 24, 1955.<sup>13</sup> Article 3 set forth the duties of the procurators, and the first duty assigned was procuracy supervision

"over the strict execution of the laws by all ministries and government departments and their subordinate establishments and enterprises, executive and administrative agencies of local Soviets of workers' deputies, co-operative and other public organizations, as well as supervision over the strict observance of the laws by officials and citizens."

This section was probably intended to constitute the general supervision function of the Procuracy, although the term is nowhere used in the statute, because succeeding chapters of the statute spell out in detail the functions involved in each of the duties listed in Article 3. Thus, Chapter II is entitled "Supervision over the execution of the laws by establishments, organizations, officials and citizens of the USSR." Article 10 under this chapter states that the Procurator General of the USSR and the procurators subordinate to him are to exercise supervision within their respective jurisdictions over the following:

"1) strict conformity of the acts issued by ministries, departments and their subordinate establishments and enterprises, and also by executive and administrative agencies of local Soviets of workers' deputies, co-operative and other public organizations, with the Constitution and laws of the USSR, the constitutions and laws of the constituent and autonomous republics, and the decrees of the Council of Ministers of the USSR and of the Councils of Ministers of the constituent and autonomous republics.

"2) strict execution of the laws by officials and citizens of the USSR."

These provisions for the first time in Soviet legislation specify the twin functions of the Soviet Procuracy in exercising general supervision: ascertaining the conformity of various administrative enactments with higher laws and decrees, and checking on the observance of the laws.

<sup>12</sup> *Ibid.*, p. 86.

<sup>13</sup> *Vedomosti Verkhovnogo Soveta SSSR* (Gazette of the Supreme Soviet of the USSR), 1955, No. 9 (827), text 222.

A recent book on the Soviet Procuracy states that the participants of the federal procuracy conference held in June 1955 indicated that as of that time there were still no clear and definite limits to the general supervision activity of the Procuracy. Some of those attending the conference were in favor of expanding the limits of general supervision, a move opposed by others. There were also speeches which, "despite the clear instructions of the Statute on procuracy supervision in the USSR (of May 24, 1955)," insisted that general supervision be limited to checking the legality of official acts.<sup>14</sup>

In 1956 the Procurator General of the USSR noted that:

"the unfounded expansion of the general supervision functions of the Procuracy, linked in the majority of cases with the dilettante excursions of procurators into one or another field, only distracts the procuracy agencies from their basic work in exercising supervision over the strict observance of the laws."<sup>15</sup>

Early in 1958 the chief of the Department of General Supervision of the Procuracy of the USSR stated that a conference was soon to be convened in Moscow of the chiefs of the departments of general supervision of the procuracies of the constituent republics and of a number of regional procuracies. Among the subjects to be discussed at this conference was the question of the limits of general supervision because "its jurisdiction has evoked many arguments for a long time." He did claim that "to a considerable extent" this was explained by the absence in the laws regulating procuracy activity of indications of the limits of procuracy intervention in exercising general supervision. However, he maintained that Chapter II (Articles 10-16) of the Statute of May 24, 1955 gave "the answer to the question of the limits of general supervision."<sup>16</sup>

The conference of the chiefs of the departments of general supervision of the procuracies of the constituent republics and of large regions was held in the Procuracy of the USSR sometime between April and September 1958. At this conference the chief of the department of general supervision of the procuracy of Moscow region said it would be desirable for the Procurator General to issue

<sup>14</sup> V. S. Tadevosyan, *Prokurorskij Nadzor v SSSR* (Procuracy Supervision in the USSR) (Moscow 1956), p. 119.

<sup>15</sup> R. A. Rudenko, "Zadachi dal'nejshego ukrepleniya sotsialisticheskoy zakonosti v svete reshenij XX s'ezda KPSS" (the tasks of further strengthening socialist legality in the light of the decisions of the Twentieth Party Congress), *Sovetskoe Gosudarstvo i Pravo* (Soviet State and Law; hereafter cited as *Sov. Gos. i Pravo*), No. 3, 1956, p. 22.

<sup>16</sup> G. Toropov, "O granitsakh obshchego nadzora sovetsoj prokuratury" (On the limits of general supervision of the Soviet Procuracy), *Sots. Zak.*, No. 4, 1958, p. 18.

a new order on general supervision which would define the tasks and limits of this work.<sup>17</sup>

In March 1959 the Deputy Procurator of the Turkmen SSR stated that "up to now the question of the limits of general supervision of the Procuracy has not been worked out theoretically and practically."<sup>18</sup> This statement, made after the Procuracy had been exercising general supervision for nearly 37 years, attests to the considerable confusion which attends this function so that not even the officials of the Procuracy are absolutely certain of the jurisdictional bounds of general supervision.

### III. The Objects of General Supervision

#### 1. Higher Governmental Bodies

The laws on the Soviet Procuracy contain no direct indications concerning whether the Procuracy is to exercise supervision over the legality of the decrees and orders of the highest governmental bodies of the USSR, constituent and autonomous Republics. However, Soviet writers state categorically that the Procuracy does not exercise supervision over the execution of the laws by the supreme soviets of the constituent and autonomous republics, their presidiums and the governments of the constituent and autonomous republics.<sup>19</sup> Specifically, the Procuracy has not been authorized to exercise supervision over the legality of the activity of councils of ministers. This is explained by the fact that the councils of ministers of the USSR, and of constituent and autonomous republics are subject only to supervision by the corresponding supreme soviets and their presidiums.<sup>20</sup>

Thus, the Deputy Procurator of the Turkmen SSR notes that individual procurators and legal scholars "erroneously assert" that the procurator has the right and duty to protest a regulation or directive of the chairman of the council of ministers of an autonomous republic which contravenes the law solely on the ground that

<sup>17</sup> "Soveshchanie nachal'nikov otdelov obshchego nadzora prokuratur soyuznykh respublik i krupnykh oblastej" (Conference of chiefs of departments of general supervision of the procuracies of constituent republics and large regions), *Sots. Zak.*, No. 9, 1958, p. 70.

<sup>18</sup> V. Krylov, "Eshche raz o granitsakh obshchego nadzora prokuratury" (Once more on the limits of general supervision of the Procuracy), *Sots. Zak.*, No. 3, 1959, p. 61.

<sup>19</sup> Tadevosyan, *Prokurorskiy Nadzor v SSSR*, p. 124.

<sup>20</sup> A. E. Lunev, "Konstitutsionnye osnovy obshchego nadzora prokuratury v SSSR" (The constitutional bases of general supervision of the Procuracy in the USSR), in *Voprosy Sovetskogo Administrativnogo i Finansovogo Prava* (Problems of Soviet Administrative and Financial Law), ed. V. G. Kotok (Moscow 1952), pp. 135—136.

the chairman is an official. He states that "we believe that such an interpretation of law is incorrect," that the Procuracy does not exercise supervision over the legality of the decrees and regulations of the councils of ministers of the autonomous republics.<sup>21</sup>

This principle of denying the procuracy supervision over the collective enactments of the higher governmental bodies has been consistently applied since the creation of the Soviet Procuracy. With the role of the Procuracy conceived as checking on the conformity of the enactments of local governmental authorities with central laws and decrees, and supervision over the execution of the central governmental laws by these same local authorities, there was no thought of utilizing the Procuracy to check on the legality of the higher laws themselves. The Procuracy has served as the eye of the central government, as its watchdog on all governmental levels, not as an inspector of the legality of the enactments of the ruling authorities; it is the arm of the Party, not its supervisor. The regime has always allowed the Procuracy to check on the legality of the official acts and actions of governmental agencies, right up to the USSR ministerial level, but these organizations are really only implementing Party and governmental policy and therefore are subject to procuracy supervision. It is only the policymaking and lawmaking bodies which are exempt.

In the Second Federal Conference of Procurators (1948), the question was raised of the right of procurators of constituent republics to protest the decrees and orders of the councils of ministers of the constituent republics. According to one Soviet writer, the prevailing practice in exercising procuracy supervision over legality is that if a legislative enactment of the supreme soviet of a constituent republic or its praesidium is issued in violation of the Constitution of the USSR or of another federal law, a procuracy agency must notify the Procurator General of the USSR about this, and the latter informs the Praesidium of the Supreme Soviet of the USSR. In these instances the Procurator General of the USSR and the republican procurators do not lodge a protest, but instead submit a proposal (*predstavlenie*) reporting such a violation to the Praesidium of the Supreme Soviet of the USSR. Likewise, as the republican procurators are not authorized to protest the decrees of the council's of ministers of the constituent republics, in all instances when these bodies enact decrees and regulations in violation of the law the republican procuracies must submit a report about this in the form of a proposal to the supreme soviets of the republics. If necessary, they also report to the Procurator General of the USSR who in turn notifies the Praesidium of the Supreme Soviet of the

<sup>21</sup> Krylov, *Sots. Zak.*, No. 3, 1959, p. 61.

USSR or the Council of Ministers of the USSR.<sup>22</sup> No examples have ever been cited of such action having been taken by the Procuracy.

However, a recent article advocates vesting in the Procurator General of the USSR supervision over the conformity of decrees and regulations of the governments of the constituent republics with the federal and republican laws, and also with the decrees of the government of the USSR. According to this writer, if the decrees and regulations of the council of ministers of the constituent republics do not conform with federal or republican laws, the Procurator General of the USSR "must, in our opinion," lodge a proper protest with the Praesidium of the Supreme Soviet of the USSR or with the similar body of the constituent republic, with the Council of Ministers of the USSR or with its republican counterpart. He cites Article 49 of the USSR Constitution and Article 69 of this Constitution which grants the Council of Ministers of the USSR the right "in respect of those branches of administration and economy which come within the jurisdiction of the USSR" to suspend decrees and regulations of the councils of ministers of the constituent republics. Therefore,

"if the Constitution of the USSR provides the possibility of revocation or suspension of the decrees of the government of a constituent republic, then it is clear that it should be possible for the Procuracy of the USSR to protest them."<sup>23</sup>

He would grant this right, however, exclusively to the Procurator General of the USSR, saying that it would be "incorrect, in our opinion," to vest in the procurator of the constituent republic the function of exercising supervision over the strict execution of the laws by the councils of ministers of the constituent republics, since this could lead to "establishing incorrect relations between the government and the procurator of the constituent republic."<sup>24</sup> In other words, such a grant of authority could only be made to the highest procuracy official, for a challenge on the part of the republican procurator of republican governmental enactments could lead to friction between the republican procurator and the council of ministers of that republic.

It is interesting to note that the Procuracy of the USSR actually did challenge an enactment of a republican council of ministers in

<sup>22</sup> V. G. Lebedinskij, *Sovetskaya Prokuratura i ee Deyatel'nost' v Oblasti Obshchego Nadzora* (The Soviet Procuracy and its Activity in the Field of General Supervision) (Moscow 1954), p. 75.

<sup>23</sup> I. D. Perlov, "O neobkhodimyykh predelakh tsentralizatsii organov prokuratury v svete rasshireniya prav soyuznykh respublik" (On the necessary limits of centralization of procuracy agencies in the light of expanding the rights of constituent republics), *Sov. Gos. i Pravo*, No. 1, 1958, pp. 18-19.

<sup>24</sup> *Ibid.*, p. 19.



1955. In paragraph 2 of its decree of October 18, 1954, the Council of Ministers of the Armenian SSR vested in the republican procuracy the duty of "systematically checking the status of work in opening current accounts for collective farms and the legality of operations performed with these accounts, informing the Council of Ministers of the Armenian SSR about the results." According to the organ of the Procuracy of the USSR, "thus, the Council of Ministers of the Armenian SSR vested in the procuracy agencies functions inappropriate for them, which violates the law." Therefore, the Procuracy of the USSR lodged a protest on paragraph 2 of the decree cited, and the protest was complied with.<sup>25</sup>

This very interesting example is the only instance reported of the Procuracy challenging the collective enactment of the council of ministers of a constituent republic. No other examples of such challenges have been reported since this appeared in 1955, and the ban on challenges of the enactments of councils of ministers of constituent republics by republican procurators and of the acts of the federal Council of Ministers by the Procuracy of the USSR probably still prevails. There is nothing in the Statute on Procuracy Supervision in the USSR of May 24, 1955 specifically forbidding such challenges, nor is any authorization contained in it. Still, the appearance early in 1958 of the suggestion that the Procurator General of the USSR be granted such power may presage further extension of the Procuracy's supervising authority.

## 2. Subordinate Legislation

Lebedinskij raises the question whether the Procuracy must exercise supervision over the execution of the directives and instructions, decisions and orders issued by departments on the basis of and in execution of a law. He says he believes that procuracy agencies exercise supervision over the strict execution of the *laws* of the USSR and constituent republics, but "they cannot exercise supervision over the execution of directives, instructions and orders of offices and also of decisions of local authorities."<sup>26</sup>

Therefore, the attempt of individual procurators to exercise supervision over the execution of decisions and orders of territorial (*kraj*) and regional executive committees contravenes the law "and has been repeatedly condemned by higher procuracy agencies."<sup>27</sup>

In 1951, Tadevosyan wrote that:

<sup>25</sup> Iz praktiki Prokuratury SSSR po nadzoru za soblyudeniem zakonnosti" (From the practice of the Procuracy of the USSR in supervision over the observance of legality), *Sots. Zak.*, No. 7, 1955, p. 89.

<sup>26</sup> Lebedinskij, p. 70.

<sup>27</sup> *Ibid.*, p. 71.

"the procurator must exercise supervision over the strict execution also of those administrative rule-making acts [podzakonnnye akty] of state authority and state administration which are issued in execution of the laws."<sup>28</sup>

According to Lebedinskij this statement contravenes the law and the long-standing practice of the Procuracy. He observes:

"The Procuracy has never exercised supervision over the execution of official acts issued by departments and local authorities. The Procuracy exercises supervision over the conformity of official acts of departments and local authorities with the laws, decrees and orders of the Council of Ministers of the USSR, but this is quite different from supervision over their execution."<sup>29</sup>

Tadevosyan replied to this criticism in his book on general supervision published in 1956. He first asks what a law is, as the Constitution of the USSR states that in the Procuracy is vested supreme supervision over the execution of the laws; does this mean only legislative acts issued by the supreme soviets, or does it also include other governmental and administrative enactments – edicts, decrees, decisions, regulations, orders, instructions, etc.? He says that the Procurator exercises supervision over the execution first of all of the Constitution of the USSR and of the edicts of the Presidium of the Supreme Soviet of the USSR. The other governmental and administrative acts, "as is well-known, are not laws." However, this does not mean that supervision over their observance is not the duty of procurators. The Procuracy combats violations of the decrees of the councils of ministers

"and other so-called administrative rule-making acts; these administrative rule-making acts are issued in execution of the laws and, consequently, their violation involves a violation of the laws."<sup>30</sup>

He maintains that one must first of all distinguish the administrative rule-making acts and other "normative acts"<sup>31</sup> issued by governmental bodies and administrative agencies in execution of the laws, saying "one cannot divorce execution of the laws from the issuance of administrative rule-making acts in execution of them." Therefore,

<sup>28</sup> V. S. Tadevosyan, "Obshchij nadzor prokuratury" (General supervision of the Procuracy), *Sov. Gos. i Pravo*, No. 4, 1951, p. 47.

<sup>29</sup> Lebedinskij, p. 71.

<sup>30</sup> Tadevosyan, *Prokurorskij Nadzor v SSSR*, pp. 120-121.

<sup>31</sup> According to an authority on Soviet law, Soviet jurists "are fully aware of the indefinite relationship of their Constitution, legislation, and decrees" and therefore seek to "blur the distinction between the authority of a constitutional provision, a legislative enactment, and an administrative decree or directive." Therefore, post-war texts have advanced the doctrine of "normative acts" as the source of Soviet law. Vladimir Gsovski and Kazimierz Grzybowski (ed.), *Government, Law, and Courts in the Soviet Union and Eastern Europe* (London

Lebedinskij's denial of the duty of procurators to exercise supervision also over the execution of these administrative rule-making acts is "incomprehensible."<sup>32</sup>

However, the reviewers of Tadevosyan's book criticize his statement that the procurator must exercise supervision not only over the execution of the laws, but also over the execution of the decisions of local governmental bodies and of the official acts issued by administrative agencies. They say that "such an assertion is completely incorrect and does not follow from the law," maintaining that the Procuracy exercises supervision over the *legality* of the acts issued by the executive committees of local soviets and by administrative agencies, "but never has exercised and does not exercise supervision over the execution of these acts."<sup>33</sup>

The late chief of the Department of General Supervision of the Procuracy of the USSR maintained that exercising supervision over the strict execution of the decisions of regional, territorial and district soviets never became the duty of procuracy agencies.<sup>34</sup> He said that by legislation in force, procuracy agencies exercise supervision over the strict *execution* of the laws by all ministries and departments, their subordinate establishments and enterprises, executive and administrative agencies of local soviets, co-operative and other public organizations, officials and citizens of the USSR. Therefore, he asserted that the laws vest in the Procuracy "supervision over the strict execution of the laws, and not of the decisions of local authorities."<sup>35</sup> His position was applauded by two reviewers of his book.<sup>36</sup>

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1959), Vol. I, p. 41. A recent Soviet legal dictionary defines the normative act as "an act issued by state agencies on various matters within their jurisdiction and establishing an obligatory rule of conduct." Normative acts include laws enacted by the various supreme soviets, edicts issued by their presidiums, decrees and regulations passed by the councils of ministers of the USSR, constituent and autonomous republics, and the ordinances and regulations of local governmental bodies and administrative agencies. P. I. Kudryavtsev (ed.), *Yuridicheskij Slovar'* (Legal Dictionary) (Moscow 1956), I, 666.

<sup>32</sup> Tadevosyan, *Prokurorskij Nadzor v SSSR*, p. 121.

<sup>33</sup> Yu. A. Kalenov, G. P. Toropov, and I. G. Sapozhnikov, Review of *Prokurorskij Nadzor v SSSR*, by V. S. Tadevosyan, *Sov. Gos. i Pravo*, No. 2, 1958, p. 130.

<sup>34</sup> P. D. Al'bitskij, *Voprosy Obshchego Nadzora v Praktike Sovetskoj Prokuratury* (Problems of General Supervision in the Practice of the Soviet Procuracy) (Moscow 1956), pp. 27-28.

<sup>35</sup> *Ibid.*, p. 29.

<sup>36</sup> G. Toropov, Review of *Sovetskaya Prokuratura i ee Deyatel'nost' v Oblasti Obshchego Nadzora*, by V. G. Lebedinskij; *Prokurorskij Nadzor v Sovetskom Gosudarstvennom Upravlenii*, by S. G. Berezovskaya; and *Voprosy Obshchego Nadzora v Praktike Sovetskoj Prokuratury*, by P. D. Al'bitskij, *Sots. Zak.*, No. 4, 1957, p. 86; S. G. Berezovskaya, Review of *Voprosy Obshchego Nadzora v Praktike Sovetskoj Prokuratury*, by P. D. Al'bitskij, *Sov. Gos. i Pravo*, No. 11, 1957, p. 155.

### 3. Execution of the Laws by Citizens

Al'bitskij's statement that the Procuracy must exercise general supervision over the strict execution of the laws by the citizens of the Soviet Union "raises doubt." Toropov claims that in practice the Procuracy by way of general supervision does *not* exercise supervision over observance of the laws by citizens and "this was undoubtedly known to the author." He says that procuracy agencies respond to violations of legality committed by individual citizens only through inquiry (when a crime is committed) or through civil and judicial supervision (instances of the wilful occupation of housing, nonfulfilment of obligations of the State, etc.). In fact, he states categorically that "there are no such violations of legality committed by individual citizens to which a response must be made by way of general supervision."<sup>37</sup>

Toropov maintains that trying to exercise such supervision "in practice" would result in undesirable consequences, to substituting the procurators for the appropriate administrative agencies. Thus, individual citizens might not pay the agricultural or income tax, make compulsory deliveries of agricultural products to the State, etc., on time. Toropov says that this is undoubtedly a violation of the law, but asks rhetorically whether in such instances the Procuracy should intervene directly "and make definite demands of individual citizens." He replies that it should not, for then it would be replacing the appropriate financial agencies in which the law vests checking on the timely payment of taxes and compulsory deliveries by citizens, "applying sanctions provided by law in certain instances to the defaulters." The Procuracy is not to "stand aside" from supervision over the observance of the laws concerning State taxes and compulsory deliveries, but its duty consists of exercising supervision over how the *financial agencies* are executing the requirements of the law which compels them to be checking constantly on whether citizens are paying their taxes and making deliveries on time.<sup>38</sup>

According to Toropov, Al'bitskij was guided by the instructions on general supervision of 1946 (Article 3) "which still have not been officially revoked" in stating his position on procuracy supervision over the observance of the laws by citizens. However,

"the author knew that in practice this article of the instructions was not applied and therefore an appropriate reservation should have been made."<sup>39</sup>

These statements by Toropov are very important and are not contained in any other source, most of which convey the impression

<sup>37</sup> Toropov, *Sots. Zak.*, No. 4, 1957, p. 86.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, p. 87.

that the Procuracy in exercising general supervision is checking on the observance of the laws by citizens. Actually, his statements make quite clear what should in any event be clear because of the nature of general supervision. This function is oriented toward organizations and enactments, i.e., procurators exercising general supervision are examining the official acts issued by various agencies and organizations for their conformity with the law, and are also checking to make sure that officials of these organizations are adhering to established procedures. It reacts to apparent violations of the law by lodging protests and proposals concerning *enactments* and *official actions*. It is not geared to finding out how each individual in the Soviet Union is observing the law.

#### 4. Public Organizations

Tadevosyan wrote in 1951 that supervision over the legality of the activity of public organizations was not within the jurisdiction of the Procuracy, although "in practice" the Procuracy continued to exercise such supervision.<sup>40</sup>

Lebedinskij objects to the statement that the Procuracy should not be exercising supervision over the activity of "public organizations," saying that supervision over the legality of their activity, including collective farms, had always been exercised by the Procuracy "and doubts never arose... of the jurisdiction of the Procuracy in this."<sup>41</sup>

Berezovskaya agrees with this interpretation of Lebedinskij. Noting that Article 113 of the USSR Constitution does not mention the collective farm administrative bodies, she says nevertheless that "the absence of such special mention in this instance cannot be considered as a limitation of the jurisdiction of general supervision with respect to the bodies cited." The Party and government of the USSR in a number of decrees had emphasized the necessity of exercising strict supervision over the execution of the laws concerning collective farms. Therefore, exercising such supervision requires procuracy checks of the legality of the acts of the collective farm board and a protest of illegal acts.<sup>42</sup>

On the other hand, Krylov notes that the All-Union Central Council of Trade Unions issues instructions and interpretations in applying the laws in force on labour. Likewise, the appropriate central committees of branch trade unions establish safety rules which are obligatory for a given branch of production. Therefore, the question arises whether the Procuracy exercises supervision over the legality

<sup>40</sup> Tadevosyan, *Sov. Gos. i Pravo*, No. 4, 1951, p. 48.

<sup>41</sup> Lebedinskij, p. 71.

<sup>42</sup> Berezovskaya, *Prokurorskij Nadzor*..., pp. 53-54.

of orders issued by these trade union bodies. He states that "in our opinion, this is not within the jurisdiction of the Procuracy."<sup>43</sup>

#### 5. The Councils of National Economy

New problems for the Procuracy were created with the formation in 1957 of the regional councils of national economy, the *sovnarkhozy*; these organizations were soon issuing enactments whose legality had to be checked. In the Kazakh SSR the republican procurator vested supervision over the legality of the decisions and regulations of these councils in the regional procurators. On the basis of his proposal the Council of Ministers of the Kazakh SSR ordered the chairmen of the councils of that republic to send the acts issued by these organizations to the procurators of the corresponding regions. In the Ukrainian SSR supervision over the legality of the councils' enactments was to be exercised directly by the republican procuracy, whereas supervision over the legality of the acts issued by the directorates of the councils was to be carried out by the procurators of the corresponding regions.<sup>44</sup>

As for procuracy supervision over the observance of legality in the enterprises, organizations and establishments of the councils, this was to be exercised in the usual manner by the city and district procurators.

### IV. Conclusions

The material set forth above indicates that there is a great deal of confusion regarding the jurisdiction of the Procuracy in the exercise of its general supervision function, with no carefully prescribed limits established in the statutes on the Procuracy. Even the latest and most definitive statute, that of May 24, 1955, does not clearly indicate just which laws and enactments are subject to procuracy supervision. The concept of supervision over the "strict execution of the laws" is obviously the source of much of the disagreement over the proper bounds of general supervision. Because of the limited use in the Soviet Union of the courts for challenging the legality of various enactments and administrative actions, and because of the reliance on an arm of the Executive, the Procuracy, to perform this function, it would seem quite essential that the jurisdictional limits of general supervision be specified in detail. Failure to do so not only allows considerable arbitrariness on the part of the Procuracy

<sup>43</sup> Krylov, *Sots. Zak.*, No. 3, 1959, p. 61.

<sup>44</sup> Editorial, "Prokurorskiy nadzor za ispolneniem zakonov v promyshlennosti" (Procuracy supervision over the execution of the laws in industry), *Sots. Zak.*, No. 12, 1957, p. 2.

in challenging administrative and other governmental and organizational enactments and actions, but also inevitably involves participation of the Procuracy in inappropriate functions and infringement of the jurisdiction of other organizations. This paper did not even touch upon an area of this sort which has always led to complaints of improper procuracy involvement i.e., supervision over the legality of acts of economic organizations, which has consistently resulted in attempted direction of economic activities.

Even the leaders of the Soviet Union have been exasperated and perplexed by the failure of the Procuracy to observe the limits of its jurisdiction (apparently forgetting that such straying by local procurators has often been due to direct orders from the centre). For example, in his speech on January 22, 1958 to agricultural leaders in Belorussia, Nikita Khrushchev, the First Secretary of the Communist Party of the Soviet Union, noted that "a group of comrades from Brest region" had asked the following question:

"Did the procurator of Brest region, who prohibited approaching the payment of the labour of honest collective farmers in one manner and the payment of the labour of loafers in another manner, act correctly?"

Mr. Khrushchev replied that:

"It is not clear to me what connection the procurator has with questions of administering the economy and, in particular, with the distribution of collective farm income . . . The procurator has nothing to do here. The procurator must stand guard over the laws of the Soviet Union. In the given instance he himself violates the order which was established for collective farms. Let us hope that the procurator who illegally intervened in the practice of distributing income will correct himself."<sup>45</sup>

Perhaps the increased attention to the problem will result in the promulgation of new directives specifying in detail the subject, objects and jurisdiction of the Procuracy in its exercise of general supervision.

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<sup>45</sup> "Rech' tovarishcha N. S. Khrushcheva na soveshchanii peredovikov sel'skogo khozyajstva Belorusskoj SSR, 22 yanvarya 1958 goda" (Speech of Comrade N. S. Khrushchev at the conference of the foremost agricultural workers of the Belorussian SSR, January 22, 1958), *Izvestiya*, January 25, 1958, p. 2.

## NOTES

### PREVENTIVE DETENTION AND THE PROTECTION OF FREE SPEECH IN INDIA

In an earlier issue of this *Journal*<sup>1</sup> Mr. Durga Das Basu described the system whereby through the machinery of the Courts protection is given to the Fundamental Rights set out in Part III of the Constitution of India. Mr. Basu wrote the article at the invitation of the then editor of the *Journal* with the object of giving within a comparatively short compass an objective account of the system for the protection of human rights operating in India. It was not his purpose to defend or to attack the adequacy of the protection given in this respect by the Constitution, and as far as the interpretation by the Courts of the Constitution is concerned he aimed only at drawing attention to the most important decisions without necessarily accepting the reasoning underlying them. Such a treatment would not, and was not intended to, satisfy an Indian lawyer, necessarily concerned with the detailed application of the laws and with their practical evaluation; but it might serve as a useful introduction to that wide circle outside India who see the real problem of human rights in terms of their remedies rather than in their theoretical vindication. For this reason, Mr. Basu set out for the purposes of comparison the relevant articles of the United Nations Covenant on Human Rights and related them to their corresponding articles in the Indian Constitution. In these circumstances it was only natural to expect that other Indian observers might in some particulars criticise Mr. Basu's treatment, or at least suggest that certain matters omitted should have been included or, finally, wish to lay the emphasis on different points in the treatment.

We welcome, therefore, the opportunity of drawing attention to two articles in the *Indian Civil Liberties Bulletin*<sup>2</sup> which show precisely this difference of emphasis. In so far as they contain more direct criticism of Mr. Basu's article we would suggest with all due respect that such criticism may in large part arise from a misapprehension of the scope and the purpose of the original article. We shall

<sup>1</sup> Vol. I, No. 2, (Spring-Summer 1958), pp. 157-197.

<sup>2</sup> No. 119 (August 1959) and No. 120 (September 1959). The *Bulletin* is published from the offices of the Servants of India Society, Poona.



endeavour in this Note to give as fair a summary as our space permits of the points made in the two contributions in the *Indian Civil Liberties Bulletin*, and we shall in each case confine our comments to such observations as may be deduced from Mr. Basu's article or, as would seem only fair, from references to Mr. Basu's other writings, in particular his two-volume *Commentary on the Constitution of India* and his *Shorter Constitution of India*, which are reviewed elsewhere in this issue.<sup>3</sup>

In No. 119 of the *Indian Civil Liberties Bulletin* it is Mr. Basu's treatment of preventive detention under Article 22 of the Constitution and under the Preventive Detention Act of 1950 (as amended by later Acts of 1950, 1951, 1952 and 1957) which is the object of a critical examination. It is, of course, true that the protection given by sub-sections (1) and (2) of Article 22 against arbitrary arrest (right to be informed of the nature of the charge, to consult counsel, to be brought before the nearest Magistrate within 24 hours, not to be further detained without the authority of a Magistrate) does not apply, by virtue of the reservation made by sub-section (3) to "any person who is arrested or detained under any law providing for preventive detention". It is also true that Article 21 of the Indian Constitution, which provides that "no person shall be deprived of his life or personal liberty except according to procedure established by law", affords little *constitutional* protection to the abstract ideal of personal liberty. This article taken alone leaves all to the wisdom of the Legislature and, as the *Indian Civil Liberties Bulletin* points out, marks a victory over those in India who wished to substitute a reference to "due process of law", and thereby to make it possible for the judges to develop on the American pattern not only procedural but also substantial safeguards of personal liberty.

On the other hand, it is proper to draw attention to the fact that the Constitution of India does by sub-sections (4)–(7) of Article 22 proceed to prescribe the limits within which laws be made providing for preventive detention. In particular, the Constitution specifically requires [Article 22, sub-section (4)] that detention for a period longer than three months shall be based on "sufficient cause" so found by "an Advisory Board consisting of persons who are or have been, or are qualified to be appointed as, Judges of a High Court". It is true that by sub-section (4) (b) of Article 22 an alternative condition for the imposition of preventive detention for more than three months is provided. This condition is that a law is made under sub-section (7) of Article 22 which says simply that "Parliament may by law prescribe – (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law pro-

<sup>3</sup> See Book Reviews below.

viding for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provision of sub-clause (a) of clause (4)". But in fact the Preventive Detention Acts do provide (Section 9) that "in every case where a detention order has been made under this Act, the appropriate Government shall, within thirty days from the date of detention under the order, place before the Advisory Board constituted by it under Section 8 the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer, also the report of such officer, under sub-section (3) of Section 3". And sub-section (2) of section 11 of the same Act provides that "in any case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned the appropriate Government shall revoke the detention order and cause the person to be released forthwith". Moreover in the Constitution itself there is the very important provision of sub-section (5) of Article 22 which requires the authority making an order of detention to communicate to him "the grounds on which the order has been made" and to "afford him the earliest opportunity of making a representation against the order".

The main weight of criticism in the *Indian Civil Liberties Bulletin* is that the courts have very little if any say in the way in which preventive detention is administered. They go so far as to suggest that "persons suspected of prejudicial activity can be thrown into prison on the say-so of a district officer or a Cabinet Minister". They particularly criticise Mr. Basu for suggesting that in certain circumstances the right of *habeas corpus* may be available even to persons detained under a law imposing preventive detention. This, with respect, seems going too far. It is possible to dislike all preventive detention as a general principle, but to welcome whatever safeguards may be supplied through the use of the judicial process or in the spirit of the judicial process. And in fact the Indian courts have played an important role in this field in protecting personal liberty. It is only necessary to refer in this connection to a number of cases (of which examples are given on p. 107 of Mr. Basu's *Shorter Constitution of India*) where a petition for *habeas corpus* has succeeded on the ground that the reasons given for detention as supplied to the detained person were too vague to enable him to make a representation as required by Article 22(5) of the Constitution. And it is perhaps permissible to add that a sincere dislike of preventive detention (which all lawyers of liberal sentiments must share) does not entitle one to dismiss as irrelevant some consideration of the scale on which preventive detention has in fact been employed in India. Mr. Basu stated in his article that at the end of 1957 the number of persons detained was about 200; at the end of June 1959 it was 77. The *Indian Civil Liberties Bulletin* says rightly that matters

of fundamental liberty must be approached in a personal way, even when we are only concerned with 77 persons in a population of 360 millions. But in fairness it must be said that the scale of the matter is relevant in that, where the numbers involved are small, the possibility that the powers of preventive detention will be seriously abused are, by reason of the publicity which can be directed to each individual case, correspondingly lessened.

In No. 120 of the *Indian Civil Liberties Bulletin* attention is directed to the treatment by Mr. Basu in the article referred to above of the protection of free speech under the Indian Constitution. Article 19 is the relevant provision. Mr. Basu pointed out that the permissible grounds for restricting freedom of speech were extended by an amendment of the Constitution in 1951 to include among other things restrictions in the interests of "public order". On the other hand it was made clear that these restrictions would as to their scope and meaning be subject to judicial review by adding to them the descriptive adjective of "reasonable". The *Indian Civil Liberties Bulletin* regrets that the amendment of 1951 was made. It points out that the original restriction in the Constitution had a limited and defensible scope. It read as follows: "Nothing in (the provision according the right of freedom of speech and expression) shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State". Attention is drawn in the Bulletin to a decision of the Supreme Court of India [*Ramesh Thappar v. The State of Madras*, S.C.R. 594 (1950)] in which, on the basis of the unamended Constitution, a distinction was made between "serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance." But Mr. Basu himself in his article in this *Journal* emphasized that under the amended Constitution the inclusion of a permissible restriction "in the interests of . . . public order" was what he calls "retrograde", in that it might entitle Parliament to make laws "which have a tendency to cause public disorder but which may not actually lead to a breach of public order"; and in this connection he drew attention to the decision of the Supreme Court of India in *Ramji Lal v. State of U.P.*, A.I.R. 1957 S.C. 620, in which Section 295A of the Indian Penal Code, penalising the uttering of words "with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India," was under consideration.

The *Indian Civil Liberties Bulletin* suggests that if Article 19 had been left in its original form it would have been possible for the Supreme Court to develop a doctrine analagous to the "clear and

present danger" test of the United States Supreme Court, and that this would have been preferable to the dangerously wide inroads made by the 1951 amendment on freedom of speech. This, with respect, seems highly doubtful for it is in the *Indian Civil Liberties Bulletin* itself that the attitude of the Supreme Court is criticised, even when considering the scope of the amended Constitution with the additional safeguard provided by the amendment of 1951 requiring that restrictions on freedom of speech shall be "reasonable". The case in question is *Virendra v. State of Punjab*, 1957, A. 1957 S.C. 896 (901), which is discussed on pp. 172-173 of Mr. Basu's article. In that decision the Punjab Special Powers (Press) Act of 1956 was under discussion. The *Indian Civil Liberties Bulletin* criticises the Act in that it empowers the Executive to impose pre-censorship on a newspaper, to prohibit publication altogether, to ban an outside newspaper's entry into the State and to require a newspaper to publish matter of the Government's choice. It would seem that the *Bulletin's* criticisms should be directed to the Supreme Court rather than to Mr. Basu who, within the limits imposed by the general plan of his article, merely sets out the relevant section of the Punjab Special Powers (Press) Act of 1956 under which the Executive has taken the powers mentioned. But Mr. Basu also makes the important point that the Supreme Court did in fact invalidate one provision of the Punjab Act on the ground that no limitation was imposed either as to the duration of the ban on the importation of the printed matter or as to the subject matter of the publication. Moreover that part of the Punjab Act which was upheld provided that no order of the Executive imposing restrictions on freedom of speech should remain in force for more than two months from its making.

An acute public awareness of the importance of civil liberties and a readiness to criticise any restrictions on their use is an essential sign of the health of any free society. On the other hand there must be room for the cool and dispassionate discussion of such limitations on these liberties as are essential in an orderly society, whether imposed by the Legislature or, under a Constitution, allowed by a Supreme Court. For this reason we find it possible both to welcome the discussion opened by the *Indian Civil Liberties Bulletin* and to be grateful to Mr. Basu for the exposition in his article in the *Journal*, and even more in his various and learned works, of the actual interpretation by the Indian Courts of their Constitution.

THE EDITORS

# REPORT OF THE KERALA ENQUIRY COMMITTEE

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### Editorial note:

#### *Witnesses and evidence:*

*A total of 78 witnesses gave evidence to the Committee. They included advocates, doctors, priests, former Ministers of the Kerala Government, journalists, school teachers, persons in managerial positions in commerce, agriculture and industry, workers and traders. Considerations of space preclude the publication of the evidence, which was included in the report of the Committee as chapter IV, but it was relevant to the following categories of activities:*

- a) police inaction,*
- b) failure to bring proper prosecutions,*
- c) remission and commutation of sentences,*
- d) relief obtained through the initiation or threat of legal proceedings to compel public officers to perform their duty,*
- e) discrimination between different associations of co-operatives and trade unions,*
- f) allowing illegal interference with trade,*
- g) allowing interference with the enjoyment of land and its produce,*
- h) assaults,*
- i) wrongful confinement,*
- j) terrorism and*
- k) the formation of Communist cell courts without consensual jurisdiction*

# **REPORT OF THE KERALA ENQUIRY COMMITTEE**

## **I. FOREWORD**

At a meeting of the Executive Council of the Indian Commission of Jurists (Indian National Section of the International Commission of Jurists) held on August 3, 1959, a desire was expressed to consider the question of appointing a Committee of Enquiry regarding the alleged subversion of the Rule of Law and the consequent insecurity in Kerala during the period when the Communist Ministry was in office. The Executive Council was of the opinion that such a Committee should be appointed and left it to the President and the General Secretary to frame suitable terms of reference and implement the recommendations of the Committee.

In pursuance of this, a Committee was appointed on September 2, 1959, consisting of the following:

### **Chairman**

Shri N. H. Bhagwati,  
Former Judge of the Supreme Court of India.

### **Members**

Shri M. P. Amin,  
Former Advocate General of Bombay  
and

Shri M. K. Nambiar,  
Senior Advocate, Supreme Court.

Shri V. Rama Shenai,  
Advocate, of Ernakulam, was appointed the Secretary of the Committee.

The terms of reference of the Committee as settled on September 7, 1959, were as follows:

To investigate and report on:

1. Whether the Rule of Law as envisaged by the Constitution was maintained during the period when the Communist Government was in office in Kerala; if not, in what respect was the Rule of Law departed from, weakened or undermined;
2. Whether, while apparently adhering to the Constitution, attempts were made to undermine the Rule of Law as envisaged by the Constitution;

3. In what respect, if any, was the Rule of Law undermined by legislative, administrative, or other pressure tactics in governmental or economic spheres;
4. What steps, if any, should be taken to safeguard the Rule of Law in circumstances similar to those that prevailed in Kerala;
5. On such other matters which might be germane of incidental to the above inquiry.

On September 9, 1959, Shri Purshottam Trikamdas, the General Secretary of the Indian Commission of Jurists, addressed a circular letter calling upon various individuals, associations and organisations, including those belonging to the Communist persuasion, and the Opposition, to submit their memoranda on any matter they considered relevant together with any copies of any documents which they would like to place for the consideration of the Committee. Intimation was also given that after the examination of the memoranda received, if any, the Committee would proceed to Kerala for the examination of witnesses who may desire to give evidence before them. It was emphasised in that letter that the Indian Commission of Jurists is an organization of leading lawyers, that it is a non-political organization, whose main concern is the upholding and strengthening of the Rule of Law and that the Committee would be very happy to have their co-operation in the matter. This circular letter was addressed, in particular, to the Chief Minister and the other members of the Communist Ministry in Kerala as also to the various M. L. A's, belonging to the Communist Party in Kerala.

The date for the submission of memoranda, which had been originally fixed for October 8, 1959, was subsequently extended to October 31, 1959, at the ordinary meeting of the Committee held in Bombay on October 4, 1959.

The Secretary of the Committee issued an appeal through the press in Kerala on October 8, 1959, inviting all parties concerned to submit their memoranda and the relevant documents to him on or before the extended date, and intimated that the Committee would highly appreciate the co-operation of all parties concerned in the task which they had undertaken. This press appeal also emphasised:

"The Committee are purely juristic in character and are not concerned with any political organisation or controversy, and are mainly concerned with finding out whether the Rule of Law as envisaged by the Constitution was maintained during the period when the Communist Government was in office in Kerala.

"The Committee propose to hold an objective enquiry in the manner indicated above and wish to gather all the necessary materials, and in particular, the relevant documents which would be helpful in arriving at a correct conclusion."

Apart from this public appeal in the press, the Secretary of the Committee also addressed several letters to the parties concerned and requested them to submit their memoranda. The communications thus addressed by the General Secretary of the Commission and the Secretary of the Committee totaled about 450.

Several representations and memoranda were received from various individuals and organisations. Though no memoranda were submitted by the Communist Party or its members, the Committee had before them the various publications issued by the Kerala Government and the Communist Party, which set out the Communist Party's answer to the various charges levelled against them.

The public sittings of the Committee were to commence at Ernakulam, Kerala, on November 15, 1959, and a further preliminary meeting of the Committee was held in Ernakulam the previous day, i.e., November 14, 1959. It was then decided that at the commencement of the sittings on November 15, 1959, a public appeal should be made by the Chairman once again to various parties, associations and organisations belonging to the Communist persuasion to co-operate with the Committee and to give them their full assistance in arriving at the truth of the matter. Accordingly, at the commencement of the sittings on November 15, 1959, the Chairman read out a public appeal wherein, after summarising the aforesaid facts, he appealed to the Communist Party and its members to extend their co-operation to the Committee. He pointed out that the Committee no doubt had before them the various publications issued by the Communist Government as well as by the Communist Party, but even those consisted of many statements unsupported by evidence, oral or documentary, and, therefore, appealed to them to give the Committee their full assistance in arriving at the truth of the matter. The Committee expressed the hope that this appeal would not go in vain, but intimated that should it fail to elicit proper response, the Committee would have no alternative but to proceed with the enquiry with such materials as they had and according to the best of their lights. Intimation was also given of the dates and places where the public sittings of the Committee would be held, and a request was made to the parties concerned to inform the Secretary of the Committee if they wanted to give evidence before the Committee. The Communist Party, however, did not submit any memoranda nor did it tender any witnesses for examination.

The Congress Party also did not fully co-operate with the Committee. The demand for public documents made by the Committee from the Centre as well as the present Kerala Government did not elicit any response, and the only concession given to the Committee was that just like other members of the public they would have access to the public documents, provided they were not privileged or confidential, and they would be given certified copies of such of the documents as were determined by the officers concerned to be neither privileged nor confidential and such as would be made available to the public at large on payment of proper charges for the same. Such a concession was obviously not of much help to the Committee. The Congress Party in Kerala as a whole, and the Office Bearers and important members thereof in particular, did not submit any representations or memoranda before the Committee nor did they appear and give evidence before them. They were head over heels immersed in the campaign for the next elections and so were the members of the other parties, viz. the Praja Socialist Party (P.S.P.), the Revolutionary Socialist Party (R.S.P.),

The Committee, however, had the advantage of examining a large number of witnesses at the public sittings which they held in Ernakulam, the Muslim League, etc.



Calicut, Guruvayur and Trivandrum, through the efforts of the Secretary of the Committee as well as his devoted band of workers.

The Committee held their public sittings at Ernakulam on November 15 and 16, at Calicut on November 17, 18 and 19, at Guruvayur on November 20, at Ernakulam again on November 21 and 22, and at Trivandrum on November 24, 25, 26 and 27; they examined in all 78 witnesses including Shri Thykad Subramania Iyer, Ex-Advocate General of the Travancore Cochin State, Shri K. Kuttikrishnan, Ex-Advocate General of Madras, Shri Kalathil Velayudhan Nair, Ex-Minister of Travancore Cochin State, Shri Panampally Govinda Menon, Ex-Chief Minister of Travancore Cochin State, Shri N. Narayana Menon, Barrister-at-Law, Shri M. K. Raja, Manager, Guruvayur Dewaswom, Shri K. P. Abraham and Shri K. T. Thomas, Advocates, Ernakulam, Father Vadakkan, who led the liberation movement on behalf of the Catholics, Shri K. B. Menon, M. P., Shri K. R. Elangath, Ex-Minister, Travancore Cochin State, Shri T. K. Narayana Pillai, Ex-Chief Minister, Travancore-Cochin State, Shri Mannath Padmanabhan, the Leader of the Vimochan Samiti, Shri M. K. Kuriakose, Chairman of the Association of Planters of Kerala, and Shri Pattom A. Thanu Pillai, Ex-Chief Minister, Travancore-Cochin State, and several lawyers and persons who were the alleged victims of the policy pursued by the Communist Ministry in Kerala.

The Committee have devoted anxious thought and scrutinised all the materials placed before them, including the various publications issued on behalf of the Communist Party, with a view to arriving at the truth of the various charges and counter-charges levelled by and against the parties concerned and have recorded their conclusions on the subject matter of the Enquiry according to the best of their judgment...

## II. THE HISTORICAL BACKGROUND

The State of Kerala, on the South-West coast of India, as at present constituted, comprises certain portions of the erstwhile State of Travancore, the erstwhile State of Cochin and certain portions of the erstwhile State of Madras, all consolidated together as a result of the recommendations of the States Re-Organization Committee. It is, however, a problem State in so far as besides the problems of pressure of population on land, low per capita holdings, low agricultural income, an increasing number of unemployed and under-employed persons, it has also the problem of a scarcity of food. It is rich in mineral resources, having deposits of heavy minerals like monozite, rutile, ilmenite, etc., which are of great strategic importance to the country. China clay is also found in different parts of this State. A multitude of rivers provides a good source of cheap water supply and electricity and there already exist well-developed transport facilities and a wealth of intelligent and efficient man-power. Industrialisation has, however, lagged considerably in the State owing to lack of finance, lack of trained personnel and lack of industrial survey. The tardy response to the need of industrialisation has also been due, *inter alia*, to the lack of initiative and drive shown by the different Governments that have been in power since 1947. Kerala has the highest percentage of literacy in the country -

about 50 per cent. Over 90 per cent of the children of the school-going age in the State attend schools. This phenomenal educational progress only helps to accentuate the already existing acute problems of unemployment, and especially of the educated unemployed. There are as many as 29 newspapers, mostly Malayalam dailies, besides scores of weeklies and magazines published in the various centres, which have a wide circulation throughout the State, and are read with avidity by the population. Politics is a national pastime in Kerala, and these newspapers carry political controversy into millions of homes in the State. This is natural in a State where there is so much literacy, such a density of population and wide-spread unemployment. A vast man-power lying idle naturally seeks outlet in active politics and this in turn breeds vague radicalism which is very susceptible to communist influence.

Against the economic background depicted above, one would have expected that the different political parties should provide at least four desiderata: (1) a stable Government, (2) an awareness of the State's problems, (3) a socio-economic programme to tackle them vigorously, and (4) impartiality in the administration, so that the State as a whole may prosper and not a particular party or group alone. The activities of the political parties, however, since 1947 have belied these expectations.

After the attaining of independence by India in 1947, the State of Travancore acceded to India, and the first general election in the State on the basis of adult franchise was held in 1948. On March 2, 1948, the first Congress Ministry came into power, with Shri Pattom Thanu Pillai as the Chief Minister. This Ministry, however, fell within seven months of its formation, when a vote of no-confidence was passed against it as a result of the group and communal rivalries in the Congress Party itself. Shri T. K. Narayana Pillai succeeded as the Chief Minister in about October 1948 and was the Chief Minister when the integration of the States of Travancore and Cochin took place on July 1, 1949. Regionalism, however, reared its head immediately thereafter and claims and counter-claims were made on behalf of the Travancore and Cochin Groups. Shri T. K. Narayana Pillai resigned in December 1950 after having been in office for about 27 months. Shri C. Kesavan succeeded him as the Chief Minister. There was a further weakening of the Congress during his regime. The demands of the Cochin Group led to a difficult situation and Shri Pillai continued in office until the first Indian General Elections, which took place in 1951—52. The State Congress Party went to the polls in this election with its prestige besmirched, its ranks divided and warring with one another. This naturally affected the fortunes of the Party in the elections and it could win only 48 out of the 108 seats in the Assembly. When the Congress was called upon to form a Ministry as the largest party in the State Assembly, it sought the support of the Travancore Tamil Nad Congress (T.T.N.C.) and a few independents to ensure a working majority. Communalism played a dominant role in the election of the party leader and Shri A. J. John (Christian) was elected leader. This coalition under the leadership of Shri A. J. John, however, was short lived. The T.T.N.C. demanded recognition as a separate provincial Congress Unit with jurisdiction over the Tamil speaking Taluqs in Travancore-Cochin, which was turned down, with the result that the T.T.N.C. withdrew from the coalition and the John Ministry resigned in September 1953. The Assembly was then dissolved and fresh elections were

held in 1954. The leftists of various shades entered into electoral alliances, and the Congress could secure only 45 seats in a 117 member Assembly in these elections. Once again, no single Party emerged with an absolute majority in the House and the Congress allowed the Praja Socialist Party to form a Ministry with its support under the leadership of Shri Pattom Thanu Pillai. This Congress - P.S.P. alliance, however, proved an uneasy and stormy one and lasted only nine months. The Congress and the T.T.N.C. withdrew their support and the P.S.P. Ministry fell in February 1955. The Congress thereafter procured the support of the T.T.N.C. and of two P.S.P. members and formed a Ministry, with Shri Panampilly Govinda Menon as the Chief Minister, with a dubious majority. During his regime, the regional rivalry between the members of the Travancore and Cochin groups was further accentuated and he was accused of corruption and nepotism in specific cases. Though the Congress High Command, after due investigation, rejected these charges as baseless, the six-member rebel group resigned from the Legislative Congress Party, and the last Congress Ministry toppled over in March 1956. The Opposition then had a clear majority as the Communist, Revolutionary Socialist and Kerala Socialist Parties offered their unconditional support to the P.S.P. to form a Ministry under the leadership of Shri Pattom Thanu Pillai. The Congress Party, however, managed to get the Assembly dissolved and the President's Rule was proclaimed in the State on March 23, 1956. This move proved detrimental to the popularity and prestige of the Congress Party. It earned not only the wrath of the other parties but also the revulsion of a large section of its former supporters. There had been since the first general elections in Travancore in 1948 until the President's Rule in 1956 - a span of eight years - three elections, nine Governments and 36 Ministers in Kerala; the communal groupings, regional rivalries and the lack of a strong and disciplined Congress organisation, when responsible Government was achieved - weakened the Congress Party. The Congress, moreover, depended less than any other party on mass membership and disciplined party cadres. Its strength centred mainly round a few eminent persons or group leaders who represented various communal or regional interests and were unwilling to put aside their petty ambitions. The leaders neglected party organisation, and the party gradually lost its contact with the masses. Every fall of a Government in Travancore-Cochin was brought about by indiscipline within the ranks of the Congress Party and never by the activities of the Opposition Parties. Shri Panampilly Govinda Menon openly proclaimed this fact in a speech at the time of his resignation in March 1956 and Shri U. N. Dhebar, the former Congress President, once remarked that he could not name a single prominent Congress leader of Kerala who had not at one time or the other tried to bring down a Minister.

The present Kerala State came into being on November 1, 1956, a few months before India's second general elections. The map was redrawn with the transfer of nine Tamil Taluqs to the Madras State and the incorporation of the Malabar District of the Madras State into it.

The second general elections took place in 1957. The Congress faced the elections with its ranks riven by factional feuds and regional rivalries and its popularity at a low ebb as a result of allegations of corruption and the party leader's unsavoury manoeuvres in bringing about the President's rule.

The vote polled by the Communists came largely from an electorate which refused to countenance the mistakes and failures of the Congress.

The Communist Party had been banned in the first general elections in 1951—52. Individual Communists released from jail, however, contested as independents and won 25 seats in the Assembly and polled 15.5 per cent of the total votes. During the re-elections in 1954, the Communists headed the United Leftists Front (U.L.F.) and at that time even the P.S.P. entered into an electoral 'no contest' agreement with the U.L.F. The leftist forces grew in strength and came close to power. At the time the President's rule was proclaimed in 1956, the Communist Party had built its bases among workers, students and unemployed youth, and slowly the U.L.F. came to be identified with the Communist Party. The technique of the Communists in the U.L.F. ultimately paid them handsome electoral dividends. Workers, peasants, writers and intellectuals who had joined the Front in search of an alternative to the Congress, invariably landed in the Communist camp as supporters of active workers of the party and thus helped the Communists tremendously during the general elections in 1957. The Congress party helped the Communists by proclaiming before the electorate that its choice lay between the Congress and the Communist parties. In the background of the Congress record of dissensions and misrule, the call was almost an invitation to the voters to vote for the Communists to the exclusion of the other parties. The disciplined and monolithic party organisation of the Communists was able to deal a crushing blow to the divided and confused ranks of the Congress. Professing faith in democracy and at the same time promising a clean sweep of the old established order in Kerala, the Communists could make a strong appeal to the masses, and the masses, fed up with political instability and the ineptitude of the former Governments, responded to the appeal by deciding to give a chance to the Communists, who thus rode into power on a wave of discontent in April 1957.

The electoral land-slide in favour of the Communist Party thus represented no ideological commitment by the people of Kerala. It was only an experiment on their part in search of political stability. In voting the Communists to power, the people of Kerala only registered their protest against the Governmental instability which had been plaguing the State since 1948, which hampered their progress and their well-being.

This was the background against which the Communists came into power on April 5, 1957 under the Chief Ministership of Shri E. M. S. Namboodiripad.

### III. CHRONOLOGY OF EVENTS

The Communist Ministry in Kerala came into power on April 5, 1957, with great auspices. Its assumption of power was hailed by a number of leading journals and men of public affairs as a great experiment in India's pronounced faith in the theory of co-existence. No less a person than the President of the Republic of India, Dr. Rajendra Prasad, voiced the sentiments and attitude of the Congress and the Government of India towards the first Communist Ministry in Kerala when he blessed it in the course of his visit to Kerala on August 14, 1957, in the following terms:

"I am happy that this great experiment, which is being made in your State, is going to serve as a great lesson not only to other States but to the country as an example of co-existence of living and working together in spite of differences for the good of all."

It is significant, however, to note what the attitude of the Communist Party in general, and the Communist Ministry in Kerala in particular, was in regard to this.

Shri S. A. Dange, on the very day that the Kerala Ministry was being installed in office asserted that "though the Communist Ministry in Kerala would function within the ambit of the Constitution, it does not mean that it would deviate from the cherished principles of Marxism, Leninism and Stalinism. We Communists have not changed. Let there be no mistake about it. We remain as we are." Shri B. T. Randive, another prominent Communist Party leader, "immediately smelt a conspiracy on the part of the Congress and vested interests in Kerala to create difficulties for the Communist Government, and started hurling threats that the failure of the Ministry in Kerala would drive them once again to insurrectionary methods." Shri P. Sundarayya, another Communist leader, stated that if the Union Government did not agree with the Kerala Ministry's policies, the Communist Party would resort to other means.

The tone which the Chief Minister of Kerala adopted was more conciliatory. Immediately after swearing allegiance to the Constitution, he asserted:

"We have to work within the frame of a system which includes several regulations and limitations, which are not to our liking, but we would work within the frame work of the Constitution and would try to utilise the provisions of the Constitution to amend the Constitution itself."

In fact, the Secretary of the Kerala Communist Party confessed:

"Winning an election under the Constitution does not mean a revolution has taken place. We are not going to do wonderful things — through drastic changes."

Shri Ajoy Ghosh, the General Secretary of the Communist Party, declared that the Communist Ministry in Kerala would implement the Congress programme more efficiently and expeditiously. Similarly, the Chief Minister also stated that the primary aim of the Communist Party would be to practise what the Congress had preached but failed to act upon. Another Communist Minister went a step further and claimed:

"We are, if you want to put it that way, the true Congressmen." It remained to be seen how far these pious wishes would be fulfilled.

It is necessary, therefore, to trace chronologically the history of the events that happened between April 5, 1957, the date of the assumption of power by the Communists in Kerala, and July 31, 1959, the date of the Proclamation of the President's Rule.

**April 5, 1957:** The Communists came into power and a Ministry was formed with Shri E. M. S. Namboodiripad as the Chief Minister.

There were sporadic assaults by Communist *goondas* on non-Communists between April 9, 1957 and April 26, 1957 as appears from the cuttings of the newspapers *Matrubhoomi* and *Thozhilali* and *Express*.

**April 12, 1957:** Ten accused in the Edappalli Police case, two in Kavumbayi Anakkaran Murder case, three in Pariyaram murder case, all of whom were undergoing life imprisonment, were released and were received at the jail gates by the Communists, garlanded and taken in procession round the town (*vide Express*, April 13, 1957).

**April 26, 1957 (about):** The Anti-Eviction Ordinance of 1957 was promulgated by the Communist Government.

**April 27, 1957:** At Shertallai, about 200 Communist Party men and their sympathisers, armed themselves with lethal weapons, and attempted to sow the lands belonging to and in the possession of Puthen Kuttill Shenais. Scenting their unlawful intention, Puthen Kuttill Shenais went to the fields and prevented trespass, and in their attempt all of them received grievous injuries and eight persons were admitted to hospital. (This was the immediate result of the Anti-Eviction Ordinance of 1957, *vide Express* and *Thozhilali*, April 28, 1957).

**May 2, 1957:** Gangadharan, an I.N.T.U.C. worker, was stabbed to death.

**May 7, 1957:** The Chief Minister dismissed the charge of increasing insecurity in the State as baseless while addressing the State Assembly.

**May 8, 1957:** In answer to a question put by Shri Ponnara Shreedhar, Shri V. R. Krishna Iyer, the Minister for Law and Home, replied that during the month of April 1957, 29 persons sentenced to life imprisonment and 5 others who had been sentenced to imprisonment for 10 years and 8 years were released (including the 15 who had been released as stated above on April 13, 1957). (*Vide Appendix III to Volume I, No. 5 of the Proceedings of the Kerala Legislative Assembly dated May 8, 1957*).

**May 9, 1957:** A resolution was moved by Shri P. T. Chacko in the Kerala Legislative Assembly:

"This House disapproves the Government proposal to commute death sentences passed by competent Courts into imprisonment for life."

This resolution was discussed and was after considerable discussion negated by the House.

**Between May 12, 1957 and June 29, 1957:** There were various incidents of violence and lawlessness on the part of Trade Unions and workers in 10 estates of planters in Travancore committed for the purpose of coercing employers to concede their demands. The grievance of the employers, as stated in the letter, dated July 15, 1957 addressed to the Chief Minister by the Association of Planters of Travancore, was that it had become extremely difficult for them to obtain the protection of the Police.

**May 17, 1957:** In the course of a strike engineered by the Communist Party-controlled labour unions in the Kottanad Estate, the women-folk and the children in the house of the Estate Superintendent and the Assistant Superintendent were confined to the house. Food supplies were

exhausted and they had not even water to drink. The Police were unable to render any help and even when the two Police Constables, who came there, tried to give water to the members of the Superintendent's family the strikers forcibly took the vessels containing water from them and threw the vessels away (*vide* the speech of Shri P. P. Ummar Koya in the Kerala Legislative Assembly on June 14, 1957, Volume I, Proceedings of the Kerala Legislative Assembly, page 1171).

**June 7, 1957:** Shri Hussain Gani, a member of the Legislative Assembly, pointed out in his speech that on June 1, 1957, some shops and houses belonging to Muslims had been attacked by some persons at Poonthura in Trivandrum-rural area. He had investigated the affair and found that the shops and houses had been attacked and some shops had lost thousands of rupees worth of goods. He also referred to another incident where not only were goods taken away, but also the owner of the shop, one Krishnan was stabbed in front of the Police and the victim was admitted to hospital, (*vide* Proceedings of the Kerala Legislative Assembly, Volume I, No. 8, page 585).

**June 15, 1957:** The Chief Minister adumbrated on the floor of the House the Police policy, stating that the old policy of the Police assisting the vested interests against the interests of agricultural labourers and other toiling masses would be totally effaced (*vide* pp. 1229—31 of the Proceedings of the Kerala Legislative Assembly, Volume I, No. 14 dated June 15, 1957).

**July 5, 1957:** The Special Correspondent of the *Mathrubhoomi* published statistics of all cases withdrawn since the formation of the Communist Government, and stated that these withdrawals amounted to 200 and had included not only petty cases but grave offences like arson, murder, burglary and dacoity. A few alone out of them related to the P.S.P., R.S.P. and the I.N.T.U.C. In all other cases the Communists were the accused.

**July 7, 1957:** The *Mathrubhoomi* published the following with reference to the previous statement dated July 5, 1957. It stated that it had collected the details of 119 cases and of these 119 cases the Communists alone figured as accused in 106 cases. In two cases only the I.N.T.U.C. workers were the accused. In 5 cases the R.S.P. workers were the accused, and the charges against the R.S.P. workers and the I.N.T.U.C. workers were nuisance and the like. Those against the Communists were security proceedings, assault, dacoity, murder, etc., encompassing all the major offences under the Indian Penal Code. Two murder cases were withdrawn and 56 Communists were involved in them.

**July 23, 1957:** The Chief Minister made a statement in regard to police policy at a Press Conference at Trivandrum. He admitted that numerous allegations had been made both inside the Legislature as well as outside regarding the law and order situation in the State since the Communist Government assumed office, but stated that they appertained to the general policy pursued by the Government with regard to the role of the police in the maintenance of law and order. It had been alleged that due to the policy deliberately pursued by the Government, the Police force had been thoroughly demoralised and that in consequence a state of anarchy had set in. He, therefore, clarified the Government policy in this respect

and enunciated the principles which would guide the actions of the police during the Communist regime.

**August 17, 1957:** The United Planters' Association of South India addressed a letter to the Chief Minister regarding the law and order situation in the Plantation Districts and reporting that, in the State of Kerala employers and non-Communist workers continued to be harassed and belaboured by Communist workers.

**August 19, 1957:** A black flag demonstration was staged at Alleppey on the occasion of the visit of the Education Minister. A group of Communists made a brutal attack on the demonstrators in broad daylight with the police nonchalantly looking on. 70 persons received injuries and 4 persons were admitted to hospital in an unconscious condition.

**August 21, 1957:** Thomas Varghese, alias Varkhan, a victim of the above attack, succumbed to his injuries.

**August 31, 1957:** Shri M. C. Abraham moved a resolution in the Legislative Assembly in regard to the lawlessness in the State:

"This house views with great concern the growing lawlessness prevailing in this State."

Shri V. R. Krishna Iyer replied at the end of the discussion that no offender was going to escape and no culprit would be left alone, and the resolution was talked out.

**September 15, 1957:** The Information Officer of the United Planters' Association of Southern India issued a statement summarising the latest series of reports of incidents received from the Planters on the law and order situation which showed that after an improvement in the situation, the number of cases appeared to rise.

**October 12, 1957:** Messrs. Achuthan Nair, Krishnan Nair and Appukkuttan Nair, members of the I.N.T.U.C. and active participants in the labour struggle at Amballore were waylaid and ruthlessly beaten by persons belonging to the Communist Union (*vide Express* dated October 13, 1957).

**October 15, 1957:** A memorandum was presented to Shri V. R. Krishna Iyer, by the law abiding citizens of Tellicherry. The memorandum requested the Minister to prevent the Communist violence in the locality, and it carried a protest against the recent happening of assaults on a few non-Communists by an organization of the Communists of the locality (*vide Mathrubhoomi*, October 17, 1957).

**October 18, 1957:** The United Planters' Association of Southern India repeated that lawlessness was on the increase in the Plantations in Kerala and pointed out two incidents: one in Kumamazha Estate and the other in Merokistone Estate (*vide Mathrubhoomi* dated October 19, 1957).

**October 23, 1957:** Shri T. V. Thomas, in a chat with pressmen, stated that his Government was considering the appointment of a person not below the rank of a High Court Judge to enquire into the alleged lawlessness in plantations (*vide Mathrubhoomi* dated October 24, 1957). The promise was never carried out.



**October 26, 1957:** A group of over 200 Communists armed with *lathis*, daggers, etc., attacked the workers in Vengakkotta Estate in Wynad. Eight workers were admitted to hospital with serious injuries. The condition of three was precarious. The Communist workers Shivaraman and Kunjunni were arrested in this connection (*vide Mathrubhoomi*, also *Thozhilali*, dated October 29, 1957).

**November 5, 1957:** The Chief Minister made another statement in Calcutta reiterating the police policy.

**December 13, 1957:** One Shri P. C. Joseph, the owner of a coconut garden near Chittattukara and his labourers, who were plucking coconuts, were surrounded by a set of *goondas* who gate-crashed into his compound and prevented them from plucking the coconuts and also from leaving the garden. Two policemen, who were in mufti among them, stated that he should not be prevented, but the *goondas* warned the Police, saying:

"This is a matter concerning labour, and you have no right to interfere in this."

Information was given to the Chowghat Police Station, but the Sub-Inspector reached there only towards the evening. The *goondas* started plucking coconuts while the Sub-Inspector helplessly looked on. When it was too late in the night, the *goondas* left the place carrying a heavy load of coconuts and shouting slogans. The *goondas* belonged to the Communist Union, while those engaged by Shri Joseph were members of I.N.T.U.C. (*vide Thozhilali* dated December 15, 1957) and *Mathrubhoomi* dated December 22, 1957).

**December 21, 1957:** At about 11.30 p.m. a set of Communist *goondas* who were waiting in ambush way-laid and stabbed to death Shri Iyyunni, the local P.S.P. Secretary and a worker of the Alagappa Nagar. They attacked his brother Varghese also, who escaped with serious injuries (*vide Thozhilali* dated December 24, 1957).

**January 6, 1958:** Shri K. A. George, a member of the Trichur District Congress Committee and Secretary of the Teachers' Association, was attacked by a known Communist worker, by the name of Narayanan, ten miles away from Ernakulam, while he was returning after attending the Congress Working Committee Meeting. He was admitted to Perumbavoor hospital. The Police registered a case and, despite a categorical statement made by him, the Police did not arrest the assailant.

**January 11, 1958:** When a no-confidence motion against the Municipal Commissioner of Mattancherry was about to be moved, two members who were proceeding in a car to the Municipal buildings were set upon by Communist *goondas*, who were waiting at the outskirts. Their car was stopped and one of them, Shri Cherian, was pushed into another car and whisked away. The other, Shri Kunni Mahomed, was stabbed and had to be taken to the Council Room with stab injuries and later admitted to hospital (*vide Mathrubhoomi* dated January 12, 1958).

**January 25, 1958:** Kunnankulam P.S.P. Secretary, Shri A. L. Puthur, his father and brother were stabbed by Communist *goondas*. They were

admitted to the Trichur Civil Hospital (*vide Thozhilali* dated January 25, 1958).

**January 25, 1958:** Kunnankulam, P.S.P. Secretary, Shri A. L. Puthur, his father, and brother were stabbed by Communist *goondas*. They were admitted to the Trichur Civil Hospital (*vide Thozhilali* dated January 26, 1958).

**January 27, 1958:** A house at Nemom near Trivandrum was raided by a Police Sub-Inspector and five constables. The party was not allowed to leave for 90 minutes and was rescued thereafter. A complaint of obstructing the Police was registered against 21 persons including a Communist Member of the State Assembly (*vide Times of India* dated January 28, 1958).

**February 8, 1958:** People belonging to non-Communist parties travelling to Tellicherry from Panoor and nearby villages became the preys of Communist spying and assaults during the past few days. The situation in this place had become very grave. It was reported that the Communist Party issued passes to passers-by in these parts. The passes contained the words "Release them" and also the signature of one Shri K. Kumaran, a Communist Party Leader of Chambat (*vide Mathrubhoomi* dated February 9, 1958).

**March 19, 1958:** Shri V. R. Krishna Iyer, Home Minister of Kerala, admitted in the Legislative Assembly that there was tension in the village Panoor in North Kerala since October 1957 and there were violent clashes between P.S.P. and Communist workers. Roads were turned into battle grounds. The Home Minister stated that the Police failed to check crime for want of information and evidence from the people of the locality (*vide Times of India* dated March 20, 1958).

**March 27, 1958:** Shri M. N. Govindan Nair, Secretary of the Kerala Communist Party, stated that violent activities in certain parts of the State were increasing and charged that interested parties were resorting to violence to defeat the progressive measures of the Communist Government and to weaken the Government financially. There had been according to him an 'organised' attempt to attack and murder Communist workers in the State since April 1957. The Communists had to indulge in violence, but 'it was always in self-defence'. He however admitted that there was 'a fear complex' in the minds of the people of the State, but that was because of the 'dangerous activity' of certain interested parties (*vide Times of India* March 28, 1958).

**April 6, 1958:** The Communist Party finished one year of its Government in Kerala. The Chief Minister wrote in the 'New Age' that the Police and the other organizations of the State were doing their best to enforce the policies of the Government.

**April 16, 1958:** In a report released to the press during the Amritsar Communist Congress, Shri P. Ramamurti, the Communist Leader of Tamilnad, stated that within a year of the Communist Party coming to power in Kerala it was able to collect much as Rs. 2,500,000 towards the Party funds (*vide Thozhilali* dated April 17, 1958).

**May 16, 1958:** A bye-election to the Devikulam constituency took place.

**May 19, 1958:** The results of the bye-election was announced and the

Communist candidate Mrs. Rosamma Punnoose was declared elected, defeating the Congress candidate by a substantial majority.

**June 1, 1958:** Addressing a public meeting at Coimbatore the Chief Minister delivered his 'civil war' speech, where he warned the members of the Congress, P.S.P. and other non-Communist parties that their 'so-called unity of democratic forces' against the Communist Party would divide the people into two camps and create disruption and disunity in the country. He reminded them of China and asked whether they wanted such things to happen in India also.

What followed is aptly described in *Kerala Under Communism* (a publication by the Democratic Research Service, Bombay) at p. 95:

"Coming as it did in the wake of the Communist victory at the polls at Devikulam, the Chief Minister's 'civil war theory' indicated a shift in the Communist line. The same threat was repeated immediately thereafter by the Kerala Communist Party Secretary. The aim of the new line was to subvert law and order by identifying the party with the State and to use both law and lawlessness against the Opposition to strengthen the Party. Consequently, terrorism was unleashed on a statewide scale against the Opposition during June, July and August 1958 by Communist partymen. Simultaneously, the party arrogated to itself the functions of the police and assumed the responsibility of maintaining law and order in the State. On July 20, 1958, Mr. M. N. Govindan Nair called for the formation of 'People's committees' all over the State to counter 'the opposition move to paralyse the working of public offices and schools,' and 'to defeat attempts to wreck the democratically elected Government in the State.' Party workers were instructed openly to usurp the powers of the police if the latter were found un-cooperative. 'If the police and the army were found siding with the Opposition,' advised the Kerala Communist Party Secretary in a speech, 'the Communist partymen of that area should muster strong to go to the help of the Government.' Similarly, Mr. V. V. Raghavan, Communist leader and brother-in-law of the State Finance Minister, at a public meeting at Trichur, on July 23, exhorted the people 'to go out and suppress everyone who opposes our Government ... The police will not molest you. If they do we are here to protect you.' Another such instance was the speech made by Mr. Kumaran, M.P., at a meeting attended by the Chief Minister, in which he warned the judiciary of dire consequences if they indulged in writing 'political theses.' These and other similar statements by Communist leaders coincided with the outbreak of violence on a large scale, resulting in many political murders, murderous attacks on political workers, and open and organised defiance of law by Communist partymen at many places in the State. There was thus a transition from class war to civil war in Kerala, a natural growth of the doctrine of the inevitability of a violent revolution which was sought to be hastened by the party in power through the instrumentality of State organs."

**June 6, 1958:** About 200 Communists made a brutal attack on a handful of Congress workers at Manali. Messrs. Govindan, Mahadevan and

Paul were admitted to hospital with serious injuries (*vide Express* dated June 7, 1958).

**June 11, 1958:** On his way back from the protest meeting at Pudukad, Shri P. R. Francis, M. L. A., Ollur and his companions were surrounded at a place called Manali by a group of Communists and beaten. The R.D.O. at Trichur and the Circle Inspector of Police went to the place of the incident (*vide Thozhilali* dated June 12, 1958).

**June 12, 1958:** At about sunset, workers belonging to the I.N.T.U.C. and the Communist-controlled Unions had a hand to hand fight in Manali and Pudukad. Seven persons with stab injuries were admitted to the District Hospital, Trichur, Shri C. G. Janardhanan, M.L.A., was also injured (*vide Express* dated June 13, 1958).

**June 22, 1958:** Anchupara Pappan was originally a Communist. He resigned from the Party during the last general elections and he actively helped the Congress Party in the election campaign. He was assaulted by a few Communists at Ithipara on June 22, 1958. He succumbed to his injuries on July 8, 1958.

**June 27, 1958:** Shri Philipose Unnunny, a Congress worker of Kottarakara, was done to death by a group of pro-Communists; while he was proceeding to his house, a number of persons from both sides of the road rushed at him with iron bars. After beating him up with iron bars, they withdrew. He was rushed to the hospital where he succumbed to his injuries the next day.

**July 24, 1958:** One Varghese, alias Kunhachan, an employee of a tobacco shop at Alleppey, was stabbed by a gang of Communists while he was returning from the shop. He was reported to have been way-laid and attacked on his way back. Shri Raghavan, the Congress President of the Committee at Irrikur was attacked by a batch of Communists. At a joint convention of the Congress and the P.S.P. some 300 Communists *goondas* paralysed the meeting by creating disturbances. The President and the others were stoned and the loudspeaker was destroyed. Though the police were on the spot, they did not interfere (*vide Mathrubhoomi* dated July 25, 1958).

**July 26, 1958:** One Karuppan, a Communist worker in Varantharapalli, Trichur District, was reported to have been attacked by some Congress sympathisers on July 24, 1958. On July 26, a large number of Communist-led workers fully armed with lathis, daggers and knives, marched in a jatha to Varantharapalli. When they reached the front of the local Congress Office, a Communist, according to previous arrangement, threw a stone on the jatha. The members of the jatha turned round and began to stone the Congress Office. Mutual stone-throwing continued for some time. Then the jatha moved from there and turned into another road. The Congressmen, who had collected in front of their office, gradually dispersed, believing that the jatha had left the spot. But the next moment, the procession returned and fell upon the few Congressmen who were left there. Five non-Communists, of whom four were Congressmen, died on the spot, while 16 persons were admitted to hospital with serious injury. One more died on August 8, 1958, bringing the total number of casualties to six.

**July 29, 1958:** Shri Sankara Pillai, a P.S.P. worker, was done to death at Nemom by a Communist after a heated argument. He was beaten and struck to death with choppers. Every bone below his knees was smashed to pieces and his skull was also cut open. His dead body was mutilated and was thrown on a deserted compound on the roadway.

**August 7, 1958:** At a Press Conference held by the Prime Minister of India, he stated in regard to Kerala that there were charges of interference with the course of administration and withdrawals of cases against the Communists. Some of these charges were not adequately explained. There were also horrifying political murders and a feeling of insecurity by large sections of the community. This feeling of insecurity was caused by the activities of the Communist Party in Kerala.

**August 8, 1958:** Two I.N.T.U.C. workers, Shri Nessamani and Shri Balkrishna Pillai, were attacked with lathis and seriously injured. Shri Nessamani had reported his apprehension to the Police before the incident. He was attacked before the Police could come to his rescue. Shri Balkrishna Pillai received injuries while he attempted to ward off the blows aimed at Shri Nessamani (*vide Mathrubhoomi* dated August 9, 1958).

**August 11, 1958:** A documented statement on Kerala was submitted to the Hon'ble the Speaker of the Lok Sabha (Indian Parliament) in support of the motion for a discussion on Kerala tabled by Dr. K. B. Menon.

**August 17, 1958:** Shri David, a P.S.P. worker, was one of the nine injured in a clash between Communists and non-Communists at Kattapuram in Trichur District. He died in hospital on August 21, 1958.

**August 21, 1958:** The Prime Minister of India had talks with the Kerala Chief Minister about the situation in Kerala.

**August 1958:** The Chief Minister in a Press Conference did not deny that a large section of the people in the State felt insecure, but he asserted that the situation was brought about by the avowed policy of the Opposition parties to oust the Communist Government by fair means or foul (*vide Statesman* dated August 23, 1958).

**August 29, 1958:** At about 10 p. m. a band of Communist *goondas* destroyed the gate and forced their way into the house of Shri George Joseph Podipara, Congress M. L. A. They threatened his life. On hearing the shouts and the clamour, neighbours rushed to the scene of the occurrence. One Shri Thomas, a Tea Shop Manager, and his servants who had come to the house were attacked by the rowdies and were seriously injured. They were admitted to hospital (*vide Thozhilali* dated August 30, 1958).

**August 1958:** The Director of Public Relations, Government of Kerala, published at the instance of the Communist Ministry, a pamphlet called *The True Picture of the Situation in Kerala* referring to the call for organising private militia, incitement of civil servants, the students' agitation, the Sitaram Mills dispute, the Coir disputes and the developments which had taken place in Kerala mainly at the instance of the Opposition parties. It also pointed out that there was no interference in routine administration for political ends.

**First week of September 1958:** Shri Doraiswamy, an I.N.T.U.C. worker at Munnar, and Shri Devassey, a P.S.P. worker of Koratty, were stabbed to death in the first week of September 1958 by a band of armed Communists.

**September 3, 1958:** A hotelkeeper in Pattom in Trivandrum City, who refused to donate for the Onam celebration under the auspices of the Young Men's Sports Club, was subjected to criminal assaults together with his three relatives. They were seriously injured and the Police took into custody nine Communists (*vide Mathrubhoomi* dated September 4, 1958).

**September 7, 1958:** At the Press Conference held by the Prime Minister of India he stated that he had no reason to change his opinion in regard to the situation in Kerala. He stated that his opinion was in fact confirmed by subsequent information and developments.

**September 8, 1958:** Shri U. N. Dhebar had toured Kerala in the meantime and submitted his report to the Congress Working Committee. A statement was issued by the Chief Minister of Kerala in reply to him entitled *'Ill-informed Criticism against Communist Government Refuted: E.M.S.\* replies to Congress President Dhebar'* Shri V. R. Krishna Iyer, the State Law Minister, admitted that a cold war atmosphere and *Jehad* politics existed in the State, but threw the entire blame on the opposition parties (*vide Mathrubhoomi* dated September 9, 1958).

**Middle of September 1958:** The Congress Working Committee again passed a resolution on Kerala. It expressed "grave concern for the continuance of insecurity in Kerala and the policy of the Kerala Government which was often discriminatory."

(It may be observed that the Central Government not only remained passive, but even tried to prevent the Kerala situation being discussed in the Lok Sabha.)

**September 22, 1958:** Shri P. Narayanankutty, a local Communist worker and Kisan leader, and several others were arrested by the Kollengode Police for unlawfully encroaching upon the paddy fields belonging to Smt. Tilothama Ammal of Perakkal house, who had leased the same to one Kittu for agricultural operations. The Kollengode Police registered a case against them and they were subsequently released on bail (*vide Mathrubhoomi* dated September 23, 1958).

**September 24, 1958:** One Sumati, a 18-year-old girl, was in custody and was taken to the Kundara Police Station from Virakal Police Station for interrogation, in connection with a case. At Aathanoor a group of persons entered the bus and tried to take her away from the custody of the Police. In this struggle a Police constable and the driver of the bus were very roughly manhandled by them. In this connection, the Paravur Police had laid a charge against two Communist leaders, Babu and Bhaskaran Pillai (*vide Mathrubhoomi* dated September 26, 1958).

**October 10, 1958:** The K.P.C.C. published a rejoinder in answer to the two pamphlets of the Communist Government above referred to: (1) *True Picture of the Situation in Kerala* and (2) *Ill-Informed Criticism against Communist Government Refuted*. This was entitled *True Picture of the Situation in Kerala (a Rejoinder)*.

\* initials of the Chief Minister of Kerala.

**Between October 4, 1958 and October 30, 1958:** There was a strike in the Kannan Devan Plantation District, otherwise known as "High Range", which is concerned almost exclusively with the production of tea. Several acts of lawlessness, violence and destruction of property were perpetrated by the workmen during the period of the strike. The Management as well as workers belonging to I.N.T.U.C. petitioned the Government to refer the disputes to the Industrial Tribunal. The strikers belonging to the Communist-sponsored Union objected to the reference and the Government refused to accede to the request.

**November 28, 1958:** The Kerala Education Bill, which had been originally passed on September 2, 1957 and had been sent to the Government of India for the President's assent on October 4, 1957, was sent back to the Kerala Government after obtaining the opinion of the Supreme Court on May 22, 1958. The Kerala Government amended the Bill in accordance with the opinion expressed by the Supreme Court and the amended Bill was passed by the State Assembly on November 28, 1958.

**December 21, 1958:** Head Constable Shri N. Achuthan Nair (1473) attached to the Trichur Town Police Station had been trying to investigate into the report that certain Communists were engaged in the manufacture and open sale of illicit toddy. As a result, he was severely assaulted and disabled by the Chittatukara Communist Party Secretary, Comrade P. P. Joseph, P. Kumaran, Kochu Vasu and some others under their leadership at Kakasseri in Chowghat Taluq. It was reported that those persons even assaulted the Head Constable's daughters. They carried the Head Constable by force to Joseph's house and compelled him to drink toddy, poured toddy all over his body before forcing him to sign a statement. They threw a cordon around his quarters and stood guard in order to prevent him from going over to the Police Station to report the matter (*vide Kerala Mail* dated December 21, 1958).

**December 22, 1958:** Two members of the I.N.T.U.C.-led Union were admitted to hospital after receiving stab injuries in a clash between two groups of workers at the goods-shed in the Cochin Port. The two groups were said to be those of the I.N.T.U.C. and the Communists (*vide Light of Kerala* dated December 24, 1958).

**December 24, 1958:** On this night 20 workers attached to the Communist-led Port Cargo Labour Union forced open the doors of a family residence of an I.N.T.U.C. worker, Shri K. M. Ebrahim, assaulted his brother, Mahomed Mammu, and laid violent hands on the women. Luckily, Ebrahim was not present. Mammu, who was seriously injured on the head was subsequently removed to the Fort Cochin Hospital, (*vide Kerala Mail*, dated January 4, 1959).

**January 2, 1959:** Subsequently to the incident referred to above, another I.N.T.U.C. worker, Shri Anthony Easy, was also attacked by Communists. One Xavier of Mundaveli was also attacked on the night of January 2, 1959, by a number of rowdies said to be under Communist inspiration. Next morning he was picked up from the road as a dead man wounded all over and perforated with 59 stab injuries (*vide Kerala Mail*, dated January 4, 1959).

**January 4, 1959:** A Congress man died and a Communist was injured in a clash at a Congress-sponsored public meeting in Veloor near Kottayam. The meeting was organised to protest against the alleged assault on Shri E T. Kuriyan, a former Communist.

**January 1959:** The President's assent was given to the amended Kerala Education Bill passed by the State Assembly. The Bill estranged even Nairs. Shri Mannath Padmanabhan was disillusioned. He found that the Communists were exploiting the organised strength of the Nairs to further their own interests. He spearheaded a State-wide campaign against the Communist Ministry itself. He began his State-wide tours campaigning against the Communists and was accorded rousing receptions wherever he went. A summary of the Report of the Text Book Enquiry Commission and the Menon Report on the conduct of the Police at Munnar during the Plantation strike in October 1958 were published by the Communist Government.

**March 4, 1959:** The Kerala School Managers passed a resolution demanding that the Kerala Education Act be not implemented. An Action Committee was formed to carry out the struggle against the Kerala Education Act and Shri Mannath Padmanabhan was elected as leader.

**March 1959:** The Government appointed a rank Committee to the State Public Service Commission. Report of the Andhra Rice Deal Enquiry Commission was released by the Government.

**March 1959:** The Kerala Education Rules were published by the Government seeking to prohibit school teachers and students from taking part in anti-Government demonstrations. (All these developments tended to confirm the people's suspicion that the Communist Government were out to undermine the administration and exploit it for Party purposes.)

**April 5, 1959:** The Communist Government completed two years in office. Meetings and demonstrations were held to explain the achievements and programmes of the Communist Government and to mobilise the democratic forces. The Opposition Party observed this day as "the Andhra Rice Deal Corruption Day" as a protest against the Government's rejection of the Enquiry Commissioner's findings. Two meetings were held in Trivandrum on this day. The Opposition meeting demanded the resignation of the Ministry. The Communist-sponsored meeting called upon the people to take a pledge to keep the Ministry in power for its full term.

**April 9, 1959:** The Kerala School Managers' Association decided not to re-open the schools after the summer recess if the Act was not amended before then. They wanted that Section 11 of the Act should be dropped as it was in their opinion "more political than educational". The agitation thereafter assumed a new complexion. The Education Minister stated that no alarming situation would arise from the Association's decision. He further stated that the whole thing was engineered by vested interests.

**April 10, 1959:** There was an incident near Anthikkad when a mast was carried in a jeep accompanied by six cars by the Youth Congress on its way to Kandessankadavu. A group of people belonging to the Toddy Tappers' Society made an attack on the last two cars and also heavily stoned



the other cars and their occupants. The Police registered a case and took one man into custody (*vide Mathrubhoomi* dated April 17, 1959).

**April 18, 1959:** Shri M. N. Govindan Nair appealed to private school managers to reconsider their decision and desist from law breaking activities.

**April 25, 1959:** A conference was held at Ernakulam consisting of representatives of the Congress, P.S.P., and the Muslim League. A Standing Committee was constituted to formulate measures for a joint front in elections and continue agitation for democratic rights under the Communist rule. It was also decided that a mammoth petition signed by the people of the State setting out their charges against the Government should be presented to the Union President.

**April 26, 1959:** The Catholic Bishops in Kerala in a circular exhorted the Catholics to continue the agitation against the Act till the Government conceded their demands and asked their followers to oppose the implementation of the Act by all constitutional means.

**April 1959 (last week):** All non-Communist students' organisations came together in Ernakulam to plan a united agitation against the Rules framed under the Education Act. Apart from these Rules, they were restive because the Government had not cared to implement the year-old assurances given to them when they called off their agitation in regard to the Kuttanad Boat fares. Four such organisations submitted to the Government a memorandum containing 18 demands and threatened a State-wide agitation from June 15 if the Government did not concede their demands before June 12, 1959.

**April 1959 (last week):** Shri Mannath Padmanabhan announced his plan to open a new chapter from May by bringing other communities into the anti-Communist front.

**May 1 to 3, 1959:** Shri Mannath Padmanabhan convened a conference of leaders of all communities to chalk out a joint campaign programme. The conference was held at Changanacherry, the Headquarters of the Nair Service Society, and was attended by Congress, P.S.P., Muslim League, Nair and Christian leaders. 460 leaders out of 500 invited to it attended, and it was clear that thenceforward the battle against the Communist rule would be waged under the leadership of Shri Mannath Padmanabhan. An 8-man action committee was appointed and Shri Mannath Padmanabhan was elected its leader. As he characterised it the conference was truly a "symbol of communal harmony and public determination."

**May 4, 1959:** Shri M. N. Govindan Nair declared in Trivandrum that "no democratic rule in the State would be possible again if the Communist Ministry was ousted by bloodshed and unconstitutional means."

**May 10 to 13, 1959:** The Central Executive of the Communist Party of India met in New Delhi and expressed grave concern over the situation in Kerala. It charged that the forces of reaction in the State were openly preaching violence and organising provocative attacks on Ministers and members of the Communist Party and stated that such methods constituted a grave danger to peace and to communal harmony in the State.

**May 11, 1959:** The State Committee of the Communist Party passed

a resolution calling upon the people to mobilise their entire strength to isolate and defeat the new "reactionary offensive led by the Nair and Christian communalists in the service of the big landlords and other vested interests against democracy and democratic reforms in the State." All Committees and members of the Communist Party were called upon to go into action to rally the entire working "democratic" sections of the people in the State to defeat the new attack of communal and "reactionary" force.

**May 14, 1959:** The Government officially transferred the Home Portfolio from the Minister for Law, Shri V. R. Krishna Iyer, to the Finance Minister, Shri C. Achuta Menon, who had a wide reputation for being "a tough Communist".

**May 19, 1959:** Shri C. Achuta Menon said that the Communist Government would seek the help of the army to keep peace if the proposed agitation warranted it. Shri Ajoy Ghosh, the General Secretary of the Communist Party of India, also supported him saying "the agitation against the Kerala Government would be suppressed by force if necessary."

**May 22 to 24, 1959:** The Central Executive of the Communist Party in India held an emergency session in Trivandrum and decided to launch a nation-wide campaign to expose the "real" nature of the agitation.

**May 24, 1959:** Shri Ajoy Ghosh addressing the newsmen in Trivandrum characterised the proposed school closure movement as a civil disobedience movement "unparalleled in the history of India" and "unheard of in any civilised country." He asserted however, that the majority of the people were not for it.

**May 27, 1959:** The Executive Committee of the State P.S.P. called upon the party units all over the State to be fully prepared to launch a mass movement at any time. The State Committee of the Revolutionary Socialist Party also declared its support for the proposed agitation.

**May 28, 1959:** The Government issued a notification postponing the re-opening date of schools to June 15 instead of June 1. It announced, however, that the Kerala Education Rules would be effective from June 1 onwards throughout the State. Shri Mannath Padmanabhan declared that the closure movement had ceased to be a movement of school managers and that it had become the people's struggle to remove the Communist Ministry.

**May 29, 1959:** Shri Mannath Padmanabhan, Shri Sanker, K.P.C.C. President, and Shri K. P. Madhavan Nair, former General Secretary of the A.I.C.C., discussed at Kottayam the means of broadening the agitation movement to get the support of all non-Communist parties in the State.

**May 30, 1959:** A seven-member Secret Action Council was formed to direct the proposed agitation. The stage was thus set for the final act.

**June 3, 1959:** The Communist Party published a pamphlet by Shri Ajoy Ghosh, styled *Real nature of the agitation against Communist-led Government in Kerala*.

**June 4, 1959:** The air was thick with reports of mass support from all centres in the State for the agitation. There were unprecedented receptions

accorded to Shri Mannath Padmanabhan wherever he went, and all India leaders lauded the sponsors of the agitation. There were also rumours of the Government recruiting special police to deal with the agitation. Shri V. R. Krishna Iyer denied at Ootacamund that special police were assembled.

**June 5, 1959:** The Chief Minister confirmed at Trivandrum that the Government intended to recruit special police, if necessary, in any emergency that might arise from the school-closure movement. He stated that the recruitment had not started, but necessary steps were being taken for the purpose.

**June 6, 1959:** Shri R. Sanker, the K.P.C.C. President, announced that a non-violent movement would be started with a state wide *hartal* on June 12 to be observed as "Deliverance Day", the objective being "the removal of the Ministry". The Prime Minister issued a statement at Coimbatore on his way to Delhi and exhorted the parties to observe democratic conventions and practices. Shri R. Sanker explained why the Congress had decided to join the agitation.

**June 8, 1959:** The Chief Minister and the General Secretary of the Communist Party, Shri Ajoy Ghosh, expressed their reactions to the statements made by the Prime Minister and Shri R. Sanker. Shri Ajoy Ghosh administered a vague threat asking the Prime Minister what would be this reaction if in every State the Opposition parties were to frame charge sheets against the Congress Governments and began a campaign of harmonised defiance of laws with a view to paralysing the administration and bringing down the Government? The Chief Minister stated that any further visit by the Prime Minister would not help in any way to ease the tension.

**June 10, 1959:** The Prime Minister of India in the course of his Press Conference in New Delhi expressed his own views on the basic question whether a legally constituted Government should be over-thrown through unconstitutional means. He said that he would not countenance any move which involved undemocratic processes, but he discounted the charge of unconstitutional means so far as the Congress was concerned, because it was not a Party either to the unconstitutional or violent agitation or to any alliance with communal elements.

**June 11, 1959:** A joint meeting of the Congress, P.S.P. and the Muslim League leaders decided that direct action for the removal of the Government must start immediately after the State-wide *hartal* on June 12.

**June 12, 1959:** The liberation struggle commenced with a State-wide *hartal*. The K.P.C.C.'s 37-point declaration was released in Ernakulam and was read out at a public meeting. It called upon the people to take a pledge for a peaceful and uncompromising struggle for liberation if the ministry did not resign immediately.

"From June 12, things in Kerala moved towards a swift climax. Picketing of Government offices, schools and public buildings became the order of the day. Volunteers in their hundreds began courting arrest. There was no centre in Kerala where the ramifications of the agitation did not extend; there was no centre where popular enthusiasm for the agitation was lacking or where the agitators were not cheered by the public. Women of Kerala, advanced educationally

and socially, came to the fore in the agitation. Batches of women courted arrest daily." (*Vide Kerala under Communism*, page 134)

**June 13, 1959:** The Chief Minister said in a Press Conference that he had formally invited the Prime Minister to visit the State. He expressed the hope that the Prime Minister would accept his invitation. Four persons were killed and another succumbed later to injuries sustained when the Police opened fire on a crowd, estimated officially to number between 3,000 to 5,000, which picketed a police station in Ankamali. Twenty-two others were injured. The Chief Minister refused to hold an enquiry into the firing, maintaining that it was justified.

**June 14, 1959:** A set of rowdies entered the Vadakkumthala Church and assaulted the priest, a Congress sympathiser. Shri Varghese, a Congress worker, while leading a *jatha* to Pulimcunnoo, was attacked and stabbed by a Communist by name Pappachen.

**June 15, 1959:** There was firing in Pulluvila and Kochuveli, killing five persons in all and injuring many others. Picketing of Government offices continued and more arrests were made. A crowd of Communists stoned St. Joseph's School at Trivandrum from both sides and broke open the gate. Shri Karunakara Panicker, a member of the District Congress Committee and Shri Albert Vaidyan, Secretary, Congress Mandal, were attacked and Shri Panicker was stabbed.

**June 16, 1959:** Communist goondas stoned the cars in which Shri Mannath Padmanabhan, Shri Pattom Thanu Pillai, a P.S.P. leader and Dr. Pereira, Auxiliary Bishop of Trivandrum were travelling. The Governor, Dr. B. Ramakrishna Rao, issued an appeal to all concerned, especially to the organisations that were sponsoring the agitation, to see that the names of their respective organisations were not tarnished with the stigma of involvement in any acts of violence and of destruction of life and property.

**June 17, 1959:** A joint statement was issued by Shri Mannath Padmanabhan and Shri Pattom Thanu Pillai stating that the stone throwing had occurred where a gang of Communists was standing and the stones were evidently thrown by one of them. There were lathi charges at Dhanuvachapuram (Trivandrum) and Chirakkal (Malabar). More than 650 people were arrested in several districts in connection with picketing of schools and public officers. Shri Sadiq Ali, the Congress General Secretary, arrived in Trivandrum, visited Pulluvilla and Kochuveli and said that the firing appeared to have been unprovoked. The Chief Minister issued a statement in the nature of a rejoinder to Smt. Indira Gandhi, claiming that several police officials and constables had been injured by stone throwing at Ankamali. Shri Panampilly Govinda Menon issued a rejoinder to the Governor's statement.

**June 18, 1959:** Shri Dhebar arrived in Kerala on a fact-finding study. Shri K. M. Munshi issued a statement that the Centre would be failing in its duty of it failed to advise the President to apply to Kerala the emergency provisions of the Constitution.

**June 19, 1959:** Shri Dhebar visited Ankamali and said that the firing was unprovoked. Preventive arrests were made of Opposition Leaders at

Chalakudi, Pariyaram, Kodakara and other places. The Prime Minister accepted the invitation of the Chief Minister to visit the State and see things for himself and decided to spend three days in Kerala. Shri M. M. Nesan, a member of the Travancore District Congress Committee, while returning home from the Post Office, was beaten by Communists under the leadership of one Appukuttan.

**June 20, 1959:** Shri Prabhakaran Nair (Chandran), a Youth Congress worker in Chengannur, was standing in front of his house and watching a Communist *Jatha* of women. A Communist leading the *jatha* stabbed him. He was rushed to hospital but died. Shri Kuriyan, a student leader, was stabbed at Trichur by Communist *goondas* and succumbed to the injuries later. A Congressman returning in the night from a meeting at Ankamali was stabbed to death. A joint meeting of non-Communist trade unions demanded the resignation of the Communist Government. Leading lawyers of Ernakulam demanded the imposition of the President's rule in Kerala.

**June 21, 1959:** A *lathi* charge on women was resorted to in Alleppey. A pregnant woman was dealt a dangerous blow and fell unconscious. A small girl's hand was twisted until she was disabled. Several women were dragged along the road.

**June 22, 1959:** Trivandrum. A large number of women led by some of the most respectable ladies in the city came in a *jatha* to the Collectorate. The Madras Special Police (M.S.P.) made a *lathi* charge. There was a reckless firing of tear-gas shells and the fleeing crowd was chased and beaten. The Prime Minister landed at Trivandrum Airport. There were anti-Government demonstrations by thousands of men, women and children. The Prime Minister began his discussions at Raj Bhavan. Shri Ajoy Ghosh came out with the statement that the real situation was not given by the newspapers and that normalcy prevailed in Kerala. There was an effective rejoinder from Shri Dhebar who listed the organisations and institutions that jointly demanded the resignation of the Ministry. Shri J. P. Narayan in the course of a statement commented upon the Communist contention that the upsurge in Kerala was communal in character. He asked:

"If peaceful direct action is wrong in a democracy, is it right for a democratic government to try to stick to office by mass arrests and shootings when demonstrably the majority of the people want them to go? Just as the people have the alternative of election so also has the Government an alternative of resigning and proving its stand and policies by seeking re-election."

**June 23, 1959:** The Prime Minister continued his discussions at the Raj Bhavan. A more brutal scene was enacted at the Collectorate. The Collector, powerless to control the M.S.P., disappeared from the scene. A volunteer was rescued by the advocates and was taken before the Judge. A batch of volunteers arrested at Parur and taken to Vyyoor Jail in a police van was stopped and attacked by the Communists at Pudukkad. It was only after more police forces were rushed to the spot that the van could proceed. Picketing continued and more than 1500 courted arrest.

**June 24, 1959:** A.P.S.P. meeting in the Maidan, near the Thampanoor overbridge, Trivandrum, was disturbed by a Communist *jatha* going that way, who shouted abusive slogans against the P.S.P. It was followed by stone-throwing from both sides. The Police rushed to the meeting place and frightened away the people gathered there. The volunteers in the *jatha* rushed towards the platform with sticks and there was a minor clash. The police again came to the rescue of the Socialists and drove away the crowd assembled for the meeting. At Kulakada, near Pandalam, a Congressman was stabbed to death. There were *lathi* charges at Tellichery and Chengannur and cane charge in front of Trivandrum Model Girls High School for the second day in succession. K.P.C.C. approved the Congress participation in the joint struggle against the Communist Government after hearing the Prime Minister for ninety minutes.

**June 25, 1959:** The Prime Minister left for Delhi. He made the following suggestions:

- (1) Suspension of implementation of the Education Act till all points of difference were ironed out;
- (2) Sitting round a table to discuss specific charges against the Government, and
- (3) Institution of a judicial enquiry into cases of police firings.

The Chief Minister accepted the first two suggestions, but rejected the third stating that it would be considered only after the agitation was withdrawn. At Menamkulam, about eight miles from Trivandrum, students picketing a school were attacked and beaten by the Communists. There was a violent clash and many were admitted to the hospital. Communist *goondas* were let loose; there were violent street fights in different parts of the State to suppress the agitation.

**June 26, 1959:** The National Executive of the P.S.P. passed a resolution supporting the agitation and charging the Government with failure to act democratically. They expressed the opinion that the Government deliberately sought to spread terror and it was no mere accident that over a score of political murders had been already committed. The Prime Minister informed the Cabinet that the Kerala Government had lost the confidence of the majority of the people. In continuation of the clash at Menamkulam, fully armed Communists forcibly entered the property of their opponents in Kazhakuttam and Attipra and cut down and sold the coconuts in a large number of compounds. Fisherwomen were attacked near the P.W.D. workshop, Trivandrum. N. Shanmughom, an active P.S.P. worker and representative of the Dinamani at Balarampuram, was returning home at about 11 p.m. when a Communist lying in ambush pounced upon him with a dagger. The light of a coming car fell upon the spot. The ruffian ran away and Shanmughom was saved. There was a *lathi* charge at Harippad.

**June 27, 1959:** The Central Executive of the Communist Party of India rejected the Prime Minister's suggestion for elections as a way out of the impasse. It said that the question of resignation did not arise and stated that the suggestion was nothing but giving a "democratic garb to a discriminatory demand which the Opposition wanted to enforce through illicit means". The Muslim League followers joined the agitation.

**June 28, 1959:** Bharatiya Jan Sangh decided to support agitation in Kerala. Christian Bishops rejected the Chief Minister's invitation to a conference to discuss the Education Act. Shri Ashok Mehta, the P.S.P. Leader, demanded dismissal of the Communist Government and inquiry into their actions since they took over administration in Kerala.

**June 29, 1959:** A Prohibitory Order under section 144 was promulgated in Tellicherry. There was a State-wide strike by workers in response to a call made by the Joint Action Council of non-Communists protesting against the anti-labour policy pursued by the Communist Government and demanding its immediate resignation. *Lathi* charges were made in different places in the State including Chalakudi, Annamanada, Alagappanagar, Alleppey, Tellicherry, Badagara and Taliparamba. At Alleppey, Shri Jalaluddin, R.S.P. Leader, and Shri Raghavan Panicker, P.S.P. leader along with 24 others were seriously injured in a *lathi* charge. Armed Communists entered the house of Shri Vayala Idicula, M.L.A. (Ranny) in the night. The inmates got up in the meantime and they escaped.

**June 30, 1959:** K.P.C.C. leaders went to New Delhi to meet the Members of the Congress Parliamentary Board. Shri Pattom Thanu Pillai issued a statement asking the Governor to dismiss the Ministry if it was not prepared to resign. The Congress Parliamentary Board after three days' discussion, called upon the Kerala Government to face the democratic challenge of fresh elections, and implicitly authorised the K.P.C.C. to continue the agitation against the Communist regime in a peaceful and constitutional manner. Haridas, a Youth Congress worker and the representative of Deenabandhu in Kozhikode was beaten to death. Pandit Velayudhan, who opposed Shri M. N. Govindan Nair in a meeting at Mannar, was severely assaulted. There were brutal *lathi* charges at Alleppey, Shertallai, Kottarakara, Kayamkulam, Quilandy and Wadakkancheri and cane charges at Kannara and Mullaseri. The I.N.T.U.C. made a call for non-co-operation with the Communist Government.

**June 1959:** During the month of June 1959, there was considerable debate in the newspaper columns and on public platforms in regard to the ethics of "direct action". Towards the end of June, the Department of Public Relations, Kerala, published a pamphlet called *Public Opinion on the Direct Action in Kerala* containing the opinions of Shri Vinoba Bhave, Shri C. Rajagopalachari, and Shri Patanjali Sastri as well as the articles in 12 newspapers on several days, all of which were to the effect that in the situation that obtained in Kerala direct action of the type which was being undertaken by the Opposition Parties was neither justified nor constitutional.

**July 1, 1959:** Shri C. Achuta Menon, the Home Minister, issued a statement which alerted the police into a fresh field of activities. Students who picketed the schools at Peroorkada, Trivandrum were attacked by Communists. The Ankamali Panchayat resigned protesting against the Government's refusal to order a judicial enquiry into police firing. The students observed a protest day against the police excesses. Shri K. V. Inasu, a Congress worker of Chittattukara was attacked by a band of Communist *goondas*. His son was also attacked and injured. The condition of Shri Inasu was critical. (vide *Thozhilali* dated July, 1959).

**July 2, 1959:** The increased tempo of agitation brought grim, determined police retaliation, which in cases almost appeared indiscriminate, resulting in greater tension throughout the State. There were large-scale demonstrations and *lathi* charges. Government issued an order denying salaries to teachers of closed schools. Two fishermen who went to have a look at their properties in Sreekariam 6 miles from Trivandrum were cruelly beaten by Communists. Shri Vavachen, a prominent businessman in Alleppey, going in a special boat with two attendants and a boat driver, was attacked by Communists. The attendant and the boat driver jumped into the water, swam ashore and informed the police. When the police arrived the boat was adrift with Shri Vavachen lying in it half dead. Shri K. R. Narayanan, M.L.A., Secretary S.N.D.P. Yogam and his daughter who were traveling in a car were stopped on the Changanacherry-Alleppey Road and made to sign a statement against the agitation.

**July 3, 1959:** A brutal massacre took place at Cheriyaathura near Trivandrum. There was indiscriminate police firing on innocent people, which killed three persons including Flory, a pregnant woman, and mother of five children. *Lathi* charges were made at Ankamali, Pathanamthitta and Kutyadi.

**July 4, 1959:** The State Committee of the P.S.P. asked all its members to boycott the Kerala Assembly and its Committee as the first step in the non-co-operation movement against the Ministry. The Catholic Bishops of Trivandrum complained to the Governor that the Government was out to exterminate the Catholic fisherfolk living in the coastal belt. The K.P.C.C. approved the memorandum to be submitted to the President of India. The Joint Council of non-Communist Trade Unions called upon their members to resign from Government Committees. Dr. K. B. Menon and Smt. Bharathi Udayabhenu, Members of Parliament, courted arrest by picketing the Collectorates. There was mass picketing by women at Ankamali.

**July 5, 1959:** Cardinal Gracias declared the struggle in Kerala to be between freedom and oppression. Vimochana Samara Samithi announced its decision to strengthen agitation.

**July 6, 1959:** Shri Ajoy Ghosh issued a pamphlet *Forward to the Defence of Kerala and Indian Democracy* (Communist Party publication). Street fighting between Communists and non-Communists resulted in injuries to seven persons. There were *lathi* charges near Quilon, Manalur, Kottayam, Kuravilangad, Ettumanoor, Neelamangalam and other places. School picketers at Alleppey were attacked by Communist *goondas*. Five were seriously injured and admitted to hospital. Habib Rehman, a student, was beaten severely at Pathirapally, Alleppey. In a Communist attack in East Kallada about 10 miles from Quilon there was a clash between Communists and others who were returning from a scene of picketing. The latter were surrounded on both sides and they jumped into the river. Shri Gopala Pillai could not fight against the strong current and he swam back crying for mercy, but got a heavy blow on the head and sunk. His dead body was found the next day. This was followed by a reign of terror spread over a very large area, hooligans going from house to house and destroying crops and beating up everybody. Five persons were known to be injured but no police appeared on the spot until the next morning.



**July 7, 1959:** The Congress High Command scrutinised the charge sheet of the K.P.C.C. before it was presented to the President. The Prime Minister declared at his press conference that the Central Government wanted to avoid intervention in Kerala, but made it clear that if there was no other way out, it would have to intervene, and stated that there was a tremendous mass upsurge in Kerala. Fishermen were made the target of a Communist attack in places round Trivandrum. Men returning in the night from a P.S.P. meeting at Anchalumood, Perinad, Quilon were beaten by Communists lying in ambush. Bus picketers at Pallimakku, near Kundara, were beaten by Communists who rushed out of a toddy shop.

**July 8, 1959:** More Opposition Leaders including Shri K. Madhava Menon, Smt. A. V. Kuttimalu Amma, Shri P. R. Kurup and Miss Annis Joseph courted arrest. The Chief Minister left for Delhi for talks with the Central Government. The Kerala State Committee of the Communist Party expressed the view that no situation had arisen in Kerala for central intervention. A military officer closely related to Shri N. R. Pillai, I.C.S., who arrived in Trivandrum on leave was stabbed by a Communist, Kumara Pillai, President of the Trivandrum District Transport Union. Students returning after picketing Karunagapally School were beaten.

**July 9, 1959:** The K.P.C.C. Memorandum was presented to the President. The Opposition Leader Shri P. T. Chacko alleged that six persons were murdered and thirteen others wounded by the Communists during the past week in free fights in pockets where the Reds were strong. The Chief Minister arrived in New Delhi and stated that he did not think there would be central intervention as there was nothing to justify it. Seven torches in memory of the seven martyrs of Ankamali were lighted at Ankamali grave-yard by Shri Mannath Padmanabhan and the relay race with torches left for Trivandrum. The Central Cabinet again discussed the Kerala affairs. There was mass breaking of the prohibitory order at Trivandrum. There was a brutal *lathi* charge at Quilon following mass picketing by Revolutionary Socialist Party volunteers. Koshy Perumal, a Congress worker in Mallapally was killed and 13 persons including a Christian priest admitted into the hospital as a result of an attack by Communists. Forest Range Office picketers in Erumely were attacked and the Samara Samiti office raided. Picketers were attacked in Kottathala, Kottarakara. Two of them were stabbed and were admitted to hospital. Picketers were attacked in Changanacherry, and this was followed by a serious clash between the two parties. There was a protest procession, which was *lathi*-charged by the police. At Balarampuram, about 8 miles from Trivandrum, Shri Kunjukrishnan Nadar (Congress) M.L.A., Shri Kuttan Nadar, K.P.C.C. Executive Member, Shri Pallichal Kunjukrishnan, a prominent Congress worker and Shri Narayanan Thampi, Advocate, were attacked. The car in which they were riding was damaged and they received injuries.

**July 10, 1959:** The President having heard the views of both the Congress leaders and the Kerala Chief Minister, forwarded the K.P.C.C. Memorandum to the Union Home Minister along with his observations on it. He hinted at the need to avoid extreme measures for resolving the continuing Kerala crisis. The President was credited with the view that no effort be spared to bring about peacefully an amicable settlement of the

problem, thereby ensuring co-existence between opposing creeds in the State - a theme which he had strongly advocated in his 1957 Independence Day speech at Trivandrum. Fresh clashes occurred between the supporters and the opponents of the Communist Government from various parts of Kerala. Several volunteers were assaulted and some were stabbed. At Viziyampalam, Alleppey, the car in which Smt. Nafeesath Bibi was travelling was attacked and the glass broken. Shri P. J. Sebastian, Congress Leader, Changanacherry, was attacked while returning home. A person accompanying him tried to protect him and received injuries. The police arrived on the spot and the ruffian ran away. In Vadackanacherry, a Communist who tried to attack Kochalu, a Congressman, with a dagger, was caught by the local people and handed over to the police. Some Bombay advocates addressed a petition to the President asking him to enjoin the Members of the Union Cabinet loyally to discharge their duty towards the Government of the Kerala State under Article 355 of the Constitution. He was asked to declare unequivocally that so long as the Council of Ministers continued to enjoy the confidence of the Legislature, it should have all the normal rights of a Government under the Constitution and that neither the Governor nor the President should intervene except in aid of its lawful authority.

**July 11, 1959:** A copy of the K.P.C.C. Memorandum to the President was submitted to the Kerala Governor. More than 1,000 courted arrests in mass picketing at Ankamali. The Kerala Catholic Congress informed the President of the serious situation prevailing in Kerala. Picketing and arrest continued throughout the State as usual. In Kidangoor, Peeli, a Congress worker who was returning from a meeting was stabbed by a man in ambush. He narrowly escaped death, as others rushed to the spot. A Communist *jatha* organised in connection with a meeting at Chennirkara, Pathanamthitta, raided the shops and houses at Muttathukonam.

**July 12, 1959:** The Prime Minister, who was at Simla, for a brief holiday, invited the Kerala Chief Minister for further discussions. The Chief Minister on his return to Delhi indicated that his party might consider the holding of mid-term elections if the agitation was withdrawn and the threat of central intervention ended. In an interview at Madras, he said the agitators could not maintain their stand for long and sooner or later the agitation leaders would have to initiate talks. Shri K. M. Munshi declared that a deliberate attempt was being made by the Communist Government in Kerala to undermine democracy and subvert the Constitution. Kerala Day was observed by Jan Sangh all over India. The office room of Model Girls High School, Trichur, was set on fire by the Communists. A Women's *jatha* was stoned at Edakulam near Irinjalakuda.

**July 13, 1959:** Four Jeeva Sikhas (torchbearers) in memory of four student martyrs arrived in Trivandrum and demonstrated before the Governor. More Opposition Members of the Kerala Assembly courted arrest. There was a *lathi* charge in front of the Trichur Collectorate and another in front of Tellicherry Taluk Office. 1,127 persons courted arrest at Kandassankadavoo. Two torches in memory of Martyrs of Pulluvila left for Trivandrum. Women were *lathi*-charged at Mathilakam. 1,000 were arrested at Ankamali. Shri C. P. Ankappan Chithirapalla and three others were attacked and admitted to hospital with stab wounds. Shri Shreedharan, a merchant and Congress-

man at Thankikkavala, Shertallai, was attacked by Communists when returning home from his shop at night. He was admitted to hospital with cuts. Shri Sukumara Kurup, R.S.P. worker, Paripally, was beaten and Shri Khadar and Shri Razak were stabbed by Communists. The latter was admitted to hospital. The procession taking the Jeevasikhas was stoned at Mavelikara. The *Note on the Situation in Kerala* by Shri K. M. Munshi was published this day.

**July 14, 1959:** About 100,000 people demonstrated in Trivandrum demanding the dismissal of the Government. The Opposition leaders jointly asked the Governor in a memorandum to conduct fresh elections and hold an impartial inquiry into the police firing. More than 1,000 women squatted all day long before the Trichur Collectorate and paralysed all work. The R.S.P. declared that it would continue to participate in the mass movement against the Communists. Shri V. R. Krishna Iyer said in Madras that Article 356 of the Constitution could be enforced only when there was a political deadlock and that in fact the situation in the State was fairly normal except for sporadic acts of political *goondas*. The Kuttanad Karshak Sangham announced their decision not to cultivate the lands until the Communist Government was ousted from office. Shri Narayana Kurup Kamukumcherry, Punalur, who was released from jail after undergoing imprisonment in the liberation struggle was attacked and admitted in the Quilon Hospital with eight serious injuries. Shri Tridib Kumar Chaudhury, M.P., who came to Trivandrum to attend the meeting of the Central Committee of the R.S.P. was put up at the Sathram near the Railway Station. At about 11:30 at night, stones were thrown against the room which he was occupying and some Communists led by a State Transport driver and armed with knives attempted an attack on the R.S.P. workers who were there. The pamphlet *As Law Sees It: Legal Opinion on the State of Affairs in Kerala* was issued by the Voice of Kerala, Ernakulam. Another pamphlet *Indian Constitution and the Central Intervention* was issued by the Communist Party.

**July 15, 1959:** Fifteen Jeeva Sikhas representing the 15 martyrs who laid down their lives during the struggle at the four police firings (Ankamali, Pulluvila, Kochuveli and Cheriyaathura) were taken to the Governor of Kerala at Raj Bhavan by a procession led by Shri Mannath Padmanabhan and other leaders. A memorandum was submitted to the Governor. The National Council of the Communist Party of India announced their decision rejecting the demand for mid-term elections in Kerala. It was stated that "the vigilance of democratic public opinion will finally end all hopes of central intervention in Kerala". Picketing of Government offices and schools was further strengthened.

There were more *lathi* charges and new sub-jails were opened. More M.L.A.'s courted arrest. Members of the Communist-controlled Students' Federation attacked the students who picketed Kottappram High School. Seven received injuries. Girl students who picketed the Sitaram School, Alathur, were assaulted by boy members of the Students' Federation.

**July 16, 1959:** Shri Mannath Padmanabhan declared at Bombay that a stage had been reached when the removal of the Communist Government in Kerala had become inevitable. Shri Vasudevan Nair, a volunteer, was

beaten by Communists in Amayida and admitted in the Ampalapuza hospital. Lawyers courted arrest at Irinjalakuda. There was a Police *lathi* charge at Ollur. Private cars K.L.Q. 1612, 1808, 3119 and 3121, were stoned in Chengannoor. Three occupants were treated in the hospital.

**July 17, 1959:** A Lawyers' Memorandum requesting immediate central intervention in Kerala was submitted to the President. Shri Mannath Padmanabhan arrived in New Delhi to meet the Central Government leaders and to apprise them of the situation in Kerala. The National Council of the Communist Party which met at Trivandrum characterised as "unnecessary" the demand put forward by the Congress High Command for holding fresh elections in Kerala. Shri Pattom Thanu Pillai also arrived in Delhi. Shri Krishnan Nair, I.N.T.U.C. worker, was beaten by A.I.T.U.C. workers in Nedumangad.

**July 18, 1959:** Shri Mannath Padmanabhan and Shri Pattom Thanu Pillai interviewed the President and forcefully renewed their plea for central intervention. They also met the leaders of the Union Government. They pointed out that there was no question of their agreeing to elections under a Communist caretaker Government or to entering into talks with the Reds. There was continuous picketing of the Collectorate at Kozhikode and brutal *lathi* charges were made in front of the Collectorate. Prosecutions were launched by the Government against five Malayalam Dailies and some political leaders including Shri Mannath Padmanabhan, Shri Panampilly Govinda Menon and Shri Baby John. Fifteen women were arrested at Ernakulam. At Pariseerimathumooku, near Chengannoor, a set of Communists attacked the houses and shops, beat people and smashed everything. A boy on a bicycle was hit on the head. Three people were admitted to hospital and the ruffians then marched from there in a procession. Shri Narayanan Asari, Pathiyur, Mavelikara, was stabbed to death. *A Note on the Kerala Situation* was submitted by Shri G. B. Pai to the Indian Commission of Jurists.

**July 19, 1959:** There was a prolonged and close examination of the situation in Kerala at the highest Government level in New Delhi. The President had a long meeting with the Union Home Minister. There were talks between the Prime Minister and the Home Minister and a conference was held between the Prime Minister, the Home Minister and the Defence Minister. Addressing a public meeting at New Delhi, Shri Mannath Padmanabhan declared that the Communists have proved that they have no faith in democracy. The Kerala Chief Minister in an interview in Trivandrum said that a way out of the situation in Kerala could be found if the Prime Minister and other All-India leaders of the Congress Party and the Central Government used their good offices to make the Opposition adopt the method of mutual discussion. He added:

"After all our country has a constitution which lays down certain obligations on the Centre as well as on the States. The Centre has also an obligation to come to the assistance of the States if the States' internal police force are inadequate to meet a particular situation created by some rash and adventurous people who are out to create trouble."

The National Committee of the Socialist Party demanded general elections in Kerala. The Trivandrum Archbishop's car was attacked by Communists. Shri Janardhanan, a tailor and P.S.P. worker, Trivandrum, was attacked and stabbed at night when returning home from his shop.

**July 20, 1959:** The K.P.C.C. Memorandum presented to the President was released to the press. Charges of subverting democracy, denying the people their fundamental rights, interfering with the judiciary and deliberately upsetting law and order were made in the memorandum. It stated that systematic and ruthless measures were being taken by the Government to fashion an effective dictatorship of the Communist Party by subordinating the administrative machinery to the party organisation at all levels. This had resulted in a complete loss of faith on the part of the people in the present Kerala Government. In Trivandrum, slogan-shouting volunteers invaded the Trivandrum Collectorate and hoisted the P.S.P. flag on the building. There was an unprecedented mass demonstration paralysing work for a while. In Ernakulam, more than 800 persons were arrested in different centres for picketing. About 2,000 women foiled in their attempt to enter the Taluk office at Irinjalakuda, squatted in front of the office for over five hours paralysing the normal work of the office. Shri T. A. Dharmaraja Ayyar, Trichur Municipal Chairman, and Members of the Municipal Council courted arrest. Journalists courted arrest at Cannanore. There were *lathi* charges at Trichur and Narakkal. There were Communist atrocities at Kuttikat, Kuttichira and other areas.

**July 21, 1959:** Shri Mannath Padmanabhan declared at Madras that central intervention in Kerala was a foregone conclusion. Shri R. Sankar said at Trivandrum that the end of Communist rule was drawing near. Smt. Indira Gandhi summoned an urgent meeting of the Congress M.P.s for August 1 to discuss the High Command's stand on Kerala. The Prime Minister cancelled his proposed visit to Mysore from July 26 to July 28 in order to be available for consultations on the Kerala situation. Communists and non-Communists resumed open combat armed with weapons in the disturbed Kallada region of Quilon District. A dozen people were injured and additional police reinforcements were rushed. The Kerala Government filed cases against the K.P.C.C. President Shri R. Sankar and a former Congress Minister Shri A. A. Rahim under Public Safety Measures Act for alleged prejudicial activities. There was mass picketing of Government offices in Trichur District in response to the call made by the District Vimochana Samara Samiti. There were a *lathi* charge at Anthikad and cane charges at Ollur and Pavaratty took place. Shri B. Willingdon, General Secretary of the Anti-Communist Front, was arrested. Shri Ajoy Ghosh uttered a threat to start an all out struggle if elections were held in Kerala and the Communist Party was defeated. On account of the repeated attacks made by Communists, 20 fishermen's families left their homes near Vaikom and fled to another locality. Communists armed with big knives and heavy cudgels attacked students who picketed the school at Nangiyarkulangara, Haripad. A ferocious scene was enacted there. Shri Charalayil Kunjappu, an I.N.T.U.C. worker and active participant in the agitation in Poovarani near Palai, while returning from a meeting was attacked by a set of Communists who came in a car. He was first beaten down with stones and then stabbed to death.

**July 22, 1959:** Shri Mannath Padmanabhan declared that he was making a call to paralyse the entire Kerala administration at all levels. Fr. Vadakkan warned Government that it was better to put an end to the oppressive tactics of the police and thus avoid the situation getting out of control. Shri K. M. Munshi visited the President and explained the situation in Kerala. The M.S.P. made a brutal *lathi* charge on a crowd of women and children squatting on the road in front of the Trivandrum Collectorate, injuring several of them. After the *lathi* charge, the police hurled tear-gas shells at a fleeing crowd of men and women who had come to watch the demonstration. There were cane charges at Ollur, Thaikathisseri and other places. At Vengamon near Mundakkayam, Shri Mahomed Ali, the representative of Malaya Manorama and Kerala Bhooshanam was beaten. A memorandum to the President of India by the All-India Kerala Catholic Congress was presented this day.

**July 23, 1959:** The police fired in the air at Ollur after resorting to tear gas firing and *lathi* charges. The Ollur Church roofing was hit by bullets and tear gas shells and was damaged. The R.S.P. Volunteers were brutally *lathi*-charged at Trivandrum and tear gas shells were fired to disperse the crowd after *lathi* charges proved ineffective. The Rt. Rev. Dr. George Alapatt, Bishop of Trichur, sent telegrams to the President and Home Minister protesting against the firing on Ollur Church. The M.S.P. made another fierce *lathi* charge on a crowd in front of the Collectorate in Trivandrum and left many of the victims bleeding profusely in the street. Litigants in Courts and lawyers were not spared. The police entered courts and lawyers' chambers and struck lawyers with *lathis*. Shri Kulathumkal Pothan's car was stoned in front of the Communist Party Office at Patturmukku, Trivandrum. Glasses were broken. A stone hit his child aged about eight, but the blow was not dangerous. There was serious street fight in Vechoor near Vaikom. The Prime Minister conferred with the Home Minister on the situation in Kerala. The Quilon Bar Association passed a resolution on the situation in Kerala and asked for the central intervention and the holding of fresh elections on a clean electoral list under impartial aegis.

**July 24, 1959:** Smt. Sucheta Kripalani, Congress General Secretary, declared at Trivandrum that there was sufficient ground for central intervention in Kerala. The Government announced that it had ordered the withdrawal of recognition to such of those primary schools as remained closed without satisfactory cause. The police fired two rounds at Thittamel junction near Chengannur. Section 144 was later imposed in the area. Communists broke into Congress office at Punalur and beat some students who were in it. Shri Purushottaman Vaidyan, of Arappara, near Vidura, was attacked with knives and killed at the very gate of his house. Shri Attoorazhrikath in Kallada was harvesting paddy in his field. A band of Communists armed with lethal weapons entered the field, frightened and drove away the owner and his labourers and carried away the paddy already reaped. There was a serious street fight in Chummanaskara near Vaikom. A house was attacked and a church was threatened. There was also police firing at Changanassery though there were no casualties.

**July 25, 1959:** Smt. Indira Gandhi, the Congress President, declared

after meeting the President of India that the Centre should have intervened in Kerala much earlier. The President later drove to the Home Minister's residence to ascertain his views on Kerala. The Kerala Chief Minister said that this Government was entitled to the same protection as was given to other State Governments against miscreants and instigators of violence and disorder. Volunteers who went to picket Cherianad School (Mavelikara) were admitted to hospital. Shri A. P. Nanoo, a P.S.P. worker, Tellicherry, brother of Shri Sankaranarayanan Thampi, the Speaker. They came in a car belonging to the Chengannoor Tappers' Co-operative Society. Three persons were admitted to hospital. Shri A. P. Nanoo, a P.S.P. worker, Tellicherry was attacked and admitted to hospital with serious wounds. A women's *jatha* that went to picket the village office at Parur, was stoned and twenty of them were injured. It appeared that by this time the Centre had made up its mind to intervene and the only question left to be decided was the form of the intervention should take.

**July 26, 1959:** Smt. Indira Gandhi again met the President on the basis of the Report received from Smt. Sucheta Kripalani after her tour of Kerala. Shri Vallyath Kizhakkethil Mathew Varghese and a blacksmith by name Shri Bhaskaran, were attacked by Communists near Kottayam and were admitted to hospital with serious wounds. The anniversary of the Varadarapilly killings and the Chandanathope police firing was observed.

**July 27, 1959:** There was police firing again at Changanassery against students who picketed transport buses. Two students were injured. Families of victims of police firings announced their decision to reject the Communist Government's offer of Rs. 3,000- as compensation. There was another brutal *lathi* charge at Ernakulam. Shri Variath Kutty, a Congress worker from Ernakulam was stabbed in front of a school which was being picketed. Students who picketed the Settlement Primary School near Alwaye were forcibly dragged away. Shri Kurumpumpurath Bhaskara Pillai and Shri Markotha were beaten. In the belief that the picketers who ran from the spot had taken refuge in the house of Shri Andrews, President, Congress Mandal, his gate was smashed and glass windows broken. Shri Bava, Congress M.L.A., who heard of these incidents hastened to the spot in a car, but was stopped near the U.C. College and his life was threatened. Shri Bava took refuge in a shop. The shop was surrounded by the crowd. The shop owner, however, saved Shri Bava. Even though a police jeep was lying on one side of the road when all this was taking place, the police did not even get out of the jeep or in any way interfere. The Bar Association of Palghat also passed a resolution on the Kerala situation.

**July 28, 1959:** The Prime Minister denied the Kerala Chief Minister's allegations that the Central Government had denied protection to the Kerala Government. The Communist Government decided to postpone the floating of Rs. 40,000.000 loan after being convinced that it would prove an utter failure. Shri Ajoy Ghosh met the Prime Minister and told the newsmen, "It is all over." The Centre had decided to intervene. Shri Ajoy Ghosh put through a series of telephone calls to Trivandrum to discuss the position with party leaders. Shri M. N. Govindan Nair was urgently summoned to Delhi for discussions. The Kerala Chief Minister started the discussions with his colleagues in Trivandrum. The Communists stoned a *jatha* in

Pukad. After the procession was over, some members of the *jatha* returned to the spot to retaliate. A serious fight took place and several were wounded on both sides. The Kerala Advocates' Association also passed a resolution on the situation in Kerala.

**July 29, 1959:** The Central Cabinet discussed the Kerala affairs for more than two hours. Reports from New Delhi indicated that the central intervention in Kerala was imminent within one or two days. The Centre was waiting only for the Governor's Report, and the Report when it came clinched the issue. It emphasised that law and order had broken down. Picketing and arrests continued on a mass scale. Stones and soda bottles were thrown at the Congress office, Trichur. Street fights occurred at different places in the town and three persons were admitted to hospital. At another place a women's *jatha* was stoned by the Communists and this led to a fight between the stone throwers and the men accompanying the *jatha*. Many persons were injured. Shri Thayyil George, a merchant in Changanacherry, was stabbed while going to take part in a demonstration. Shri K. K. Kuttan, Congress worker, Erumeli, and some others were stoned by Communists lying in ambush. Shri Kuttan was admitted to hospital. Members of the I.N.T.U.C. returning from a demonstration in Mundakayam, were attacked by the Communists. Four persons were admitted to hospital.

**July 30, 1959:** A new enthusiasm and awakening took place throughout the State following reports that the last moments of the Communist Government were drawing near. Communist violence broke out in different places. In a street fight (in continuation of the fight of the previous day) in Trichur, many were injured and four admitted to hospital.

**July 31, 1959:** Kerala Bhooshanam office, Kottayam was stoned by a Communist *jatha* headed by Shri Bhaskaran Nair, Communist M.L.A.

**July 31, 1959: 6 p.m.** The President signed the Proclamation dissolving the State Legislature and dismissing the Ministry. The Governor took over the administration with Shri V. Shankar, I.C.S., Director-General of Posts and Telegraphs as Chief Adviser. Rejoicing took place throughout the State at the successful completion of the liberation struggle.

**August 1, 1959:** All forms of agitation and the liberation fight were withdrawn and the leaders made a call to the people to prepare for the next stage of the struggle - the elections.

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It may be noted that the above enumeration of the various offences against the persons and properties of the non-Communist citizens is not exhaustive but illustrative. There were many more offences of that nature committed during the Communist regime in Kerala.

The following is the Communist record during the liberation struggle:

- |   |         |
|---|---------|
| (1) Total number of arrests (including nearly 40,000 women) | 149,341 |
| (2) Number of political murders                             | 12      |
| (3) Number of police firings                                | 7       |
| (4) Number of <i>lathi</i> charges                          | 245     |
| (5) Number of persons killed in police firings              | 15      |



|   |       |
|---|-------|
| (6) Number of persons seriously injured               | 332   |
| (7) Number of persons who received minor injuries     | 1,273 |
| (8) Attempts at murder, street fights, dacoities etc. | 189   |

It is stated that on the other hand not a single supporter of the Government and not a single policeman died or even sustained serious injuries during this struggle.

Seven firings took place at Ankamali, Vettukadu, Pulluvila, Cheriathurai, Ollur, Chengannoor and Changanacherry. At Ollur the police is reported to have fired in the air. At Chengannoor they aimed at the crowd and there were no casualties. In Changanacherry two students were wounded and removed to hospital. On the whole, fifteen persons died and 53 were hospitalised. All those who visited Ankamali, Vettukad, Pulluvila and Cheriathurai and made on the spot study of incidents were unanimous that the firings were utterly unjustified. At Ankamali the Government's case is that the crowd attacked the Police Station. As a matter of fact they were shot down at a distance of not less than 150 yards from the Station. At Vettukad the provocation is said to have been the picketing of a school. The very geography of the locality would refute the explanation. For the picketing was at 10 a.m. in the school at Madhavapuram and the firing was at 3 p.m. against the crowd in front of the Church School at Vettukad. In the case of Cheriathurai, the simple fact that one of the victims was a pregnant woman, who was waiting on the sea shore with food for her husband, was enough to convince anybody that the firing was unprovoked and deliberate. (vide *Red Repression in Kerala-Fifty Day's Diary* by the Publicity Department of the Kerala Pradesh Congress Committee, Trivandrum).

The above narration without anything more is sufficient to establish that the Kerala Government was, if nothing else, guilty of subversion of law and order in the State. The tempo of violence which started almost after the assumption of power by the Communists, gathered strength from day to day and increased beyond measure after the civil war speech made by the Chief Minister on June 1, 1958. The various sins of omission and commission perpetrated by the Communist Government and persons belonging to the Communist Party thereafter so infuriated the Opposition Parties that they petitioned the Kerala Government and also the Centre to come to their protection. The State Government, of course, would not intervene and the Centre was also reluctant to enter the lists, particularly because it did not want to give umbrage to the Communist Party who were in power and for good or for bad stuck to its thesis of peaceful co-existence and non-intervention. The non-Communist population of the State were thus driven to desperation and resorted to the only course which was open to them, viz. agitation for the overthrow of the Communist Government. The Press Statement issued by Shri Dhebar on June 22, 1959 (supplemented by further information available in *Kerala Under Communism* at page 151) shows that the following organizations, institutions, elements and forces in Kerala demanded the resignation of the Communist Ministry:

**Political:** The Kerala Congress, the Praja Socialists, Revolutionary Socialists. Socialists (Lohia), the Muslim Leaguers as also Jan Sangh apart from the Vimochan Dal.

**Working Class:** I.N.T.U.C., U.T.U.C., Hindustan *Mazdoor Sabha* and other non-Communist Independent Labour Unions like the Cochin Thuramukha Thozhilali Union (All Trade Unions except those controlled by the A.I.T.U.C.).

**Local Self-Government Institutions:** Municipalities at Tellicherry, Kozhikode, Palghat, Trichur, Ernakulam, Kottayam, Quilon, Neyyatturkara etc. (25 Municipalities) passed resolutions demanding resignation of the Ministry.

**Panchayats:** There were a total number of 894 Panchayats in the Travancore-Cochin area. Many of them (nearly 700 out of 894) passed resolutions demanding the resignation of the Ministry.

**Bar Associations:** The Kerala Advocates' Association (representing advocates throughout Kerala) and the Bar Associations of Tellicherry, Calicut, Palghat, Alleppey, etc. (all the 30 Bar Associations), passed resolutions demanding the resignation of the Ministry. 99 lawyers at Trivandrum and 61 in Quilon issued statements demanding such resignation and several Bar Associations also passed resolutions calling for the observance of *hartal* on June 20, 1959.

**Newspapers:** There were 32 daily newspaper in Kerala. Of these, 27 demanded the resignation of the Government. Out of the remaining 5, 4 were run by the Communist Party directly.

**All Students' Organizations** except the Communist controlled Students' Federation and **All Teachers' Organizations** except the Communist Controlled Kerala Primary Teachers' Federation also demanded the dismissal of the Communist Ministry.

The above narration is quite sufficient to convince any observer that there was a mass upsurge against the Communist Government in Kerala and that the Communist Ministry had forfeited the confidence of the people, except of course of those belonging to their own persuasion.

The gruesome tale which is told by the various murders, assaults and criminal offences perpetrated by the Communists during their regime would be sufficient without anything more to establish the subversion of law and order during their regime.

## V. BREACH OF THE RULE OF LAW

The best exposition of the Rule of Law and its corollaries is contained in Dicey's 'Law of the Constitution' (9th Edn. at pp. 202—203):

"That 'rule of law' . . . , which forms a fundamental principle of the constitution, has three meanings, or may be regarded from these different points of view. It means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government . . . It

means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts . . ."

Cognate provisions embodying the rule of law are enacted in Part III of our Constitution also under the heading 'Fundamental Rights,' particularly Articles 14, 19 and 21.

### POLICE POLICY

The Communist Government came into power on April 5, 1957. Within a few weeks, charges were openly made against the Communist Government that "due to the policy deliberately pursued by the Government, the police had been thoroughly demoralised, and, in consequence, a state of anarchy has set in." The Chief Minister made that the occasion for a Press Conference at Trivandrum on July 23, 1957 on the Role of the Police in the Maintenance of Law and Order. In the course of the statement, the Chief Minister enunciated the Police Policy as under:

(1) After Independence and before the Communist Party came into power in Kerala, the police were used "against what are popularly known as left political parties in general, and, particularly, against the Communist Party and its friends."

(2) "It has been the practice of previous Governments that, at the slightest sign of workers and peasants, unrest leading to demonstrations, strikes, *hartals* or *satyagraha*, the police was rushed to help the employers, landlords, etc., to suppress the movements, prohibitory orders were issued and security proceedings launched and *lathi* charges and firings ordered, and such use of police force had come to be considered as part of the rule of law."

(3) "The Government, therefore, repudiate the charge made against them that their policy of not giving capitalists and landlords the assistance and protection, which they have so far been getting in the matter of suppressing the working class' and peasants' struggles, is a violation of the rule of law. They, on the other hand, hold the view that such use of the police in favour of the owning classes is a violation of the fundamental rights of the toiling classes, the right of collective bargaining accompanied by the right to resort to strikes or other forms of peaceful direct action." While the statement preceeded that "direct action should not do violence either to the person or property of the individuals and families of the owning classes," it also asserted emphatically; "What is guaranteed is not the right of the employer to recruit blacklegs during times of strikes, nor his right to take blacklegs in and out in order to work a unit, from which the majority of the workers have withdrawn their labour, but the right of the individual employer and his staff members to carry on their personal and family life. The employers cannot expect police help in working a factory or plantation or other institution against the declared will of the workers who have resorted to collective bargaining and to strike and other forms of direct action."

(4) "Resort to such repressive measures as sections 107, 144, etc., will not be made in order to suppress a movement of any section of the people; the right of organisation, of collective bargaining and of direct action will be guaranteed to all sections of the people". Here also a proviso was added: "But no direct action will be allowed to go beyond the limits of peaceful action laid down above. The person and property of every individual and family will be protected."

(5) With regard to the charge that units of the Communist Party in several places are taking into their own hands the functions of the State, the Government had found, on enquiry, to be true an instance of the issue of summons by the cell of the Communist Party at Chathanthara to certain witnesses to attend an enquiry of a local dispute, and the Collector on inquiry had reported that a certain amount of coercion appeared to have been used in the case. While the Government stated that they were issuing instructions to all Collectors, asking them to take the necessary action against those who use coercion in the name of settling local disputes, it was made clear that "the local units of any political party or any other organisation or even individuals are entitled to use their good offices in bringing together the parties concerned and get any local dispute peacefully settled; such mediation and arbitration by any organisation or individual should, as a matter of fact, be encouraged, since, according to the celebrated dictum, "That Government is best which rules the least".

(6) The policy of not giving capitalists and landlords the assistance and protection which they have so far been getting is not a violation of the Rule of Law. On the contrary, the use of the police in favour of the owning classes is a violation of the fundamental rights of the toiling classes." \*

The above announcement furnishes the key to the situation that developed in Kerala in the course of the Communist regime. Members of the Communist party from one end of Kerala to the other respected no right to life, limb or property of those who did not belong to the Communist Party. The innumerable instances, of which evidence was given to us, revealed a system, following the same pattern which must necessarily have emanated from Communist leadership. Communist desperadoes would band in numbers, trespass on private property, pluck coconuts from the trees or harvest paddy crops by force. In pursuance of the avowed police policy, information laid at the police station absolutely proved useless. No policeman came to help, and the offence of criminal trespass was committed throughout the State without any redress. These wanton outrages came within the category of 'Peasants' Movements'. Nor did such high handed illegalities respect even the civil Court's decrees or orders. We have had instances, where the decree of the civil Court for possession in favour of a particular party was flouted deliberately and possession re-taken by force. It would be no exaggeration to say that the writs of the Communist Party overrode the writs of the Courts established by law. In plantations, the situation was worse. As a result of the direct incitement by the police policy of the new Government, Communist unions of workers picketed not merely

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\* See the speech of the Chief Minister at pp. 208-212 below.

offices of the management, but also the residential houses of the officers, literally laid siege to them, and prohibited the entry of all supplies and help and the exit of all the inmates including women and children. All communications from outside were cut off. Here again, appeals to the police evoked no response and the harrowing tales of men and women who were the victims of such lawlessness make gruesome reading. In some cases, ministers of the new Government who were present in or near the vicinity were appraised of the sorrowful plight of the families who were thus forcibly confined to their houses, but no help was given. The assurance given in the police policy that direct action should not do violence either to the person or the property of the individuals and families of the owning classes, was intended apparently as an attempt to give a colour of justice to the directions. Subsequent events make it clear that it was never intended to adhere this part of the police policy, nor do we find that it was ever observed. If a Communist Union made any demand on the employer, however unreasonable it be, the employer was absolutely helpless. He could not recruit new men, since he had to observe the ban on blacklegs; nor could he move his goods, manufactured or in the process of manufacture, however large or irreparable the losses might be. The Communist workers might indulge in committing deliberate, wanton, criminal trespass in the premises of the factories of the employers, offences cognisable under the law, or lay siege to their houses or offices, wrongfully confining the officers and their wives for days together. Instances have come to our notice, where a woman worker who would not join a strike was stripped naked and belaboured in the presence of police officers and her husband, and other equally violent acts committed in the immediate presence of police. In all such cases, the police invariably turned a blind eye. They followed the lead on police policy declared by the Chief Minister of Kerala.

The new police policy proclaimed by the Chief Minister rested on the assumption that all police action was conformable to the will of the Ministry. Nothing could be more obnoxious to law. Under the Constitution, the Ministers, of course, carry on the government of the State. But, such government has to be carried on only according to law. The duties of the police are regulated by the relevant statutes - mainly, by the Indian Penal Code, the Criminal Procedure Code and the Police Acts obtaining in each State. Neither the Chief Minister of Kerala nor any one else could change the provisions of these laws by a unilateral declaration of police policy. Of course, it was open to the Communist Ministry to initiate legislation, if a change in the existing laws was thought necessary or desirable. But, so long as such laws obtained, the laws had to be enforced, and the relevant provisions of these Acts were not susceptible to alteration by a mere fiat or ukase of a Chief Minister.

The criminal administration is founded on law, and has to be carried on only in accordance with the provisions of the law. A police officer is empowered to arrest, without even a warrant, any person against whom a reasonable suspicion exists of having been concerned in a cognisable crime like criminal trespass, or arrest a person who commits any offence in his presence. If an officer in charge of a police station has reason to suspect the commission of an offence, which he is empowered under law to investigate from information received or otherwise, he is normally under a duty to send a report to a Magistrate and proceed immediately in person or

depute a subordinate officer to proceed and investigate into the matter. After investigation, the law enjoins him to send up a report to the Magistrate and prosecute the offender when evidence is found to be sufficient. These duties are laid on the police officer by law, and, if he, knowingly, disobeys the law and fails to discharge the duties imposed upon him, he is punishable both under Section 166 I.P.C., and also under Sections 33 (1) and (6) of the Travancore-Cochin Police Act, 1951. In the discharge of those duties laid on him by law, neither the policeman nor his minister has any choice of action. Any police officer who is guilty of either a breach or even neglect of any provision of law, which it is his duty, as such police officer, to observe or to obey, is punishable under the law. There are further stringent provisions under the Indian Penal Code, which render punishable a police officer as a public servant making an incorrect document or of an intentional omission to give information; and if a police officer who is legally bound to apprehend any person omits to apprehend him, he is also guilty of an offence under the Indian Penal Code. Even a private citizen, who is aware of the commission of, or of the intention of any other person to commit any offence specified therein, including the formation of an unlawful assembly or of rioting, shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer, of such commission or intention. Village Headmen and owners of occupiers of land are also under a similar legal duty to give such information of the commission, actual or intended, of any non-bailable offence, including the offences of unlawful assembly and rioting, or of any matter likely to affect the maintenance of order.

Indeed, it is difficult to understand how any State Government in India could seek to amend or repeal the provisions of a legislative enactment by a declaration of policy. It must be emphasised that the police are not the servants of the State Government in the sense that the Government can order the method and the manner of the performance of the various acts committed to the police by law; and when the requisite conditions in the specified provisions of the law are present, the police are under a statutory duty to function in accordance with the mandate of the Legislature; and it would be a gross violation of the statute for the State Government to alter the code of conduct contrary to the provision of the law. The moment an offence is committed or intended to be committed, the law takes its own course; and it is not open either to the police officer or the Chief Minister to change the course of law, much less to prohibit the policeman from doing his legal duty in accordance with the provisions of the various Acts. The statement of the Police Policy was a mere cloak to veil the real designs of the Communist Ministry, and we have only to mention that, when police protection was denied in situations where it was bound to be given as a result of the Police Policy, the High Court of Kerala did not hesitate to step in; and, in cases where its jurisdiction was invoked under Article 226, *mandamus* was issued against the State Government compelling the grant of police protection of the aggrieved party, when the law officers of the State were either reluctant or unable to give any undertaking to that effect.

Even as regards Section 107 and Section 144 of the Criminal Procedure Code, the position was no different. Section 107 provides:

"Whenever a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate, or Magistrate of the First Class is informed that any person is likely to commit a breach of the peace, or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity, the Magistrate (if in his opinion there is sufficient ground for proceeding) may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond..."

The Criminal Procedure Code has conferred this power not on the Government, but on the Magistrate concerned, and the preliminary requisite for enforcement of the section is the opinion of the Magistrate, namely the opinion of the authority designated in this particular provision of law and not the opinion of the Government. Equally in section 144, power, again, is vested in the District Magistrate, Chief Presidency Magistrate, Sub-Divisional Magistrate, or any other Magistrate specially empowered to act under the section. Here again, the section provides as a necessary condition precedent for the operation of the section the formation of the subjective opinion of the designated Magistrate. As far as the State Government is concerned, any direction to the Magistrate by the State Government to initiate action under Section 107 or 144 would be totally illegal and without jurisdiction; and so too, would it be for a State Government to say that sections 107 and 144 will not be utilised to suppress the right of organisation, collective bargaining or direct action; for, if the condition precedent postulated in the sections exists, it is not for the State Government to tie the hands of the Magistrate and prohibit him from taking the necessary action. The State Government, in making this particular statement, has virtually abrogated sections 107 and 144 Criminal Procedure Code, which was entirely for the State Legislature to do after enacting the required legislation and reserving the same for Presidential assent. The State Government can exercise only executive functions, and the Executive cannot interfere with the courts of law, or render nugatory the provisions of the law. In incorporating the directions in the police policy, the Ministry embarked on a course of action without even the semblance of legal authority or jurisdiction. The State Government or the Executive could not usurp the functions of the Legislature and amend or repeal the laws that had been duly enacted, by unilateral executive fiat.

The Chief Minister of Kerala does not appear to have realised that the machinery of the Government and the powers and duties which belong to its several parts including the police are defined by the law, and its working could be altered only by a change of law. The police have no powers or duties apart from the law; and, if the Chief Minister desired to initiate a new policy compelling the police to pursue a particular course of action in conflict with the law, such policy was subversive of law. Nor need it be emphasised that the Chief Minister of Kerala had no power of dispensing with the laws or with their execution - a power which was repudiated long ago in England by the Bill of Rights in 1689. The Criminal Laws of the land bind both the police and the Ministry; and, in so far as the police policy enunciated by the Chief Minister directed the police to neglect the provisions of the existing criminal laws, which laid on them a duty to interfere and arrest persons committing cognisable offences like criminal trespass

and the like, and proceed against them under the law, the Ministry encouraged the violation of the law.

Obviously, the new police policy must have been sponsored after a cabinet decision, and conveyed to the Governor, under the provisions of the Constitution. Undoubtedly, the new police policy confirmed the illegalities of the Communist Government up to the date of its announcement, and directed the continuance of similar irregularities under the cover of Governmental sanction. The history of twenty-seven months' Communist rule of Kerala is a history of lawlessness, of crimes committed against life, limb and property of peaceful citizens of Kerala who belonged to the capitalist and landowning classes, and of the denial of their elementary rights to security of person and property, because of the Communist philosophy embedded in the police policy. Apparently the Governor acquiesced in this policy, little realising its far-reaching effect, though, later on, in his report to the President, advising action under Article 356 of the Constitution, he felt that the police policy had "laid the foundation for the deterioration of law and order and also for legitimate fear of security of person and property."

### THE COMMUNIST GOVERNMENT'S DEFENCE

The defence of the Communist Government is contained in the Government's reply under the title "Kerala Government's Answer to K.P.C.C. Charges." That sets out at length the case of the Government and makes interesting reading. At the forefront of the charges against the Communist Government was the remission order of the Kerala Government on the assumption of power which states as follows:

#### "Remission Order - Kerala Government"

*"Remission of Sentences.* To mark the assumption of office by the Government, the following orders will be issued:

- (a) All current death sentences to be commuted to imprisonment for life.
- (b) Remission of sentences to be granted as per scale to be fixed.
- (c) All political prisoners to be released.
- (d) All pending warrants against persons involved in political cases will be withdrawn.
- (e) Cases arising out of industrial or agrarian disputes, which have since been settled will be withdrawn. Cases connected with the *hartal* at Tellicherry and the Trivandrum Bench agitation will also be withdrawn."

It need hardly be added that most, if not all, of the beneficiaries under this order were Communist prisoners. The Government were not satisfied by the exercise of their power of remission. They withdrew all pending warrants against persons involved in "political" cases, and releases also were confined to "political" prisoners. What were those that came under



the category of "political cases" and who were those who came in the fold of "political" prisoners? The Law Minister in answer to a question on the floor of the House on April 30, 1957, gave a reply, which is extracted in the Kerala Government's Answer and is given below:

"In a rough and popular way, it would not be difficult to define political offences. For instance, if a man were killed in a riot, or in the attempt to excite a tumult or popular insurrection, that probably would be regarded as a political offence (Clarke on Extradition). 'Any offence' says John Stuart Mill, 'committed in the course of a political commotion is an offence of a political character' and even this definition was rejected as too narrow by Courts which have always construed these words according to the circumstances existing at the time when they have to be considered. Even the English Courts have given a wider and more generous meaning to the phrase 'political prisoner' than was formerly given - *vide* Halsbury's Laws of England. Any person who had committed an offence incidental to and forming part of political disturbances was a political offender, according to a weighty authority. (Mews' Digest of English Case Law). On the basis of the aforesaid principles, cases were examined and releases ordered, not rigidly nor relaxing unduly."

Nothing could be more irrelevant. The principles laid down by the authorities cited referred to the determination of political offenders for the purpose of extradition. Neither Clarke nor any other authority referred to therein intended to lay down that any civilised Government could class offences committed within its own borders as political offences, invoke the principles of extradition, and release the prisoners. No municipal Court would ever listen to a plea in bar by a prisoner who is arraigned on a charge of murder or of any other offence committed within its jurisdiction that the offence was committed out of political motives. Clarke, in his well-known book on Extradition, has appended an illuminating note on political offences even for purposes of extradition. He says that "the thesis that an offence is a political offence if it had for its motive or purpose a promotion or prevention of a political object assumed that a political crime could be correctly defined as a crime committed from political motives. As was pointed out in the debate, the murder of President Lincoln and the shooting of a policeman in Ireland by Fenian Assassins were both crimes committed for political reasons; but no one would pretend that they were any the less murders; and murders, the perpetrators of which it would be a disgrace to any nation to harbour." And where the prisoners, against whom warrants were withdrawn or released, as in Kerala, were Communists who had committed murders or grievous hurt or other such crimes against persons belonging to a different political party, it would be the height of absurdity to state that these were political offences for the commission of which the prisoners could not be proceeded against. Indeed, one recent case, which probably is the one extracted with the citation from Mews' Digest of English Case Law, is that reported in (1955) 1 All England Law Reports, 31. There, curiously enough, eight Polish sailors belonging to a fishing trawler overpowered the political commissar in control of the crew and reached the English coast, after which they sought political asylum. In Poland, the Communist Party had become "the only party in the State with complete control with the

help of the security police. Any one opposed to the Communist regime is arrested and some disappear. Relatives too are arrested. It is an offence to leave the country... To go to a Western country without permission is treason." Treason is, of course, an offence of a political character; and a learned Judge of the Queen's Bench Division held that the words 'offence of a political character' must always be considered according to circumstances existing at the time when they have to be considered... Now, a state of totalitarianism prevails in some parts of the world and it is a crime for citizens in such places to take steps to leave the country. In this case, the members of the crew of a small trawler engaged in fishing were under political supervision. The applicants revolted by the only means open to them. They committed an offence of a political character. And Lord Goddard, C.J., added, "The evidence as to the law prevalent in the Republic of Poland to-day shows that it is necessary, if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary crimes which have no political significance will be thereby excused". It is indeed a startling proposition that crimes like murder, rape or arson committed within the Kerala State should go unpunished and the offenders escape scot free, merely because the victims happened to belong to a different political persuasion. Indeed, if this thesis is carried to its logical extent, every party which succeeds at the polls at the general elections would be entitled to grant a general dispensation, and the rigours of criminal law would apply only to those who have the misfortune to belong to no party. For this signal order of the Kerala Government, an order of the Andhra Government dated September 12, 1954 on the formation of the Andhra State is set out, which, on its face, is patently and manifestly a violation of the law of the land. Two wrongs cannot make one right. It may be that power is vested in the Government to grant commutation or remission of sentences. But these are to be used but rarely, to mitigate the rigours of the law. The provisions of Section 401, Cr. P.C. for suspension or remission of sentences are not intended to further party prospects, or, to shield the members of a particular political party from the process of the law. Any such use of section 401 for purposes other than in public interest and purely for private or party purposes would be grossly *ultra vires*, belonging as they do, to the domain of abuse of power, - a doctrine which obtains in our legal system. But, clauses (c), (d) and (e) do not have even the semblance of legal authority. The criminal law is administered in accordance with the provisions of the Criminal Procedure Code, and of other relevant statutes. Once a cognisable offence is committed, the criminal law takes its own course and cannot be diverted by the will, whim or fancy of any Ministers functioning under the Constitution. Cognisance of an offence, investigation, arrest, prosecution and trial proceed in accordance with the process of the law and are not susceptible to any ministerial interference. All these are steps in the prosecution of an offence, which follow one by one by the compulsion or the force of law, and do not depend on the volition of even the police officer concerned. As stated earlier, if a police officer fails to report a cognisable crime like criminal trespass or any other major offence, or abstains from investigation or subsequent prosecution, he is guilty of a breach of the law, unless, of course, he has reasonable grounds for inaction, as provided for by the law itself. But, what is important to notice is that

there is no room for ministerial interplay in the investigation of a criminal offence, and, if a Minister orders a policeman, merely because of his ministerial authority, to desist from arrest, investigation or prosecution, he would himself become privy to the commission of a criminal offence.

The Communist Government has stated in paragraph 19 of its answer, "Withdrawal of cases in exercise of the power vested in the State Government is in itself not wrong." But, what is the legal power which the Kerala Government has in mind? Section 494 of the Criminal Procedure Code? But section 494 vests the discretion to withdraw from a prosecution only in the Public Prosecutor who is a statutory authority created by the Code. In the eye of the law and of the court, the discretion to withdraw is confined to the Public Prosecutor alone, subject, of course, to the consent of the Court. Neither a Chief Minister nor any other Executive Officer has any power to issue a fiat, staying a criminal prosecution or withdrawing the same, and such power which has been exercised by the Communist Government as a normal technique to secure immunity to Communist offenders from the process of the law is devoid of legal authority. It is no answer to say that withdrawals of criminal cases have been directed by previous governments. Perhaps, the only difference between the Communist Government and its predecessors in Kerala was that, while such illegal withdrawals are confined to cases which the predecessors thought in public interest should be withdrawn, the Communist Government has been systematically withdrawing all cases wherein Communists face trial. But that makes no difference at all to the legal principle that the government of a State has absolutely no legal authority to direct the withdrawal of a prosecution. The Public Prosecutor, of course, is a servant of the Government. So too is a Magistrate, or even a Judge of a High Court. But that does not empower the Government to control the decision of a Judge or a Magistrate, or direct the discretion of a Public Prosecutor. The Kerala Government appears to have discarded the elementary principle that power could be exercised only by an authority in whom it is vested by law, and statutory authorities are not the conduit pipes of ministerial ukase.

It is contended in the Communist Government's defence that in several cases the Magistrates had granted their consent to the Governmental withdrawals. True; but did those Magistrates address themselves to the question whether the Government had legal authority to direct such withdrawals. This is a question which should have elicited only one answer in consonance with the opinion of a long line of decisions of the several High Courts in India, and of the Kerala High Court itself that such withdrawals lacked legal authority. No doubt the Magistracy is independent of the Executive. But it would certainly be difficult for the subordinate Magistracy to flout the wishes of the Ministry in power; and it must be said to their credit that in several cases the Magistrates had the courage of their conviction and refused to toe the line with the Communist Ministry whose confidential reasons of State as the ground for withdrawal of the criminal prosecution, they found, to be palpably unworthy of belief. Indeed, throughout the dark period of Communist misrule the only bright star that shone undimmed in Kerala was the judiciary; and when appealed to the High Court of Kerala did not hesitate to exercise its correctional jurisdiction under Article 226 of the Constitution and the Criminal Procedure Code to suppliants who had been wronged by the Communist Ministry.

Indeed, the evidence given before us, as also the innumerable reports appearing in the daily papers, leave one with the impression that the Communist Government had evolved a technique of its own to be applied in cases where Communists had committed a criminal offence. The police officers whose action was regulated by law did not hesitate to take their cue from the Communist Ministers, their public utterances, policies and party predilections. Preference and promotion are temptations which few Government servants can withstand. The police officers knew the wishes of their new masters, and reports of police conduct in the investigation or prosecution of Communist criminals from one end of the State to another bear a similarity, which can hardly be said to be accidental. If Communists in broad daylight committed a crime, the police would first of all decline to take cognisance. If, however, they were compelled by the magnitude of the offence, or by public opinion, or by the status of the victims, quite often, the first information would be incorrectly recorded; or, at times, as in the case of a brother-in-law of a Minister, the name of the particular accused would be omitted from the charge sheet though it was included in the F.I.R. If later investigation was compelled by press uproar, the records of the investigation, particularly, statements under section 162, would contain so many discrepancies that it would be difficult for the prosecution to stand. We have been told in several cases how either the first informations or reports or the section 162 statements were so made out that the prosecutions were bound to end in an acquittal; and not infrequently, when Communists were charged with major crimes of murder, almost invariably, a counter case would also be started by the police, wherein the witnesses in the one could be accused in the other and vice versa, the more serious cases against the Communists would end in acquittals. If, however, a conscientious police officer was remiss in following this technique and a prosecution proceeded to trial, the Government straightway resorted to section 494 of the Criminal Procedure Code and directed the Public Prosecutor to withdraw the case. In one of the early cases which came up before the First Class Magistrate, Chowghat, six Communists stood charged with offences of rioting and grievous hurt. The case against them was that they had formed themselves into an unlawful assembly and belaboured P.W. 1 and caused him grievous hurt. The prosecution witnesses had been examined and they had given evidence of the outrage. The prosecution, apparently, had been launched before the Communist Government came into power. The Public Prosecutor sought to withdraw the case, stating that, on grounds of public policy as well as for confidential reasons of State, it was inexpedient to continue the prosecution of the case. The Deputy Superintendent of Police also swore an affidavit, stating the same formula in explicit terms. What exactly were the reasons of the State or the grounds of public policy were not disclosed. The Public Prosecutor also stated that the Government of Kerala had been pleased by order G.O.R. 306, dated February 6, 1958, to sanction the withdrawal of the case. Of course, any one could see that the confidential reason was that the accused belonged to the Communist Party. The learned Magistrate held that it was a simple case where the accused were alleged to have assembled unlawfully with the common object of injuring P.W. 1 and to have beaten him with sticks and hit him on his face, which resulted in the loss of some of his teeth. The Court was entitled to know as to how public policy would be served by withdrawing the prosecution. The learned

Magistrate held that the ground was absolutely vague and that he saw no valid reason. What was more, the learned Magistrate further added that he was not satisfied that the application made by the Public Prosecutor was a *bona fide* exercise of the discretion vested in him. The learned Magistrate refused the withdrawal, and the case ended in a conviction. It would appear that the State Government filed a criminal revision petition to the High Court of Kerala to quash the order of the Magistrate refusing withdrawal; but when the conviction followed, the criminal revision petition was dismissed as infructuous. The learned Judges of the Kerala High Court have held that the power of withdrawal is not vested in the State Government and that the Government have absolutely no jurisdiction to direct the withdrawal of criminal cases. (*vide* 1959 Kerala Law Journal 354 at p. 356). The sad fact remains that in spite of the High Court's order pointing out the flagrant illegality of the Government's purported withdrawals, the Communist Government did not give up the practice, and, in several cases, repeated the same illegality. The result of this illegal interference with the process of criminal law was that any Communist could commit any crime with impunity without any peril whatever of being brought within the clutches of the criminal law.

So far as the Communists were concerned, they came within the protection of the Communist Ministry. The Communist Government exercised the power of dispensation from the observance of the criminal law by the members of the Communist Party. Throughout the length and breadth of Kerala, the Communists stalked about, defying the law and committing any offence they chose in the full confidence that the police who were the guardians of law and order were under their thumb and that they would come to no grief at any time. Every such incident reported in the daily newspapers caused nothing but consternation and alarm. There was no security of life, limb or property. Persons affected sent representations to the Ministers of the Kerala State, to the Governor and also to the President, the Prime Minister and the Home Minister of the Union Government. The Union Government has a Central Police Intelligence Department, and we have reason to think that, quite often, these wires to the Central Government had resulted in enquiry by the Central Intelligence Department. Even within three months of the Communist rule, the Karshaka Samajam, Parur Taluk, had sent a Memorandum to the President of India in New Delhi, with copies to various authorities, stating, *inter alia*:

- “(a) Groups of Communists have formed themselves into unions or cells and pretend to be the recognised units of the Government in power. The local police is not calling them to order. The police somehow is noticed to follow a policy of inaction or abstention.
- (b) The unions and cells publish exhortations, calling on all labourers to resort to unlawful actions.
- (c) During the recent sowing season, the cultivators of several paddy lands were obstructed from re-planting their seedlings, and much seedlings have been wasted and destroyed, at the instance of the so-called cells, the labourers having been incited to strike and demand uncommon and exorbitantly high wages.

- (d) In coconut gardens, their owners are prevented from plucking the nuts in time, the cellmen claiming for the *kudikidappukars* (licensees residing in tenements within the garden) a considerable portion of the nuts and absolute right over some trees.
- (e) Active and wilful trespass is made into many compounds without the consent, and rather against the will, of the owners.

In all these cases, the owners become helpless and the aid of the police to maintain *status quo* and peace is sought in vain. A feeling of helplessness and insecurity of life and property among the agriculturists is experienced and a fear of lawless rule prevails. Shortly the harvest comes, and greater troubles are apprehended then to occur."

The Memorandum, therefore, prayed for immediate and appropriate steps to see that the present lawless state thrust upon the villages be ended forthwith and to see that an independent enquiry be made immediately by the Central Government. (*vide* Ex. AA44(b) dated May 25, 1957).

In pursuance of this Memorandum, it would appear that some members of the Central Intelligence Police had instituted enquiries and we have reason to think, that, at the enquiry, the truth of the allegations had been substantiated. Nevertheless, the Central Government took no action whatever. The Union Government felt, as admitted by the Home Minister in subsequent debate in Parliament, that, if it took action, it was liable to be misunderstood as the Government of Kerala was of a different complexion. Nor did the Governor apparently take any action on the representations sent to him.

### CONSTITUTIONAL ROLE OF THE GOVERNOR

It would be apposite at this juncture to examine the role of the Governor in our Constitution.

The Indian Constitution is founded on the scheme of responsible government on parliamentary lines, similar to that obtaining in the United Kingdom, the Commonwealth countries, the States of Australia and the Provinces of Canada. The position of the Governor approximates to that of the Crown in the United Kingdom, the Governor General in the Commonwealth and the Governor in the States of Australia. It is certainly axiomatic that the Governor, like the Crown, is and must be guided by the advice of the Ministers. But, equally, it is well settled that the Crown or the Governor has three important rights; the right to be consulted, the right to encourage, and the right to warn, though, in the last resort, he must give way to the advice of his Cabinet. Article 163 of the Constitution provides for a Council of Ministers with a Chief Minister at the head to aid and advise the Governor, and, under Article 167, it is the duty of the Chief Minister of each State to communicate to the Governor all decisions of the Council of Ministers relating to the administration of the affairs of the State and proposals for legislation, furnish such information relating to the administration of the affairs of the State and proposals for legislation as the

Governor may call for, and if the Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister, but which has not been considered by the Council. In the process of consultation, it is always open to the Governor to insist on his point of view for careful consideration, and, in the process, the reasoning of the Head of the State would certainly go far to influence the mind of his Cabinet. No clearer exposition of the Constitutional relationship between the Governor and his Ministers exists than that of Mr. Asquith in a Memorandum that he wrote in 1913 on the Rights and Obligations of the Crown.

"We have now a well-established tradition of two hundred years, that, in the last resort, the occupant of the Throne accepts and acts on the advice of his ministers... He is entitled and bound to give his ministers all relevant information which comes to him; to point out objections which seem to him valid against the course which they advise; to suggest (if he thinks fit) an alternative policy. Such intimations are always received by Ministers with the utmost respect and consideration, with more respect and deference than if they proceeded from any other quarter. But, in the end, the Sovereign always acts upon the advice which ministers, after (if need be) reconsideration, feel it their duty to offer. They give that advice, well knowing that they can, and probably will be called upon to account for it by Parliament." (Jennings: *Cabinet Government*. p. 258).

This, no doubt, is a statement that applies to all the ordinary functions of the Government. But, this does not exhaust the entire sphere of the Governor's action. The Ministers hold office at the pleasure of the Crown, or of the Governor, and this is incorporated in the Constitution in Article 164, and, if Ministers hold office during the pleasure of the Governor, they may also be dismissed at his pleasure. It cannot be expected that the Ministers would voluntarily advise their own dismissal. In what circumstances, then, has the Governor the right or the duty to dismiss his Ministers? This is what is stated in Halsbury's *Laws of England*, Volume 7, p. 361:

"The Sovereign may legally dissolve the Ministry at any time by dismissal; but the exercise of this power in order to assert the personal wishes of the Sovereign in opposition to the wishes of Parliament, and ultimately of the electorate, is clearly recognised as unconstitutional. However, in cases where the Ministry still retains the confidence of the House of Commons, but the Crown has reason to believe that the latter no longer represents the sense of the electorate, the dismissal of the Ministry or the dissolution of Parliament, would be constitutional; and cases of emergency might conceivably arise where, through the unfitness or incapacity of the Ministry, the exercise of the power of dismissal would be constitutional, justifiable and proper, in order to prevent the adoption of some course of action ruinous to the nation."

Reference may also be made to the following passage from Dicey, *Law of the Constitution*, 10th Edn. p. 433:

"There are certainly combinations of circumstances under which the Crown has a right to dismiss a Ministry who command a Parliament-

ary majority, and to dissolve the Parliament by which the Ministry are supported. The prerogative, in short, of dissolution may constitutionally be so employed as to override the will of the representative body or, as it is popularly called, "The People's House of Parliament." This looks at first sight like saying that in certain cases the prerogative can be so used as to set at nought the will of the nation. But in reality it is far otherwise. The discretionary power of the Crown occasionally may be, and according to constitutional precedents sometimes ought to be, used to strip an existing House of Commons of its authority. But the reason why the House can in accordance with the constitution be deprived of power and of existence is that an occasion has arisen in which there is fair reason to suppose that the opinion of the House is not the opinion of the electors. A dissolution is in its essence an appeal from the legal to the political sovereign. A dissolution is allowable, or necessary, whenever the wishes of the Legislative are, or may fairly be presumed to be, different from the wishes of the nation."

Though in the United Kingdom no Government has been dismissed by the Sovereign since 1783, conditions have arisen in some of the Commonwealth countries, where the question has sometimes become a live issue. Keith, in his book, *Dominions as Sovereign States*, writes thus at page 228:

"More serious still is the question of the position of the Governor when he is advised to act in such manner as to violate the law. If there is doubt, of course, regarding the legality of action, he is entitled to demand a legal opinion, but he may rely on it when given, unless it is so obviously wrong as to render it farcical, and few issues are so clear as to make such an event probable."

There is a story of what happened in Canada in 1873 given by Jennings in his book on Cabinet Government at page 303:

"In Canada, in 1875, a Royal Commission proved that there was corruption in Sir John MacDonal'd's Government. The Governor-General informed the Prime Minister that 'he did not consider it his duty to intervene until Parliament should have dealt with the matter, but that, inasmuch as the decision of Parliament might itself be partially tainted by the corruption exposed, he should hold himself free to require the resignation of the Ministers in the event of their winning by anything short of a very commanding majority.' The Government thereupon resigned."

Over the situation created by the Home Rule Bill in 1913, Professor Dicey wrote:

"I entirely agree that the King can do nothing except on the advice of Ministers. I totally disagree with the doctrine drawn from this principle that he can never dismiss Ministers in order that he may ascertain the will of the nation. Of course, the incoming ministers must, like Sir Robert Peel, accept responsibility for the change of Ministry. No one need be ashamed of following the principle set by Pitt and Peel."



In 1932, Mr. Lang, the Premier of New South Wales, repudiated the payment of interest on the State loans due to the Commonwealth, in spite of the decision of the High Court of Australia in favour of the validity of the Financial Agreements Enforcement Act of the Commonwealth. Mr. Lang then defied the law and the decision of the High Court, and, ultimately, the Governor was compelled to dismiss the Ministry, and order the dissolution of the Legislature. On this instructive episode, this is what Keith writes:

"No doubt, on principle, a Governor may dismiss a Ministry which has ceased to represent the people and which is bringing discredit on the name of the State... The High Court's ruling, however, renders it impossible any longer to deny that Mr. Lang is violating the Constitution, and the Governor has now to face the issue how far he can acquiesce in the violating of law whose authority as a representative of the Crown he is under a clear duty to uphold... Hitherto, in his action both in respect of the internal affairs of the State and in its relation to the Commonwealth, Mr. Lang has no doubt been able to allege that he has acted without actual illegality or at least that his measures might possibly be defended as being within the law to such a degree that he could induce his legal advisers to claim that his action was not illegal. But, in the face of the decision of the High Court, it is plain that this excuse is no longer available, and the Governor's position towards Mr. Lang has been made far more delicate than it has hitherto been. The Governor is normally entitled to accept the Premier's statement of the legal position, if fortified by a formal legal opinion; but, he cannot disregard the law of the land when finally declared by the High Court, and it is his right, and indeed his duty, to refuse to be party to any illegal action of the Premier and to decline assent to any order in council which in substance is illegal. Moreover, he will be under the obligation of considering more seriously whether it will be possible for him to give Mr. Lang the authority of the Premier's office in order to defy the law of the Constitution. While the difficulty of the Governor's position must be fully recognised, it is clear that the paramount duty of the King's representative is to carry out the law of the Constitution and that he is entitled to demand from Mr. Lang obedience to that law, and, in the event of refusal of the demand, to exercise his constitutional power of removal."

And when eventually Mr. Lang was dismissed, Keith wrote:

"Instead of accepting the law of the land, he has attacked the impartiality of the High Court and made successful efforts to defeat the methods adopted by the Commonwealth to enforce performance of the duties of the State... In these circumstances, it would have been impossible for the Governor to justify acquiescence in the continued tenure of office by the Premier; the Governor is under a clear obligation to secure the observance of the law of the Commonwealth, and, if his Premier refused to obey that law, the Governor would have incurred personal responsibility, had he failed to take action... So long as Mr. Lang kept within the limits of the law, it would have been unwise for the Governor to act against his advice. But, when

Mr. Lang deliberately defied the legislation of the (high) Commonwealth after it had been declared valid by the Court and continued to issue illegal orders to the servants of the Crown, the Governor had no alternative but to require him to withdraw these orders, and, on his refusal to do so, to remove him from office. If he had thus failed to act, he would have impleaded himself in the illegalities of the Minister, for, the law of the Commonwealth binds the Governor no less than the Ministry and the people of the State."

Undoubtedly, if the Governor finds on the dismissal of the Ministry that no party would be able to command a majority in the Legislature, he would have, of course, to order a dissolution and consequent fresh elections; but it would be constitutionally incorrect and delusive to assume that the Governor is a cypher or a rubber-stamp or a dignified hieroglyphic in Coke's immortal phrase. The Governor is the guardian of the Constitution. His oath of office binds him to preserve, protect and defend the Constitution, and, when his Ministry initiates a policy in deliberate defiance of the existing laws of the land, it would be his duty as the guardian of the Constitution to dismiss the Ministry, save on pain of himself being implicated in such illegalities by his inaction.

The twenty-seven months of Communist rule in Kerala tell a harrowing tale of naked lawlessness, stalking the length and breadth of that State. In the innumerable daily papers of Kerala, from day to day, events were reported of the sufferings of the people who did not belong to the ruling Party, of wanton assaults, of belabouring of people, of murders, of breaches of the peace in plantation and rural areas, and consequent insecurity of person and property, of brutal attacks on persons and of criminal trespass to property by members of the ruling Party against the rest. Most of these were also referred to and discussed in the proceedings of the Kerala Legislative Assembly. Yet, the Governor remained only a silent spectator, little realising that all this wanton misrule was being carried on in his name. Obviously, he was not alive to the role that he fulfilled in the constitutional machinery of the State. What exactly were the duties of a Governor when his Ministry embarked on a policy in flagrant violation of the law of the land, does not appear to have engaged his consideration at all.

When the Chief Minister persisted in masking his illegalities under the enunciation of a Governmental Policy, the Governor should have warned him to desist from the same and if in spite of such warning he still persisted in following it, he should have exercised his power of dismissal, and not waited for another two years when the consequence of his inaction had sprouted in gross lawlessness throughout the State.

It may be that the Governor found himself in a dilemma. If he dismissed the Ministry without dissolving the Legislative Assembly, he would have to summon another Party to form the Ministry and that would have been impossible having regard to the numerical majority which was enjoyed by the Communists (though with the support of the independent members who had entered into an alliance with them). No other party could have ventured to form a stable Government. If then he thought of the expedient of dissolving the Legislative Assembly in exercise of his power under Article 174(2) (b) of the Constitution, he would have been faced

with the problems of forming an interim or care-taker Government pending fresh elections. He could not very well have entrusted the interim or care-taker Government to the same Ministry by reasons of the various sins of omission and commission which it had perpetrated and he might have thought that the expedient of dissolving the Legislative Assembly also would be of no avail. The next alternative before him then was to make a report to the President, which he had a right to do as contemplated by Article 356, that a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution and invite the President to intervene. This also the Governor did not do and allowed the position to drift.

The inaction of the Central Government and of the Governor must necessarily have encouraged the Communist Government to spread their tentacles all over the State, conditioning the people's minds by terror and violence, encouraging the members of the Communist Party to take the law into their own hands and screening them from punishment in the devious ways already stated. Day after day, Kerala press flashed reports of these innumerable violations of law and order; and, when after repeated prayers to the Governor and to the Central Government not a finger was lifted, the people resorted to the ultimate rights of man to turn against tyranny and oppression. When the oppression became insufferable, and no redress came from any quarters, the Liberation Movement was started which avowedly sought to overthrow the Communist Government by the force of members, by demonstrations of thousands and thousands of men and women, rising in revolt to free their country from the strangle-hold of Communist misrule. The liberation movement was avowedly unconstitutional and liable to legal condemnation. But what else was the alternative left to the people, when help never came either from the Governor, the guardian of the Constitution, or from the Union Government, which has rights of intervention? The people were either to continue to suffer oppression, or rise in insurrection. When tyranny becomes intolerable, man has an inherent and inalienable right to stand up against the oppressor, and that was exactly what happened in Kerala. The liberation movement was not merely a mass upsurge, but, in fact and in law, an insurrection which wielded no arms but the arms of moral strength. Those outside Kerala shared no suffering or the horror of tyranny. Life, liberty and the pursuit of happiness had become empty phrases in the face of oppression and misrule. What reigned in Kerala was not the rule of law, but the law of the jungle.

The Communist Ministry, who had taken their oath to bear true faith and allegiance to the Constitution of India as by law established and to do right to all manner of people in accordance with the Constitution and the law without fear or favour, affection or illwill, failed in their elementary duty and there was complete subversion of law and order. They also failed to ensure to the non-Communist citizens in the State equality before the law and equal protection of laws, the right to form associations or unions, the right to hold property and the right to carry on trade or business, and there was deprivation of the life and personal liberty of non-Communist citizens of the State otherwise than in accordance with procedure established by law.

The functioning of the Cell Courts moreover subjected non-Communist citizens of the State to the jurisdiction of extra-judicial tribunals which had no justification under any law in force in the State, but were

a sort of parallel judiciary set up by members of the Communist Party to adjudicate upon disputes, inter alia, between Communists and non-Communists and to enforce their decisions by illegal methods. Apart from denying the non-Communist citizens equality before the law and equal protection of laws, there was a flagrant violation of the Rule of Law.

There was thus in our opinion a breach of the Rule of Law envisaged by the Constitution and demonstrably a situation had arisen in which the Government of the State was not carried on in accordance with the provisions of the Constitution.

## VI. CONSTITUTIONAL REMEDIES

Considerable controversy took place in the month of June 1959 over the ethics of the direct action resorted to by the opposition parties to oust the Communist Ministry in Kerala from power. Acharya Vinoba Bhave, Shri Patanjali Sastri, retired Chief Justice of India and Sri Chakravarti Rajagopalachari had expressed their opinion that what the Communist Ministry was doing in Kerala was legal, that it enjoyed the majority of votes in the Legislative Assembly, that a vote of no confidence had not been passed against it, that the period normally allotted to it had not expired and that the movement to oust it from power in the manner contemplated was opposed to all canons of democracy and was a negation of democratic rule. It was urged that it was entitled to continue for the full span of five years unless discredited by a vote of no confidence or retired by efflux of time on the expiry of the period fixed for a general election according to the Constitution. It was further urged that even a Governor had in those circumstances no power to dismiss it, as the Governor was bound to act in accordance with the advice given to him by the Ministry and could not act counter to its avowed wishes in that behalf.

Newspapers all over the country including the *Times of India*, *Amrita Bazar Patrika*, *The Statesman*, *Tribune*, *The Hindu*, *Indian Express* and the *Hindustan Standard* also expressed themselves to the same effect and doubted the propriety as well as the expediency of the step taken by the opposition Parties to oust the Communist Ministry from power. The main argument advanced against this step was that it would undermine the democratic functioning of the Constitution and would expose all constitutional governments to the risk of being ousted by unconstitutional means and would really be a negation of democracy.

Legal opinion was also expressed in regard to this matter. The Communist lawyers of course wholeheartedly supported it, but there was also a considerable body of lawyers, who, while conceding that that was the position, if normalcy prevailed and the Government was carried on in accordance with the provisions of the Constitution, urged that if a Ministry flouted the provisions of the Constitution and violated the Rule of Law, it was not only proper but incumbent on the Governor as well as the Centre to intervene and dismiss the Ministry guilty of such grave dereliction of duty and breach of the Rule of Law as envisaged by the Constitution.

We have already seen earlier that the Communist Ministry in Kerala was guilty of subversion of law and order, had flouted the oath of office and had committed a breach of the Rule of Law, thus forfeiting its right of continuing in office for the full span of five years even though it enjoyed the numerical majority in the Legislative Assembly and was in a position to defeat any vote of no confidence moved against it. Would it under those circumstances be entitled to continue in power inflicting all tyranny and oppression on the citizens not belonging to the Communist persuasion, filling the cup of their bitterness to the brim and without any redress at all? We are of the opinion that the Constitution does not countenance any such flagrant violation of the Rule of Law and the normal provisions of the Constitution cannot have any application in such circumstances. The five years' period contemplated by the Constitution can have no application in such case and even there the Constitution provides in Article 172(1):

"Every Legislative Assembly of every State *unless sooner dissolved* shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly",

and in Article 174(2):

"The Governor may from time to time . . . (b) dissolve the Legislative Assembly."

These provisions should be read in conjunction with the provision contained in Article 164 (1):

"and the Ministers shall hold office during the pleasure of the Governor."

This Article invests the Governor with power to dismiss the Ministry and to dissolve the Legislative Assembly of a State before the expiration of the period of five years if he, in the exercise of his discretion, deems it fit to do so. There is no indefeasible right in the Ministry to continue for any particular length of time if it enjoys the numerical majority in the Legislative Assembly and a vote of no confidence cannot or is not carried against it. (*Vide* the discussion in Chapter V as to the Constitutional Rule of the Governor).

It is equally futile to urge that the Governor can only move in the matter of the dismissal of the Ministry and the dissolution of the Legislative Assembly under the advice of the Ministry. It is palpably absurd to expect that the Ministry would ever advise the Governor to sound its own death-knell either directly or even indirectly by dissolving the Legislative Assembly. That step would be taken by the Governor in the case we are considering by reason of the misrule and the breach of the Rule of Law by the Ministry and that supervening circumstance would invest the Governor with absolute and unfettered discretion in the matter of the step he would contemplate taking in this behalf.

To say that the action of the Governor or of the opposition Parties

conducive to this end would be tantamount to a negation of democracy is hardly an argument which deserves serious consideration. It ill lies in the mouth of people guilty of subversion of law and order and of committing breaches of the Rule of Law to pose as guardians of democracy. They themselves flout all canons of democratic rule, and they certainly cannot invoke the protection of the Constitution to enjoy the full period of their tenure so that they may inflict further tyranny and oppression upon those who had the misfortune of being governed by them.

The same argument would apply also in the matter of the Governor making his report to the President within the meaning of Article 356.

This contention is, therefore, equally untenable, and all the legal objections urged on behalf of the Communist Ministry in Kerala were thus devoid of substance.

We then come to the next and what we consider to be the most important question in the field of our enquiry, namely, what steps, if any, should be taken to safeguard the Rule of Law in circumstances similar to those that prevailed in Kerala. On this part of our investigation, we have had the benefit of various interesting suggestions given by several witnesses. We have enquired into the happenings of the twenty-seven months of Communist rule in Kerala, so that we may suggest any remedies for the future, if such events happen again.

One suggestion which came from some of the witnesses was that the Communist Party which had carried on the administration in deliberate defiance of the law, can no longer be trusted to govern in accordance with the provisions of the Constitution, and that therefore the Communist Party should be banned. This is a course of which we cannot possibly approve. In trying to uphold the Constitution, one should not attempt to undermine the very basis of the Constitution, of freedom of thought, of belief and of association. There can be no political growth, unless people have the liberty to form their own political opinions and pursue the ideology of their own choice. If Kerala or any other part of India should opt for Communism, by all means, bow to the free will of the people. But, by tradition and temperament, the Indians in Kerala, as those outside, have always believed in the doctrine of co-existence, of peaceful co-existence in the day-to-day life. No country in the world has shown such tolerance of thought in matters held most sacred. In India, we have had no religious wars, no inquisitions, and no burnings at the stake. The country has absorbed different races, creeds and religions and in the warp and woof of their daily life runs the golden thread of "Live and let live." The belief has been universally held among the millions in India that the law of God or of man should rule the world, and that even kings and emperors are not above the law. What Bacon and Bracton had enunciated of old that "Law is a great organ by which the sovereign power doth move," is also enshrined in the Indian way of life in the respect for the supremacy of law. Even the concept of 'the rule of law', or of 'the due process of law' is rooted in the doctrine of *dharma*, *nyaya* or *neeti*, which is the most cherished tradition of Indian life.

Another proposal advocated by several eminent witnesses was that the only course feasible in the present situation is to integrate Kerala into the larger neighbouring State of Madras or Mysore. Some have suggested the formation of a large southern State of Kerala, Madras and Mysore. The inarticulate premise appears to be that, in that case, the Communist forces

would get submerged in the larger States of Mysore or Madras, where the Congress Party holds its sway over the people. It is difficult for any one to chalk out the pattern of political life of the future, or to hazard any prophecy. Kerala cannot seek refuge in Madras or Mysore, so that Communist influence may be smothered by the political atmosphere in these two States. Kerala must face its own problems and cannot ask the neighbouring States to fight its battle. Nor is there any guarantee that either Madras or Mysore would welcome Kerala with open arms. To suggest the integration of Kerala with other States is merely to suggest a transfer of trouble from Kerala to the other States.

These are, of course, political remedies, which, in our view, are neither feasible nor calculated to achieve the desired end. We believe that the problem is largely one that appertains to the domain of Constitutional Government and has to be redressed by Constitutional remedies. What faces one at the outset is the misuse of the machinery of the police and of the provisions of the criminal law in the administration of justice. Law and order is the basic requisite of any civilised society. Nor could it be dispensed with in a Welfare State. And the maintenance of law and order rests entirely on the observance of the Rule of Law. There can be no free society, no liberty, no freedom in any sphere of life, if law and order is undermined. Neither the previous Congress regime, nor the P.S.P. rule in Kerala was entirely free from abuse of power. Indeed, Governmental withdrawal of pending prosecutions had occasionally been adopted even during these regimes; and the ex-Chief Minister during the Congress regime who is himself an able lawyer agreed before us that the Government had no legal authority or jurisdiction to direct the withdrawal of any prosecution under Section 494, Criminal Procedure Code. But such instances were no part of a deliberate plan or pattern. They were not in pursuance of any organised system to benefit any particular party or the members thereof. Nor had the previous regimes deliberately flouted the law of the land. Whether the party in power is Communist or Congress, it is of paramount necessity that the administration of criminal justice should be immune from ministerial interference. Administration of justice should not become a pawn in the game of party politics.

As pointed out earlier, the structure of our administration mostly rests on law; and it is not competent to the Government or the Ministry to flout the law or order any deviation therefrom. So long as the law is not changed, the law must be enforced. That is the principle, basic and axiomatic, which no Government can deny. It is not open to the Ministers to initiate a police policy in contravention of established law and institutions; nor are the Ministers or the police above the law. They may not break the law; and both the ministers and the police are liable civilly and criminally for their tortious or criminal acts. It is true that it may not always be feasible for an aggrieved citizen to file a prosecution for a criminal offence or a suit for damages for such acts. But, in countries like the United Kingdom and the United States, there is the Constitutional provision for impeachment, which, though now in disuse in the United Kingdom, because the occasion has not arisen, has some times been resorted to in the United States. Under our Constitution the only person who could be impeached is the President. But the President has to act normally on the advice of his Ministers. The responsibility for governmental acts thus rests on the Ministers, and there-

fore, the provision for impeachment of the President must largely be otiose and remain a dead letter in the Constitution. But, neither at the Centre nor in the States is there any deterrent against ministerial illegalities or excesses. It is the Ministers who wield the reins of power and run the administration; but, neither wanton illegality nor deliberate misrule is subject to any Constitutional restraint or penalty. We feel that the absence of any provision for impeachment of the Ministers or of other executive officers in our Constitution is a sad omission which requires rectification. Civil servants are liable to be dismissed even for trivial acts of corruption. There is also the provision for surcharge against misapplication of funds. But a Minister may be guilty of nepotism, wasteful expenditure or misrule, and yet, there is absolutely no sanction deterrent in the Constitution against Ministerial iniquity.

Secondly, we would like to emphasise that there is a misconception regarding the powers of the Governor. Government is carried on in the Governor's name. All acts and orders are subscribed "By order of the Governor"; and, in the eye of law, the orders issued by the Ministry are the orders of the Governor. Where, therefore, the Governor is satisfied that Ministerial orders are in violation of the law, it is not only his right, but his duty as the guardian of the Constitution, which he has sworn to preserve, protect and defend, to correct and rectify, and, in the last resort, to dismiss the Ministry, if recalcitrant. A Governor who fails in this duty, must be deemed to be privy to the violation of the law; and his position would become wholly untenable. It may be that on the dismissal of the Ministry, the Governor might be unable to find an alternative Ministry commanding a majority in the Legislature. But, in that event, he has the right to order a dissolution of the Legislative Assembly and direct fresh elections.

There is, however, one possibility that has to be considered in this context. If he dissolves the Legislative Assembly and directs fresh elections there is necessarily a time lag before the next elections take place and the Government is to be carried on during the interim period. How is the Governor to carry on? Under the Constitution it is incumbent on the Governor to have a Council of Ministers with the Chief Minister at the head to aid and advise him in the exercise of his functions. (Article 163(1)). He is to appoint the Chief Minister himself and the other Ministers are to be appointed by him on the advice of the Chief Minister. (Article 164(1)). A Minister, who for any period of six consecutive months is not a member of the Legislature of the State, shall at the expiration of that period cease to be a member. (Article 164(4)). The last provision can have no application where the Legislative Assembly has been dissolved, and a new Legislative Assembly can come into existence only after fresh elections. There is, however, nothing in the terms of Article 163(1) or Article 164(4) to prevent the Governor from appointing as members of his interim or care-taker Ministry pending fresh elections and coming into existence of a new Legislative Assembly, any person of his choice as the Chief Minister and any other persons recommended by the Chief Minister as Ministers provided he is satisfied that they will carry on the Government in accordance with the provisions of the Constitution during the interim period. He may therefore adopt this procedure and after dismissing the Ministry and dissolving the Legislative Assembly, order fresh elections and appoint an interim or care-taker Ministry during the interregnum.



The Governor may, however, having regard to the exigencies of the situation then obtaining in the particular State consider that the above course is not feasible and may not therefore dismiss the Ministry and dissolve the Legislative Assembly. He may not take upon himself the burden of appointing an interim of caretaker Ministry, but may make a report to the President with a view to invoke the President's intervention under Article 356. That Article recognises the Governor's power in certain circumstances to make a report on the situation to the President and if on receipt of such report the President is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution, he may in exercise of his discretion act under Article 356 and issue the necessary proclamation thereunder.

The course that was actually adopted in the end was Presidential intervention under Article 356. Several alternative suggestions appear to have been made, some invoking Article 352, and some others Article 355, as the appropriate remedy. Article 356 has a history of its own. No State in the Commonwealth has a provision akin to Article 356 of the Indian Constitution. The forerunner of Article 356 was Section 93 of the Government of India Act, 1935. The provision inserted in the White Paper, and the Joint Select Committee, in paragraph 109, stated:

"Lastly, it is proposed to give the Governor power at his discretion, if at any time he is satisfied that a situation has arisen, which, for the time being, renders it impossible for the Government of the Province to be carried on in accordance with the provisions of the Act, to assume to himself by proclamation all such powers vested in any provincial authority as appear to him to be necessary for the purpose of securing that the Government of the Province shall be carried on effectively... Events in more than one Province since the Reforms of 1919 have shown that powers of this kind are unhappily not yet unnecessary, and it is too soon to predict that even under responsible government their existence will never be necessary... Thus, the Governor might, if the breakdown were in the Legislative machinery in the province alone, still carry on the Government with the aid of his Ministers, if they were willing to support him. We are speaking, of course, of such a case as the refusal of the Legislature to function at all, and not merely of lesser conflicts or disputes between it and the Governor... A constitutional breakdown implies "no ordinary crisis and it is impossible to foresee what measures the circumstances might demand. It is right, therefore, that the Governor should be armed with a general discretionary power to adopt such remedies as the case may require."

Section 93 of the Government of India Act was enacted in Chapter VI headed "Provisions in case of failure of constitutional machinery, and Section 93(1) read:

"If at any time the Governor of a Province is satisfied that a situation has arisen, in which the Government of the Province cannot be carried on in accordance with the provisions of this Act, he may by proclamation..."

Article 356 of the Constitution has for its marginal note the old heading of Chapter VI: "Provisions in case of failure of constitutional machinery in states", and Article 356 (1) reads:

"If the President on receipt of a report from the Governor or Raj Pramukh of a State or otherwise is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by proclamation..."

The wording of the material portion of both the present Article and the old Section is practically identical. Each contemplates a situation in which the Government cannot be carried on in accordance with the provisions of the Constitution. There is no doubt a distinction between the two positions, viz (1) a contingency in which the Governor cannot carry on and (2) a contingency in which the Government is being carried on in contravention of the Constitution. One contemplates the impossibility of working the constitutional machinery; the other the working of the constitutional machinery in breach of its provisions. It may be urged that that on the wording of Article 356 as also its history and in particular the report of the Joint Committee, Article 356 is not applicable when the Ministry of a State carried on the Government in violation of the provisions of the Constitution as happened in Kerala during the regime of the Communist Ministry. The distinction however is only technical. Would it make any difference where the form of the Constitution survives but the substance has disappeared and the Government of the State is carried on in flagrant violation of the Rule of Law and the provisions of the Constitution contained in Part III "Fundamental Rights" are flouted deliberately with a set purpose and pursuant to an ideology which inspires the rule by a party not for the whole State but for the members of that party only?

The provisions of Article 356, contemplate the exercise of the powers by the President on a report being received by him from the Governor and, if the President acts under Article 356 in such case, there is nothing unconstitutional in his doing so and any proclamation made by him thereunder cannot be challenged as *ultra vires*. We are aware that the discretion vested in the President under Article 356 is very wide and normally he is guided in the exercise thereof by the advice of his Council of Ministers which may in a conceivable case be hostile to the Ministry in power in the particular State. But these are rare cases and the President occupying the responsible position that he does under the Constitution would not merely toe the line with his Council of Ministers but would considerably hesitate to bow to the dictates of the Council and sign on the dotted line, if his better sense indicated an action to the contrary. We recognise that this power which is vested in the President is liable to be abused in conceivable cases but we must presume that the President's action would conform to reasonable norms of democratic functioning of the Constitution and not be prejudiced by any party affiliation or indirect motives.

At the time central intervention was being thought of, there was an uproar in the Communist press in Kerala that the Congress party was in power at the Centre, that the Congress Party in Kerala State was also the Prosecutor of the Kerala Ministry, and that, therefore, in effect the same political party became both the prosecutor and the judge. It was sought to

press this argument against the ouster of the Kerala Ministry, and the principles of natural justice. But, if there was Communist misrule, redress in the shape of central intervention could come only from the President aided and advised by the Congress Council of Ministers; and, for two long years or more, as the Home Minister confessed during the debates in Parliament later, what deterred the Centre was the complexion of the Ministry in Kerala. Under the provisions of the existing Constitution it is not possible for Presidential satisfaction under Article 356 to be arrived at except on the advice of the Council of Ministers that advises him for the time being; and it would indeed be a great calamity if central intervention should be withheld against oppression and misrule in a State, merely because, at the Centre, the Council of Ministers is formed of a party different from that in the State. Justice cannot be denied and redress could not be refused to the suffering people of Kerala, merely because the complaint against the State Government was supported by the Congress Party of the State as well. Misrule has to be judged from the truth of the charges, and not from the complexion of the judge. If the thesis of the Communist Party was carried out to its logical extent, communist misrule in a State should secure complete immunity from central intervention, if the Centre happens to be manned by a different political party. In our view, the Union Government should have enquired into the truth of the charges immediately after three months of the Communist rule, when the *Parur Karshaka Sangham* had submitted its Memorandum to the President, which recited practically the same charges as have been repeated during the course of the succeeding 24 months, and taken appropriate action. The delay and the reluctance of the central intervention in Kerala resulted in no little suffering to the people of Kerala.

It would be apposite at this juncture to examine the powers of the Union over the Units under the Indian Constitution, when gross misrule obtains in any of the States. It has to be noted at the outset that the Indian Union is not a true federal Union. It is not an "indestructible Union of indestructible States," for, Parliament may alter the existing boundaries of the constituent States, or, even annihilate the old and form new States. Again, while the distribution of the Legislative powers is no doubt patterned on a Federal model, there are provisions in the Constitution which confer executive and legislative control over the Units by the Union. Firstly, the Governor is appointed by, and holds office at the pleasure of, the President, who, it should be remembered, is aided and advised by his Council of Ministers. The executive power of the Union extends to the giving of directions to a State so as to ensure compliance with the Laws made by the Parliament (Article 256); and the executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and, what is more, the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose. The sanction for compliance with these directions is laid down in Article 365, under which it shall be lawful for the President to hold, on disobedience of the directions, that a situation has arisen, in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Such intervention may take place even where a State suffers from any financial emergency. Further, laws made by a State in respect of matters enumerated in Lists II and III are subject to the laws made by the Union. There are

several situations even normally, where Parliament is empowered to legislate for States even on exclusively State subjects. On proclamation of emergency, the Union is empowered to legislate even for matters in the State List, and the proclamation of emergency rests on Presidential satisfaction. Again, it is the duty of the Union to protect every State against external aggression and internal disturbance, and to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. The right of intervention, therefore, is implicit when a State Government violates the provisions of the Constitution. Every duty implies a corresponding right. But Article 355 does not merely leave it to implication or intendment; for, the provision is explicit that it has a duty to ensure that the provisions of the Constitution are complied with. How exactly this is to be ensured, and what are the steps that the Union may take, have not been specified. But the grant of a power always carries with it the grant of the necessary means to effectuate that power. Article 356 is another weapon in the armoury of the Centre against constitutional breakdown. It is not necessary to advert to the financial provisions which throw the States on the bounty of the Centre to a large extent for financial assistance. It is therefore clear that the Constitution of India is an amalgam of both the unitary and the federal types and that the Indian Constitution has peculiar features of its own; or, in other words, the Indian Constitution is *sui generis*; it does not fall under any particular label or pattern. The relationship between the units and the Union has to be gathered from the entire scheme and text of the Constitution, and not merely by a reference to any catchword as "State autonomy", or isolation.

Whenever, therefore, conditions exist in a State which violate the provisions of the Constitution, it would be the duty of the Centre as well to advise, to suggest, to warn, and finally, to intervene, if its directions are not heeded. It is lamentable that, in the case of Kerala, the texture of the particular party in power should have deterred the Union from doing its duty by the people of Kerala far earlier than the actual date of its intervention. It is elementary that a Government should be carried on in good faith, that it does not administer the State only for party benefit, or for party members, that any Government must observe the normal decencies of administration, and grant equal protection to all the people, irrespective of party affiliation or ideology. Where, therefore, the citizens of a State appeal to the Union against a State Government's excesses, illegalities or misrule, it would be the duty of the Union under the Constitution of India to make enquiries and issue appropriate directions for observance of the rule of law ingrained in the Constitution.

With reference to the administration of criminal law, which is really the cornerstone of all law and order and of organised society, the lesson of Kerala calls for deep consideration whether the administration of justice, of public order and enforcement of the criminal law should not be taken over by the Centre, in other words, whether items 1 to 3 of List II should be transferred to List III. That, of course, would be one solution. If, however, it is found that the administration of criminal law and enforcement of law and order should continue to vest in the State, it is necessary that certain safeguards should also be introduced against abuse of power. All investigations of crime and all prosecutions should be under the control of a Director of Public Prosecutions, whose independence from the Gov-

ernment should be assured by statute, so that justice is always done as between man and man, and not left to the capricious, arbitrary or *mala fide* orders of a Ministry in power. The Director of Public Prosecutions must, of course, have the same status, salary and security of tenure as of a High Court Judge. Withdrawals of prosecutions should not amount to dispensation from the law; and we therefore suggest that section 494 may be so amended that no prosecution can be withdrawn except upon application to the High Court of the State and with its express sanction. We believe that these suggestions, if carried out, would ensure the honesty and impartiality of administration of justice and deter the Ministry from intruding into that domain.

As far as commutation and remission of sentences are concerned, we feel that the Governor should act in consultation with the Chief Justice of his High Court. That would ensure that the powers of remission would not be abused either in the interest of party politics or personal favouritism.

That brings us to the consideration of the questions that are likely to arise when the elections are held after the dismissal of the Ministry or at the end of the Presidential rule. In the Kerala State, there are today a number of political parties, and at the elections, there is always a likelihood that no single party may be returned to power with an absolute majority. Recent political history of the State tends to show that the State is gravitating towards what is called the Group System, which has been the bane of France in recent years. Parliamentary Government would, of course, be easy if there were only two parties having clear-cut policies of their own. But, where the existence of several parties cannot be obviated, problems arise, which may make a stable Government difficult to function. Party Government sometimes may make strange bedfellows. But, where no single party commands a majority, what ensues is a government of groups functioning from day to day by compromise and concession. The problem has been posed as to what should happen if the Governor is unable to find a single party commanding a majority in the Legislature after the elections, or, if he is unable to find even a group of parties to form a stable government. The only remedy that could be thought of in such a situation is to continue the Presidential rule. But, for how long? Some eminent witnesses who appeared before us suggested that, in such an event, Presidential rule should continue for the full term of five years by procuring the necessary constitutional amendment. Party leaders, however, have been uniform in their disapproval of lengthy continuance of Presidential rule. To use the language of one political leader who gave evidence before us, all political parties are allergic to Presidential rule; and, in particular, the Congress Party leaders aver that Presidential rule places them at a disadvantage, since the Congress Party in the State is precluded by their party affiliation from raising any criticism against any act of the Presidential administration for the very obvious reason that Presidential rule is nothing more than party rule from Centre. All this may, no doubt, be true. But, several high persons in public life, some of whom did not wish to court unpopularity by stating their views in public as witnesses, have pleaded strongly for the continuance of the Presidential rule in Kerala for the full term of five years, so that the people may enjoy the blessings and the benefit of an efficient and impartial administration, having only the welfare of the people at heart. This is a point of view that cannot possibly be ignored. Democracy, Parliamentary

Government and the great imponderables of a free Constitution, undoubtedly tend to secure the people's political growth. But, when a crisis has arrived, and events have happened, where the machinery of the Constitution is sought to be abused, misused and perverted and the State has been in travail for a considerable period, the interest of the people at large demand that an honest and efficient administration should continue for a little longer time to redress and balance the iniquities of the old. It is indeed doubtful whether the Kerala State has enjoyed even a tenth of the benefits of the First and the Second Five Year Plans. The police force which forms the backbone of law and order has been so demoralised and corrupted that it would take some time to reverse the process and restore its reputed integrity. The State of Kerala cannot be thrown into the throes of repeated elections, and the tumult and the passions they beget, apart from the heavy financial outlay involved therein. We are therefore constrained to state that, if after Presidential rule the general elections do not return a stable majority for any political party, or that for some reason or other it is not possible to form a Government commanding the confidence of the Legislature, the Presidential rule should continue and enure for a statutory term of five years, after obtaining the necessary Parliamentary amendment to Article 356 of the Constitution. Recent events in Kerala have made the people feel whether, after all, self-Government is really a substitute for good Government.

## VII. SUMMARY OF CONCLUSIONS

We now set out in brief the conclusions that we have arrived at:

(1) During the Communist regime in Kerala, there was a gross and systematic violation of the rule of law, undermining both equality before the law and the equal protection of laws. The Communist rule was a rule for the benefit of the members of the Communist Party, and not for the benefit of the people at large, and had for its main objective the securing of Communist hegemony over the whole of Kerala.

(2) The non-Communist citizens of the State were denied fundamental rights to form associations or unions, to hold property, and to carry on trade or business. There was deprivation of life and personal liberty otherwise than in accordance with procedure established by law.

(3) The functioning of Cell Courts subjected the non-Communist citizens of the State to the jurisdiction of extra-judicial Courts which had not the sanction of any law in force in the State and which enforced their decisions by illegal methods. This was a flagrant violation of the Rule of Law.

(4) There was a complete subversion of law and order and a flagrant breach of the Rule of Law as envisaged by the Constitution.

(5) The Police Policy enunciated by the Chief Minister in July, 1957, was a flagrant violation of the law of the land. The duty of the police is regulated by the relevant statutes, and the Police Policy laid down a code of conduct in violation of the provisions of the relevant legislative enactments in force, and amounted to the abrogation of the relevant provisions in

conflict with, or dispensation from, such laws, which the Communist Government had no legal authority or jurisdiction to ordain.

(6) Neither the Police nor the Ministers are above the law; and Ministers who promulgate orders in contravention of the law or instigate acts or omissions by the police or the statutory authorities contrary to law are themselves privy to a breach of the law, and are liable to be proceeded against civilly or criminally for their tortious acts or criminal offences.

(7) There should be a provision for impeachment of the Ministers or civil officers in the Indian Constitution, as in England or in the United States.

(8) To ensure the administration of impartial criminal justice it is necessary that a statutory authority designated as a Director of Public Prosecutions shall be appointed with the same salary, status and security as a Judge of the High Court of a State with powers of supervision and control over all criminal investigations and prosecutions.

(9) It is a matter for serious consideration by Parliament whether the administration of justice, of public order and enforcement of Criminal Law should not be transferred to the Concurrent List.

(10) The Governor in the Indian Constitution is neither an ornamental figure-head nor a dignified hieroglyphic. He has the threefold powers to be consulted, to advise and to warn, though, in the last resort, he must give way to the advice of his Ministers. It is the duty of the Governor to act as the guardian of the Constitution, to dismiss a Ministry pursuing a course of action in violation of the law of the land, and, if necessary, to dissolve the Legislative Assembly and order fresh elections.

(11) It is the duty of the Union Government to hold an enquiry into the allegations of misrule, whenever made, and to take appropriate action by the issue of directions, and, if necessary, to impose Presidential rule.

(12) If on the dismissal of a Ministry or at the end of the term of the Presidential rule under Article 356 no Ministry could be found to form a stable Government for any reason whatever, or, the Ministry so formed should pursue policies in violation of the law of the land, the Presidential rule should again be imposed and continued for the full term of five years after making constitutional amendment to that effect.

N. H. Bhagvati

M. P. Amin

M. K. Nambiar

Bombay, 5th January 1960.

**KERALA ENQUIRY COMMITTEE**

**Constituted by the Indian Commission of Jurists**

Sittings at Ernakulam

November 15, 1959

**OPENING SPEECH BY THE CHAIRMAN**

We the Kerala Enquiry Committee constituted by the Indian Commission of Jurists are instituting this enquiry in order to find out whether there was subversion of the Rule of Law and consequent insecurity in Kerala during the period when the Communist Ministry was in office. The Executive Council of the Indian Commission of Jurists at the meeting on August 3, 1959, considered the question of appointing such a committee of enquiry and left it to the President and the General Secretary of the Commission to frame suitable terms of reference and to implement recommendations of the Committee. It was in pursuance of this resolution of the Executive Council that this Committee of Enquiry was constituted on September 2, 1959 and the terms of the reference of the Committee as finalised are as follows:

1. Whether the Rule of Law as envisaged by the Constitution was maintained during the period when the Communist Government was in office in Kerala; if not, in what respect was the Rule of Law departed from, weakened or undermined.
2. Whether, while apparently adhering to the Constitution, attempts were made to undermine the Rule of Law as envisaged by the Constitution.
3. In what respect, if any, was the Rule of Law undermined by the Legislative, Administrative or other pressure tactics in governmental or economic spheres?
4. What steps, if any, should be taken to safeguard the Rule of Law in circumstances similar to those that prevailed in Kerala?
5. On such other matters which might be germane or incidental to the above enquiry.

On September 9, 1959 the General Secretary of the Indian Commission of Jurists issued a circular letter calling upon various individuals, associations and organisations, including those belonging to the Communist persuasion and the opposition to submit their memoranda on any matter they consider relevant, together with copies of any documents which they would like to place for the consideration of the Committee. Intimation was also given to various parties that after the examination of the memoranda, if any, received, the Committee would proceed to Kerala for the examination of witnesses who might desire to give evidence before the Committee. It was emphasised in that letter that the Indian Commission of Jurists is an organisation of leading lawyers, that is a non-political organisation whose



main concern is, the maintenance and preservation of law and that the Committee would be very happy to have their co-operation in that matter.

The date for the submission of memoranda which had been originally fixed for the October 8, 1959 was thereafter extended to October 31, 1959. The Secretary of the Committee issued an appeal to the press on October 8, 1959, inviting all parties concerned to submit their memoranda and the relevant documents to him on or before the extended date, and intimated that the Committee would highly appreciate the co-operation of all parties concerned in the task which they have undertaken. This press appeal was in the following terms:

"The Committee are purely juristic in character and are not concerned with any political organisation or controversy, and are mainly concerned with finding out whether the Rule of Law as envisaged by the Constitution was maintained during the period when the Communist Government was in office in Kerala.

The Committee propose to hold an objective enquiry in the manner indicated above and wish to gather all the necessary materials, and, in particular, the relevant documents which would be helpful in arriving at a correct conclusion.

The Committee have already addressed circular letters to all the political parties, including the Communist Party, various associations and individuals in Kerala State to assist the Committee in their task, and the Committee feel that what will be more material and helpful would be evidence supported by documents and not mere verbal allegations. The Committee, therefore, request all the sections of the public who have relevant materials to send their memoranda and the relevant documents to the Secretary of the Committee, Shri V. Rama Shenai, Advocate, Ernakulam, on or before October 31, 1959.

The Committee will highly appreciate the co-operation in the task which they have undertaken".

Apart from this public appeal in the press, the Secretary also addressed several letters to the parties concerned and also requested them to submit their memoranda. Several representations and memoranda have been received but the Committee regret that they are only from the opposition and there is none so far from any parties of the Communist persuasion.

The Committee are entering upon this enquiry now with such materials as have been received by them. The Committee, however, feel that their task in the matter of enquiry undertaken by them will be an onerous one in the absence of parties belonging to the Communist persuasion. The Committee have no doubt before them the various statements and brochures issued by the Communist Government as well as by the Communist Party but even these consist of many statements and no more, unsupported by evidence, oral or documentary.

The Committee, therefore, once again appeal to various parties, associations and organisations belonging to the Communist persuasion to co-operate with the Committee and give them their full assistance in arriving at the truth of the matter.

The Committee hope that this appeal which has been made to the parties concerned will not go in vain. Should, however, this appeal fail to elicit proper response, the Committee will have no alternative but to proceed with the enquiry with such materials as they have got and according to the best of their lights.

The public sittings of the Committee will be held in Ernakulam on November 15 and 16 as also on November 21 to 23; at Calicut on November 17, 18 and 19 and at Trivandrum on November 24, 25, 26 and 27 1959. And any party organisations wishing to give evidence before the Committee will be welcome to do so at any of the said places convenient to them on their giving information to the Secretary of the Committee in that behalf.

## PENDIX "B"

### STATEMENT MADE BY THE CHIEF MINISTER OF KERALA TO A PRESS CONFERENCE AT TRIVANDRUM ON JULY 23, 1957

Numerous allegations have been made, both inside the Legislature as well as outside, regarding the law and order situation in the State since the present Government assumed office. These pertain not only to the behaviour of individual officers and men in the police force, not only to the conduct of the Police Department as a whole, but to the general policy pursued by the Government with regard to the role of the police in the maintenance of law and order. It has been stated that, due to the policy deliberately pursued by the Government, the police force has been thoroughly demoralised and that, in consequence, a state of anarchy has set in. The Government have paid the most anxious consideration to these allegations in the light of which they desire to clarify Government policy in this respect.

1. It is admitted on all hands that the role of the police, as understood in the past, has been of a two-fold character; firstly, to help society in tracking down crimes and bringing anti-social elements to book; secondly, to prevent the development of the democratic movement in the country by restricting the activities of, if not totally suppressing, certain democratic political parties.

This latter role was, in pre-Independence days, directed against all the freedom-loving political parties including the Indian National Congress. After Independence, it was directed against what are popularly known as Left political parties in general, and particularly against the Communist Party and its friends. The developments of the last two years, particularly the result of the recent general elections, have made it abundantly clear that the people do not appreciate this role of the police, whatever the party in power. The Government want to make it clear to all concerned that the rights of freedom of speech, press, assembly or organisation being the essence of democracy and guaranteed by the Constitution of our Republic, they shall be allowed to be exercised by every political party in the country and that the police will not be allowed to use the provisions of law and the duties of maintaining law and order in such a way as to suppress or restrict the democratic activities of any political party whether big or small. Rules and practices which go contrary to this essential basis of a democratic state will be changed.

2. Apart from the question of political parties, there is also the question of the approach to such things as strikes of workers, peasants' struggles, students' agitation and such other people's movements. It has been the practice of previous governments that at the slightest sign of workers' or peasants' unrest leading to demonstrations, strikes, *hartal* or *satyagraha*, the Police was rushed to help the employers, landlords, etc. to suppress the movements, prohibitory orders were issued and security proceedings launched, lathi charges and firings were ordered.

This use of the police for suppressing people's movements has become so normal a feature of our public life that they have come to be considered as part of the "Rule of Law". The Government, however, desire to point out that, in such a country as Great Britain, which is considered to be a classic land of the "Rule of Law", the police is not allowed to be thus used for the suppression of the people's movements. For decades in the past, one has never heard of firings on strikers or issuing of prohibitory orders and security proceedings against people for participation in strikes and other people's movements even when such movements affected the whole country or the entire line of industries. But they are normally considered inevitable in our country even in a small strike in a small factory or plantation. The Government therefore repudiate the charge made against them that their policy of not giving capitalists and landlords the assistance and protection which they have so far been getting in the matter of suppressing the working classes and peasants' struggles is a violation of the rule of law. They, on the other hand, hold the view that such use of the police in favour of the owning classes is a violation of the fundamental rights of the toiling classes - the right of collective bargaining, accompanied by the right to resort to strikes or other forms of peaceful direct action.

3. The Government fail to see why their refusing to use the police in such an anti-people way should "demoralise" the police personnel, as is made out by several spokesmen of the Congress, and other opposition parties, including the General Secretary of the Congress, Shriman Narayan. The policy pursued by the Government is only one of restricting the use of the police force in an anti-people way. The Government do not desire the slightest weakening of the efficiency and usefulness of the police force in so far as it relates to the suppression of anti-social crimes such as theft, arson, murder, dacoity, etc. The Government are, on the other hand, anxious to see that the efficiency and usefulness of the police in this respect is further augmented. They will do all that is within their power to bring about such a strengthening and toning-up of the morale of the police force in discharging its real task.

4. The Government further want to make it clear that their policy of not using the police force in the suppression of the people's movements does not mean any weakening of the role of the police in rendering that protection and assistance to the person and property of the owning classes to which they are entitled as the citizens of the State. The Government recognise that the right of the toiling classes to resort to collective bargaining and direct action has certain well-defined limits. The essence of these limits is that the direct action should not do violence either to the person or property of the individuals and families of the owning classes. The Government have had reports that, in certain instances, direct action has gone beyond these limits; *satyagraha* in front of a factory or a plantation, or other institution has, sometimes, gone to the extent of surrounding the houses of the employer or his staff members, preventing them and even their family members from going into or out of their houses for their normal, daily, peaceful life. Such practices do obviously go beyond the limits of peaceful direct action. The Government hope that all organisations of the working class, and all democratic-minded persons will do their best to avoid such incidents and enable individuals and families to peacefully carry

on their normal daily life. However, if these efforts made by the organisations and individuals fail, and the direct action continues to overstep the limits set forth above, the police will have obviously to intervene. The Government desire to make it clear that this will be done.

5. The Government hope that the owning classes will not use the above declaration of Government policy as the thin end of the wedge and make the plea of "protection of their person and property" for using the police force to suppress the activities and movements of the toiling people. What is guaranteed protection is not the right of the employer to recruit blacklegs during times of strikes, nor his right to take the blacklegs in and out in order to work a unit of which the majority of the workers have withdrawn their labour, but the right of the individual employer and his staff members to carry on their personal and family life. The employers cannot expect police help in working a factory, or plantation, or other institution against the declared will of the workers who have resorted to collective bargaining, and to strike and other forms of direct action. Disputes between the employers and their workers have to be settled and production maintained uninterrupted, not through the use of police but through reasonable adjustments and compromises between the employers and workers. The Government desire, in this connection, to appeal to the employers to adopt a policy of recognising the unions, carrying on collective bargaining and settling all industrial disputes through them. In the event of failure of such bargaining, if either party so desires, the Government sponsored machinery of arbitration or adjudication will be available. The Government also commend to them the desirability of coming into their own agreements with the representatives of the trade unions - agreements which are of a relatively stable character - and thus create a basis for avoiding frequent outbreaks of labour disputes and work stoppages. The Government would lend their help to encourage such agreements being arrived at.

6. The Government also hope that all sections of the working classes, all their organisations, will see the wisdom of the policy outlined above. The hope that the trade unions will recognise the supreme necessity of minimising, if not totally eliminating, such industrial disputes as causing interruption to the process of production, thus leading to great national loss; they hope that all sections of labour will realise the desirability of working for stable agreements with employers in order that while the legitimate rights of the working classes are protected, the process of national production goes on uninterruptedly. The Government further hope that, even in those instances where, due to the obstinate stand taken by the employers, the working class is forced to strike or take other forms of direct action, this direct action is confined to peaceful limits as defined above, and that there is no danger to the person and property of the individuals and families of their employers and their staff members.

7. While hoping that the adoption of the policy laid down above will more or less avoid the necessity for the intervention of the police in Labour disputes, the Government want to make it clear that they cannot give an absolute guarantee that in no situation will the Police be used in labour disputes. There may be occasions on which the obstinacy of a particular

union or group of workers leads to stoppage of production or transport in an industry which is vital to the life of the people. Even in such cases, the Government will initially do all that is within their power to make the union to change the opinion and to have the dispute amicably settled; but, if that fails, the Government will have obviously to intervene. As an example of this may be shown certain labour disputes connected with the transport of foodgrains. The Government hope and call for the co-operation of all concerned in preventing the development of such situations; they, at the same time, desire to state that they will not hesitate in such situations to protect the industry which, being so vital to the life of the people, deserves the protection of the State.

8. The guiding lines laid down above, regulating the conduct of the police and the Government in the matter of employer-worker relations, would generally guide the Government's conduct in the matter of a dispute between other classes and sections of the people. Resort to such repressive measures as Sections 107, 144, etc., will not be made in order to suppress the movement of any section of the people; the right of organisation, collective bargaining and direct action will be guaranteed to all sections of the people. But no direct action will be allowed to go beyond the limits of peaceful action laid down above. The person and property of every individual and family will be protected.

9. The Government desire to make specific mention of the charge that units of the Communist Party in several places are taking into their own hands the functions of the State. As an instance of this has been cited the summons issued by the cell of the Communist Party at Chathanthara to certain witnesses to attend an enquiry of a local dispute. The Government immediately took action in this case by instructing the Collector to make enquiries as to whether this was a case of a Communist Party unit using coercion against the parties concerned in order to enforce upon them a decision which was not to their liking. The Government have since received the report from the Collector stating that a certain amount of coercion appears to have been used in the case. The Government are therefore issuing instructions to all Collectors asking them to take necessary action against those who use coercion in the name of settling local disputes. However, the Government want to make it clear that the local units of any political party, or any other organisation or even individuals, are entitled to use their good offices in bringing together the parties concerned and get any local dispute peacefully settled, such mediation and arbitration by any organisation or individual should as a matter of fact, be encouraged, since, according to the celebrated dictum, "that Government is best which rules the least". The Government therefore desire to make it clear that, while it would not put any obstacle in the way of any organisation or individual resorting to mediations or arbitrations in local disputes, necessary action will be taken against any organisation or individual who resorts to coercion in the name of conciliation and arbitration of disputes.

10. The Government know that certain elements in the political life of the State are trying to take advantage of the policy pursued by the Government of full, unfettered freedom for any political party or organisation or organise, agitate and demonstrate in order to create tension and

develop undesirable situations. It was openly stated by a well-known leader of the public life in the State that the P.S.P. demonstration on the issue of food organised on July 13 was not so much concerned with ventilating people's grievances in the matter of food, but was 'a test of whether there is a police force in the State or not'. Under these circumstances, the Government want to make it clear that, while it would be their endeavour to strictly adhere to the general policy of not using the police force against people's movements, they would have unhesitatingly to use the police force if and when the above mentioned elements in the political life of the State create such situations as would leave no alternative but to use the police. The Government, however, hope that the above mentioned elements of the political life of the State will re-examine their position and co-operate with the Government in preventing the development of such undesirable situations.

11. The Government are conscious that the guiding lines laid down above being new to the officers and men of the police force, many of them may find difficulty in fully and correctly implementing them. Theirs is a complicated and tough job; they have to keep clear of two dangers – *firstly*, the danger of continuing to be used as of old as an instrument for suppressing democratic political parties and the organisations and movements of the toiling people; *secondly*, the danger of being at a loss as to what is to be done in carrying on their normal duties of tracking down anti-social crimes and bringing their perpetrators to book. The Government hope that all officers and men of the police force will do their best to avoid these twin dangers and set up new traditions of service to the people. The Government want to assure them that they will do their best to help the carrying on of these twin duties.

12. The Government, in the end, desire to appeal to all political parties, organisations and the people generally to help them in implementing the policy laid down above.

## APPENDIX "C"

### GLOSSARY OF TERMS AND ABBREVIATIONS

|                                   |   |
|-----------------------------------|---|
| Bharatiya Jan Sangh . . . . .     | an Indian Party   |
| Dacoity . . . . .                 | robbery by a gang   |
| Goondas . . . . .                 | rowdies, hooligans  |
| Hartal . . . . .                  | protest stoppage of work  |
| Hindustan Mazdoor Sabha . . . . . | a central Trade Union organization controlled by PSP  |
| Jatha . . . . .                   | procession of people  |
| Jehad . . . . .                   | religious war   |
| Karshaka Sangham . . . . .        | Peasants' Union   |
| Lathi . . . . .                   | long stick carried by the police  |
| Lok Sabha . . . . .               | the town house of Indian Parliament   |
| Muslim League . . . . .           | Party consisting of Muslims   |
| Panchayat . . . . .               | Committee of local rural administration   |
| Raj Bhavan . . . . .              | Official residence of the Governor  |
| Satyagraha . . . . .              | civil disobedience  |
| Socialists (Lohia) . . . . .      | a splinter group led by Dr. Lohia   |
| Toddy . . . . .                   | fermented palm juice  |
| Vimochan Samara Samity . . . . .  | a citizens' anti-communist front led by Shri  |
| Vimochan Dal . . . . .            | Maunath Padmanabhan   |
| AICC . . . . .                    | All India Congress Committee<br>(Committee of Congress Party consisting of<br>representatives elected by Congress Members<br>in States) |
| AITUC . . . . .                   | United Trade Union Congress<br>(small non-party organization)   |
| FIR . . . . .                     | First information report<br>(report of an offence to the police)  |
| ICS . . . . .                     | Indian Civil Service  |
| INTUC . . . . .                   | Indian National Trade Union Congress<br>(controlled by the Congress Party)  |



|                |   |
|----------------|---|
| KPCC . . . . . | Kerala Pradesh (State) Congress Committee<br>(Kerala branch of Congress Party)        |
| MLA . . . . .  | Member Legislative Assembly   |
| MP . . . . .   | Member of Parliament  |
| MSP . . . . .  | Malabar Special Police  |
| PSP . . . . .  | Praja (Peoples) Socialist Party   |
| PWD . . . . .  | Public Works Department   |
| RSP . . . . .  | Revolutionary Socialist Party<br>(Party confined to Kerala State)                     |
| TTNC . . . . . | Travancore Tamil Nad Congress<br>(Party confined to Tamil speaking area of<br>Kerala) |
| ULF . . . . .  | United Leftist Front<br>(headed by Communists)  |

## BOOK REVIEWS

*Government, Law and Courts in the Soviet Union and Eastern Europe.* By Vladimir Gsovski and Kazimierz Grzybowski, General Editors. [London and New York: Atlantic Books (Stevens & Sons Ltd., London; Frederick Praeger, Inc., New York). 1959. Two Volumes. XXXII (Vol. I), XV (Vol. II) and 2,067 pages. £ 8 8 sh net.]

### The Rulers of Law in Eastern Europe

The path of the law in the Soviet Union and the People's Democracies of Eastern Europe is hard to trace. Some of the ups and downs and detours of the path have been followed in valuable articles and monographs; maps showing various parts of the terrain have appeared from time to time in *Osteuropa-Recht*, *Highlights of Current Legislation and Activities in Mid-Europe*, *Law in Eastern Europe*, *Soviet Studies*, *Soviet Survey*, *Problems of Communism*, and other, less special, periodicals. Journalists, travellers, and emigrés have contributed their necessarily fragmentary impressions. Panegyric from within, celebrating "socialist" law as law of a higher type, can be matched with philippic from without, denying to Soviet law even the right to the name of law. The problem of supplying the inquiring onlooker with a comprehensive and trustworthy guide defies solution.

Thanks to the labors of twenty-eight scholarly contributors and their assisting staff, we have since 1959 been able to examine an admirably ambitious approach to this intractable problem. *Government, Law and Courts in the Soviet Union and Eastern Europe*, published as an "Atlantic Book" by Stevens (London) and Praeger (New York), is a survey of legal developments in the Soviet Union, the Baltic states, and seven other countries of Eastern Europe. Its authors, working under the general editorship of two of their number (Dr. Vladimir Gsovski and Dr. Kazimierz Grzybowski), are "lawyers who received their legal education and practised law in their native countries",<sup>1</sup> which are the countries covered in their respective contributions. They had, as it is perhaps superfluous to say, left their native countries before taking part in this work. The book has been published in two volumes; of its 2000-odd pages, over 1900 are devoted to text and appendices, about 65 to bibliography, and about 55 to indexes. The material is grouped in seven parts by

<sup>1</sup> Vol. I, p. XVI.

subject matter: the Regime and its Origin, Administration of Justice, Judicial Procedure, Substantive Criminal Law, Civil Law (selected topics), Worker and Factory, and Law and Peasant. Within each part, the material is organized by countries, beginning with the Soviet Union and the Baltic states and continuing with the seven other countries in alphabetical sequence. Thus the reader may follow a given topic through all eleven countries or he may, with the assistance of the table of contents, follow one country by dipping into each of the parts.

Despite the bulk of the book, its scope had to be restricted if the remaining topics were to be covered adequately. The book is not, and was doubtless not intended to be,<sup>2</sup> what the dust-jacket proclaims as "a complete survey of the legal systems of Eastern Europe". There is almost nothing, for instance, on international law; very little on social insurance; not much on state arbitration. In the treatment of those topics that were covered, the research "was focused not on the legal technicalities and details but on the effects of the legal system on the rights of the people. Elucidation of rights of the individual and their protection within the Soviet orbit was the main objective..."<sup>3</sup> Similarly, in the survey of judicial procedure the authors present "only those features which depart from traditional standards applied in other parts of the world."<sup>4</sup>

In all the chapters a balance, not always steady, is maintained between current analysis and historical narrative. The current analysis pertains – in general – to the period 1956–57; a few of the sections seem to have been limited by the dearth of sources more recent than the early 1950's, and some of the appendices convey more recent material. The book might have benefited from a clear indication of the cut-off date for the sources used in the various parts or in the various country-chapters. The historical narrative is usually marked by a restriction of method, characteristic of lawyers writing history: reliance is placed "primarily on laws and decrees, court decisions, administrative practices and procedures, and authoritative statements by leading spokesmen and scholarly writers within the Soviet orbit."<sup>5</sup> The orderly exhibition of such texts, sometimes insufficiently appraised for relative weight and not often qualified by other types of evidence, goes to make up a book of selected sources with commentary, not history so much as indispensable semi-processed historical material. In some of the chapters the authors permitted themselves a modest measure of freedom in this regard; for example, in most of the chapters on agriculture and in several

<sup>2</sup> "It is hoped that, without pretending to be complete, the work is nevertheless adequately comprehensive". *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> P. 839.

<sup>5</sup> Vol. I, p. XVI.

of the other chapters devoted to Poland and to Hungary, as well as in scattered passages elsewhere. The results in these exceptional instances are so felicitous that one wishes there had been space, and time, for more of it.

By confining themselves, in the main, to official and quasi-official texts, the authors have achieved two curious side-effects, possibly on purpose. The first is that at each important turn of the Party line the official texts convey a criticism of the previous line; that criticism, though seldom complete or candid, carries more weight with the reader than invective from outside the regime. The second is that official statements made during relatively "Stalinist" periods are apt to be explicitly based on premises distasteful to the probable readers, as well as the authors, of this book. During other periods, however, as in the period of the Popular Front or the period of coalition governments just before the coups d'état or the period of the Thaw and the Geneva Spirit or (most of all) the immediate present, the regime is more prudent about its external "public relations", and official statements are apt to be distorted by a special tactical factor for which appropriate discounts ought to be made.

The book is so condensed that there would be little use in attempting here to summarize the summary. Some observations may be made in the nature of general conclusions based on a comparison of the country-by-country chapters. Written by many authors on a national basis, the book largely avoids comparisons among countries except for occasional brief references to differences or similarities between experience in the Soviet Union and that in one of the other countries. One of the purposes that would ordinarily be served by direct comparison, that of discerning common features, is rendered unnecessary here by the pervasive influence of the law of the Soviet Union. Soviet concepts, legal institutions, economic arrangements, and procedures were held up as the standard pattern and still may be regarded as central.<sup>6</sup> Poland and Yugoslavia have diverged most, Albania (and, of course, the annexed and incorporated Baltic states) least, from the central pattern. This very fact is evidence against the official Soviet theory: it suggests the primacy of the political base as compared with the economic superstructure.

The variations are not the consequence of deliberate and rational planning. On the contrary, the authors show that, while local conditions were to be taken somewhat into account, the grand idea of Soviet planners in the People's Democracies was to pass at a more rapid pace through most of the stages resembling the historical course of events in the Soviet Union, as the planners saw them.

<sup>6</sup> The authors might have paid more attention to the recent stress on "reverse lend-lease", in which Soviet writers profess to be interested in borrowing legal ideas from the People's Democracies.

That idea may have owed something to a popular version of the biologists' thesis that an individual embryo goes through stages corresponding to the evolutionary history of its species, that (to paraphrase Haeckel) ontogeny recapitulates phylogeny. As the book indicates, even between shifts in the line there was inconsistency and confusion from time to time in traveling what was supposed to be one and the same line. Totalitarian consistency did not attain total consistency.<sup>7</sup>

The chapters on the origin of the People's Democracies unanimously attribute the victory of Soviet-supported movements to Soviet military intervention and, by doubtful implication in several passages, to the consent or acquiescence of the Western Allies. For country after country the authors show, in brisk and almost matter-of-fact rendition, the violations of treaty, the making and breaking of promises to local populations, the disregard of civil rights repudiated or "re-interpreted" in the name of that which the Party was pleased to term socialism. Terror in the direct and physical sense, though the authors do not dwell on it, was liberally applied in the interest of the general welfare, as spokesmen of the regime have in part conceded.<sup>8</sup> In more oblique applications, terror took the form of massive official deceit, arbitrary confiscation, and falsification of public facts. One of the less bizarre episodes, recounted in chapters on the Baltic states, involved the managed Baltic elections in 1940, when the Soviet news agency inadvertently released to the London press the results of the balloting well before the ballots had been counted.<sup>9</sup>

The general features of constitutional structure seem common and durable, largely surmounting local accidents and changes in other policy. In place of Montesquieu's separation of powers, Soviet constitutional theory proclaims the unified formation and harmonious execution of public policy under the leadership of the Party.<sup>10</sup> While a division of functions is recognized, the diffusion of power by means of what American constitutionalists call a system of checks and balances is scorned as inefficient or meretricious. Yet the high tension among the organs of this one-souled body is shown by an intricate network of internal and inter-organizational controls. Everyone watches, and everyone is watched as he watches.<sup>11</sup> It has

<sup>7</sup> See, e.g., pp. 473-74 (tacit application by Soviet courts of formally abrogated imperial laws); pp. 491-92 (assumption of law-adjusting role by Yugoslav courts despite theoretical monopoly in legislative branch); pp. 501-02 (aborted Soviet proposal for two systems of contract law, one for the "socialist" sector and the other for the private sector), and similar difficulties in the other countries.

<sup>8</sup> Pp. 12, 767, 207, and elsewhere.

<sup>9</sup> Pp. 124, 150.

<sup>10</sup> See, e.g., p. 1282.

<sup>11</sup> See, e.g., pp. 1067-73.

been said, after the orator John Philpot Curran, that eternal vigilance is the price of liberty; but so is it also the price of total dominance.

The book does not essay a discussion of either the practical interaction between the Party and the organs of the State, or the institutions and practices within the Party that in a sense make the Party's "law". For such information the reader must look to other works such as those of Fainsod, Granick, or Armstrong. Full prominence is, however, given to the inferiority of the formal institutions of government to the Party in its "directive role". Thus the Supreme Soviet, nominally the highest legislative-parliamentary body, is summed up, after description, as "a kind of convention of field officers called by the central government to hear current policy instructions, take the blame for failures, report on accomplishments and vote unanimously".<sup>12</sup> Again, the pressures and controls exerted from several quarters against the judiciary lead to the comment that "a Soviet judge seems to be permanently on probation".<sup>13</sup>

Indeed, the weakness of the judiciary, both as a branch of government and as a group of individuals, is a theme that runs through much of the book's strong sections on the administration of justice and judicial procedure. The authors were trained under legal systems in which the judges, at least in ideal and often in fact, were distinguished by high qualifications, status, and independence. In the regimes under analysis, the concept of independence has a very different meaning, the status of the judiciary has been deliberately lowered, and the pertinent qualifications of intellect and training have been supplemented by others of a more political character. The potency of the government attorneys (*prokuratura*), which the authors view with disfavor, may have been conferred by the regimes, particularly in the periods immediately following the conquest of state power, to cope with the consequences of the changes in the judiciary. Judges held over from the old regime were suspect; many of the new judges were only lightly qualified. The *prokuratura* may be not only an engine for transmitting Party policy (though often only indirectly) into the courtroom and checking on the Party regularity of the judges, but also a necessary watchdog intended to assure "legality" in the sense of regularity, order, and calculability.

The diminished power of the regular courts is shared with other tribunals. These "non-courts", as they might be called, are officially named special boards, comrades' courts, boards of contraventions, or general meetings of citizens. Their jurisdiction over crimes, particularly but not only over petty offenses, has been extensive.

<sup>12</sup> P. 1416.

<sup>13</sup> P. 522.

Procedural safeguards are minimal. Though not officially criminal tribunals, the non-courts have had authority to impose banishment or incarceration in labor camps for terms up to several years in duration. In several instances, they have been abolished or discontinued, but other functionally equivalent non-courts spring up to take their place.<sup>14</sup>

Procedure in the courts has been officially praised for its flexibility and informality. Such traits, when practiced by a largely intimidated Bar before a partly weakened Bench, may not always serve the ends of justice even as understood by the regime. In the field of "substantive due process", to borrow a term from constitutional lawyers in the United States, the book comments on a number of remarkable doctrines. Laws have apparently been construed *contra legem* in unjustified circumstances.<sup>15</sup> Laws have been now partially, now totally, repealed *sub silentio*.<sup>16</sup> Before the death of Stalin and the provisional decline of Stalinism, penal legislation was not uncommonly applied retroactively, and occasionally the retroactivity was explicit in the legislation; here, as elsewhere, Albania was more royalist than the king.<sup>17</sup> The Soviet institution of analogy, under which a "socially dangerous act" not previously named as criminal could be punished by analogy to the nearest act that was covered in the code, was copied in several of the People's Democracies, and was discarded when the Soviet Union discarded it. The authors show implicitly the technical insignificance of that symbolically important institution, for its place can be taken by loose drafting, broad interpretation, catch-all provisions, or vagueness in defining or applying the burden of proof.<sup>18</sup>

The sections on substantive civil law take up less than 300 pages, though parts of other sections cover legal relations that elsewhere would fall under civil law. The discussion of economic contracts reflects the difficulty, common to the authors and to scholars in the Soviet orbit, of reconciling Plan and Contract;<sup>19</sup> here the needs of the market, the imperialism of the bureaucrats, the demands of the Theory, and the impossibility of omniscience dance in an unresolved dialectic.

Except for those provisions designed to carry out the imperatives of the "socialist" order, the civil law seems not to have had a leading place in the agenda of the legal planners. Local variations from the Soviet pattern, at least in terminology, are particularly

<sup>14</sup> For references to various non-courts, see pp. 738, 577ff., 934ff., 1909ff., 1548, 1566, 717f., 578-9.

<sup>15</sup> Pp. 494ff., 735ff.

<sup>16</sup> See, e.g., p. 497.

<sup>17</sup> P. 976.

<sup>18</sup> See p. 1403 and the comments of the present reviewer in *Problems of Communism*, July-August 1958 and March-April 1959.

<sup>19</sup> E.g., p. 1147.

evident in this field. In agriculture, the exasperating obduracy of the land and of the farmers forced many zig-zags, retreats followed by resumed advances followed by new retreats. Collectivization was, as the authors show, undertaken to adapt the situation of the countryside to fit the neo-Marxist analysis of the industrial proletariat and to break the spine of potential resistance represented by the more successful among the peasants. It was also an attempt to raise the level of agricultural techniques, to make use of the advantages of large-scale farming without the socially obnoxious *latifundia* that existed in some of the countries, to make the production of food more rational as manpower was drained from the farms to meet the needs of the new urban industry. The policies of the regime may have complicated, but did not create, these universally refractory problems. In industrial labor relations, as well, the role of organized labor in the formation of managerial decisions and the relationship between trade unions and the state have troubled many countries; it is one of the tragedies of historical paradox that the state that still calls upon workers of the world to unite has reduced trade unions to ancillary subservience.<sup>20</sup>

The authors neither conceal nor parade their disapproval of many of the policies and events they analyze. In a very few instances, opinions diverge, as when the fate of the border region of Kosovo (Kosava) is mentioned in one of the chapters on Yugoslavia and in one of the chapters on Albania.<sup>21</sup> For the most part, the approach is internally consistent, and the bias though negative is not indiscriminate.

Not all the bias is political. The Anglo-American lawyer will find here many examples of the specific attitudes of the continentally trained jurist, often differing from his own. Thus, regretting the absence of compendious codes, the authors write, "Nor is the body of Soviet statutes a harmonious whole but rather an unco-ordinated collection of rules enacted at various times and for various purposes."<sup>22</sup> Again: "...a legal system is no longer a logical whole..."<sup>23</sup> "Socialist law-makers are not concerned with the systematic arrangement of the laws in force, or with the logical aspects of the legal order."<sup>24</sup> The comment that Soviet codes are conceded by Soviet writers not to offer "'an exhaustive answer to all the needs of legal actuality'"<sup>25</sup> implies the claim that better-drawn codes would provide such an answer. An interesting exception is

<sup>20</sup> See pp. 1524-31 and 1934-38 for a thoughtful discussion of the rise, character, and abolition of workers' councils in Hungary.

<sup>21</sup> Cf. pp. 396, 1726.

<sup>22</sup> P. 43.

<sup>23</sup> P. 507.

<sup>24</sup> *Ibid.*

<sup>25</sup> Quoted on pp. 46-7.



indicated in Hungary, where "at the end of World War II... the Hungarian law was not a system of codified statutes but one which, having run its own course, developed into a system of its own with a semblance of the Anglo-American common law... [In Hungary] sovietization of private law was achieved through the reinterpretation of the existing legal provisions by the newly introduced Soviet political rather than legal concepts without substantial changes in the text of the rules of law."<sup>26</sup>

The discussion of the law of contracts draws a contrast between "a realm of socialist economic planning where the will of the Government is supreme" and contract law in non-Soviet countries as "the legal expression of economic freedom, private initiative, and the equality of rights of contracting parties" where "the will of the parties is supreme".<sup>27</sup> Many students of Anglo-American law would treat these categories as opposite poles at the ends of a continuum, along which the actual legal systems are distinguished by differences of degree. When the objection is made that terms like "articles of consumption" and "means of production" are inappropriate for use in legal provisions, the observation is added that the demarcation between various types of restriction on private ownership "is flexible and exposed to arbitrary interpretation. What is a cow? Is it an article of consumption or an instrument of production? Articles of consumption and means of production are economic categories not fit for legal treatment."<sup>28</sup> Similar difficulties have been found, at least in Anglo-American courts, with more traditionally legal categories such as "cow".<sup>29</sup>

Recent developments in Soviet jurisprudence, many of them occurring probably after the manuscript for the book under review went to press, show a change in the style of legal writing that has more than narrowly professional significance. Many terms, concepts, and ideals that used to be derided as "bourgeois" are now not merely accepted but appropriated. It is the Soviet system and only the Soviet system, in the current publicity, that assures in fact "the protection of individual rights, impartial justice, and fair and equal treatment of human beings", denominated in the book the fundamental principles of traditional jurisprudence.<sup>30</sup> A comparative appraisal of Soviet and non-Soviet systems of law cannot safely be limited to slogans, because the slogans tend to be held more and more in common.

Outside the Soviet Union, Communist legal scholars have been

<sup>26</sup> Pp. 1277, 1278.

<sup>27</sup> P. 1137.

<sup>28</sup> P. 1136.

<sup>29</sup> See *Sherwood v. Walker*, (1887) 66 Mich. 568, 33 N.W. 919; *Cotter v. Luckie* (1918) N.Z.L.R. 811.

<sup>30</sup> Pp. 51-52.

slower to re-arrange old tunes in the newly prescribed orchestration. Legal writing in the People's Democracies occasionally has a special charm. The habits of the writers are not so firm as are those at the Center; their ruts are not worn quite so smooth and deep. Here and there the foot slips. Thus a writer in Hungary, as late as 1955:

"Ensuring the observance of legality is primarily a *political* task even in the area of general supervision. This follows from the very nature of legality. Even general supervision cannot be effectively performed without understanding the *dialectic of legality*. The government attorney should be always conscious of the most recent requirements in social and economic developments, of the line of the Party's policy. The government attorney, when performing general supervision, should always be aware where the edge of legality is primarily directed."<sup>31</sup>

A Soviet writer would probably not now concede that socialist legality has an edge, or that it is as subject to change as the quotation seems to suggest. Nor would he probably concede now, as one did in 1949, that "In the socialist society there is no difference in principle and quality between drafted labor and labor performed by voluntarily entering into labor relations by the taking of employment... Under the conditions of socialist society... it is impossible to secure the principle 'from each according to his ability' without pressure by the state and law regarding the universal duty to work."<sup>32</sup>

André Maurois once contrasted Disraeli, the doctrinaire who prided himself on being an opportunist, and Gladstone, the opportunist who prided himself on being a doctrinaire. Communist legal theorists have surmounted dialectically the contradiction posed by Maurois: they can be both doctrinaire and opportunistic while priding themselves on being neither. For example, Czechoslovakia has made treaties providing for the extradition of felons; by way of exception the treaties state that political offenses are not extraditable crimes; to the exception there is an exception, explained as follows in a Czechoslovak textbook on the criminal code:

"In the People's Democracy we do not recognize as political offenses those acts which are directed against the People's Democracy and against socialism because these acts are directed against the just social order and the Government of the large majority of the working people, and against the removal of exploitation and of all inequalities which follow from exploitation and the laborless accumulation of profits. Therefore we do not recognize as political offenses acts committed against the People's Democratic Constitution or against the socialists development of the Republic."<sup>33</sup>

<sup>31</sup> Quoted, pp. 722-23 (italics in the original).

<sup>32</sup> Quoted, p. 1455.

<sup>33</sup> Quoted, p. 1012.

Thus, apparently, a political crime is extraditable if it was committed against a People's Democracy but not if it was committed against a "bourgeois" democracy.

Until recently, it was customary for legal writers in the Soviet orbit to maintain that Justice everywhere has a class character. The authors cite, with emphasis, many such proclamations. They might have mentioned, more directly than they do, that the relevant division into classes is not determined economically so much as it is politically. Despite official rhetoric, the Soviet-style regimes have been guided less by sympathy for the Have-Nots against the Haves than by a preference for the About-to-Haves over the About-to-Have-Nots. That self-justifying character of success, in the Bolshevik code, is one of the factors that have made the political struggle so intense.

The class character of Justice has required the courts to take account of class (however class is determined) in dispensing rewards and penalties. Accoutred in the fashion laid down by "socialist" legality, the figure of Justice is marked not so much by her scales or her blindfold as by her sword, which must have an edge sharpened by the Party and must be pointed against the Party's enemies. Yet the correspondence between a litigant's class and his fate need not be direct; fair procedure, respect for the evidence, indiscriminative adherence to the substantial commands of the statute, could come to appear as the best means of promoting in the long run the interests of the state and thus of the class that is deemed to be in control of the state. In a country where political leaders have assumed oversight of every substantial allocation of values, every case in the courts has to be in some sense a political case; but perhaps some cases need not be quite as political as others, and the famous Bolshevik question, Who-Whom?, is not the only question calling for answer. Policies looking to the preservation of the courts' institutional integrity, to the predictability and regularity of the decision, to the educative impact on society,<sup>34</sup> to the discipline of the Bar, may come into play and the courts may acquire a dialectic beyond the ken of the dialecticians.

The book under review has paused to consider a few of these, and many other, pertinent factors. The range of topics, countries, and chronological periods imposed stringent limits upon the depth of the examination in any one field; difficulties were increased by the very fact that the regimes so often showed their worst face to the outside world. It may be true, as Gide said, that the Soviet Union is a place of which men speak the truth with hatred and falsehood with love. The authors of this book have presented their findings with as little passion as was permitted by the circumstances of their political

<sup>34</sup> See p. 505-06.

background and the character of the truth that they sought. It would be highly useful to keep the material up to date by periodic revision, perhaps supplemented by special studies on particular topics. The "non-courts", for instance, seem to be called upon to play a special rôle in contemporary Soviet theories of the progressive transfer of governmental functions to organs outside the formal machinery of the state, and may deserve intensive scrutiny. The police, official and unofficial, might be studied in more detail. The administration of industry, which in its legal aspects is covered spottily as a pendant to the discussion of labor,<sup>35</sup> is a subject worth special attention. But these comments on what remains to be done are no more than a tribute to a book that already does so much so well.

LEON LIPSON \*

*Commentary on the Constitution of India.* By Durga Das Basu. Third edition [Calcutta S. C. Sarkar & Sons, Ltd. Vol. I, 1955; Vol. II, 1956. lvi and 848 and (index) 27 pp. (Vol. I). lvi and 809 and (index) 37 pp. (Vol. II). £ 3 (\$ 8.50) per vol.]

*Shorter Constitution of India.* By Durga Das Basu. Second edition [Calcutta: S. C. Sarkar & Sons (Private), Ltd. 1959. lvi and 653 and (index) 26 pp. 23 Rupees].

The two massive volumes here first mentioned are already well-established works. As a supplement to the second of the two works reviewed there are included several pages of extracts from the appreciative comments which have been made by leading lawyers in many countries on Mr. Basu's *Commentary*. At this stage it would be superfluous to add to the chorus of praise. It is sufficient to say that the work justifies the ambitious sub-title which he has given it, namely: "A comparative treatise on the universal principles of Justice and Constitutional Government with special reference to the organic instrument of India". For those who are not already familiar with the *Commentary* it will be sufficient to give one or two examples of his technique. Thus, Article 19 of the Constitution of India provides *inter alia* that: "All citizens shall have the right . . . (c) to form associations or unions." In the commentary which immediately follows some eighteen pages in small print are devoted to consideration of those general factors which affect the interpretation not only of the right to form associations or unions but also all the other

<sup>35</sup> One of the most informative discussions of this point is on Yugoslavia (pp. 1572-85).

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rights (freedom of speech, assembly, movement, residence, property and the right to practise a profession or trade) included in Article 19. One of the most interesting questions there considered is the extent to which it would be permissible to make the exercise of a right given by the Article dependent on the subjective satisfaction of the Executive, and the conclusion is reached, on the basis of decisions of the Supreme Court of India, that the answer depends on the nature of the right and the circumstances calling for the restriction; whereas deprivation or limitation of liberty might in certain circumstances be affected by an order made to the subjective satisfaction of a particular officer [*Gopalan v. State of Madras*, (1950) S.C.R. 88; (1950-51) C.C. 74], the exercise of a basic right such as freedom of association cannot be reasonably made dependent upon the subject satisfaction of the government or of any of its officers [*State of Madras v. Row*, (1952) S.C.R. 597 at p. 607]. After these general considerations we find another six pages devoted firstly to the treatment of this freedom in countries other than India (the United States at length, England, Eire, the German Federal Republic, Czechoslovakia, Rumania, Japan and Burma) and secondly to decisions of the Indian courts on the same subject. It may incidentally be remarked at this point that the English Trade Disputes and Trade Union Act of 1927, restricting the freedom of civil servants in regard to Trade Union activity and making "general strikes" illegal, to which Mr. Basu refers on p. 210 of Volume I of the *Commentary*, was repealed *in toto* by an Act of 1946. For those lawyers who have been trained in the Common Law tradition there will be particular interest in the treatment accorded (in Vol. I, p. 370 *et seq.* and in Vol. II, p. 56 *et seq.*) to the ancient remedies of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* and to the description of the way in which the Supreme Court and the High Courts have used their powers under the Constitution to issue not merely these writs but "directions, orders or writs . . . in the nature of" those remedies. It is, of course, by virtue of Article 32 (dealt with by Mr. Basu on p. 370 of Vol. I) that the Supreme Court has exercised such a powerful and salutary control over the observance throughout India of the fundamental freedoms guaranteed by the Constitution.

It has been necessary to deal at some length with Mr. Basu's *Commentary*, as his *Shorter Constitution of India* is in a sense an abbreviated version of the larger work but also a supplement to it, in so far as it adds the case-law between the publication of the *Commentary* and the end of 1957. The comparative lawyer will miss the references to the laws of other countries, but the book as a whole is stated by the author to be "a book of reference for busy practitioners", and it would be unfair to expect too much within the space available. It is in any event an extraordinarily handy and

convenient guide on how the Indian Constitution and the Indian Courts deal with many matters of interest to lawyers in all countries. There are, for example, some twenty-one pages devoted to the comment on Article 22 of the Constitution (which provides protection against arrest and lays down the basic conditions governing laws dealing with preventive detention) the full text of the Preventive Detention Act of 1950, as amended by later Acts of the same year, of 1951, of 1952 and of 1957, being set out in the text. As in the larger work, and naturally to a still greater extent if only by reason of the limited space available, the author is reluctant to express his own opinion on difficult and disputed points and it may be, therefore, that a somewhat misleading impression is given that the interpretation of the long and intricate Constitution of India has been a comparatively simple process. One may hope that in the future, to the great advantage in particular of legal education in India, the author will not hesitate, at all events in the larger work under review, to give his readers the benefit of his own opinion and to set out some of the different solutions which might be adopted of problems of interpretation still undecided by the Indian Courts.

NORMAN S. MARSH

*State Immunities and Trading Activities in International Law.* By Sompong Sucharitkul, M.A., D.Phil. (Oxon), Docteur en Droit (Paris); LL.M. (Harvard); Diplômé de l'Académie de Droit International de la Haye; of the Middle Temple, Barrister-at-Law. [London: Stevens and Sons Ltd. 1959. XLIV and 390 pp. 70 s. net.]

The very concept of the Rule of Law implies that the State itself is subject to law and cannot evade liability by reference to some transcendental attribute or other. From this it should follow that internally as well as in its dealings with other States a State should, as defendant, submit to adjudication by the court of the appropriate forum according to the rules of private international law.

The evolution of this problem is well known, as are the manifold difficulties that delayed or restricted the acceptance by the State of the jurisdiction of its own courts, and, *a fortiori*, of foreign courts, in matters concerning its activities.

In international dealings the doctrine of immunity from jurisdiction has provoked a great deal of writing. One is at a difficult intersection of several branches of law: public international law, private international law and administrative law. With the entry of States into industry and commerce the question has become one of exceptional importance. It seems anomalous to allow to a State the

excessive immunity of the common law when it enters into an area traditionally reserved to private economy and private law.

Dr. Sucharitkul is no stranger to the International Commission of Jurists and for several years served the Commission well as one of the principal members of its team of jurists. In this excellent study of State immunities in trading activities he has been able to call upon his dual resources as a scholar and as a practitioner. Like most modern writers on this topic, the author is strongly in favour of limiting an immunity from suit which no longer corresponds with the social and economic realities of our time. On the question whether there is immunity according to customary law he is always cautious. It cannot be seen clearly whether in his view there is a rule of absolute immunity. On one occasion he seems to deny that there is (p. 356) remarking that such an immunity no longer corresponds with the case-law and present governmental practice – which is true. On another occasion, however (p. 358), he recommends the abolition of absolute immunity *de lege ferenda*, which seems to imply that the *lex lata* continues to embody this rule. He rightly sees in the notion of sovereignty the legal basis of immunity, but is somewhat too optimistic on the present-day position. He says at p. 356:

“Sovereignty, or its necessary consequences, dignity and other attributes, appears to belong to the past. True it is some States still jealously guard their sovereignty, but most enlightened governments are now prepared to sacrifice what little factual independence and sovereignty they have in exchange for peaceful and more fruitful international co-operation.”

Unfortunately the situation is much more complex and gives less ground for optimism.

The author's solution would be to assimilate the State in its trading activities to the position of a private individual. He is right in saying that in this way the problem would very largely disappear, but he runs into the same obstacle that has bedevilled so many courts and writers before him. He does not define “trading activities” and believes that this concept is easier to discern and define than the older one of *acta jure gestionis*. In fact the real difficulty remains, and there are many border-line cases where the “trading” aspect of state activities is neither obvious nor apparent.

The only logical and equitable solution is to abolish entirely the doctrine of immunity, with reservations made, if desired, in a few cases duly and precisely listed by international conventions. The State, the guardian of justice, must learn to submit to justice, even if it is administered by a foreign State.

JEAN-FLAVIEN LALIVE

*Freedom of Speech in the West.* By Frede Castberg. [Oslo: University-Press; London: Allen & Unwin, 1960. 475 pp., bibliography, index, table of cases.]

The author is Norway's leading authority on constitutional and international law, Professor and twice Rector of the University of Oslo and former chairman of Norwegian delegations to conferences of the United Nations. He has chosen France, the United States and the Federal Republic of Germany to project in a broad historical perspective the development of the freedom of speech in three countries which all now live under free democratic rule but went through various stages of legislative and judicial interpretation of the subject matter. The author describes his book as a study in comparative public law, concerned principally with legislation and the rules of constitutional law as well as with the practice of the administration and the courts in the field of freedom of speech. The reviewer would however fail to do justice to this work if he omitted to refer to the many pungent personal comments and observations with which Professor Castberg interspersed his scholarly study. The gist of his argument is contained in the concluding personal views which summarize the issue raised particularly in chapters dealing with France (Freedom, too, to oppose freedom?) and with the United States (The struggle for the freedom of speech): how much tolerance towards intolerance can a democratic government afford? The author arrives at the conclusion that "the state, whose form of government is based on political freedom of speech, should be capable of allowing opponents of the régime to agitate, among other things for the abolition of freedom." In a logical sequence to this postulate, regard for internal peace would, he feels, require the acceptance of a situation created by an actual success of agitation in favour of a non-democratic constitutional system. It would seem that this reasoning presupposes that such an agitation is carried on according to the rules of the democratic game – a requirement which has failed to materialize in many successful recent attacks on free communities. Nevertheless, Professor Castberg's confidence in the political vigour and moral health of Western society justifies his advocacy of the broadest scope of the freedom of speech and his belief in the educational value of its widest use in a modern democracy.

VLADIMIR M. KABES

*Human Rights and World Order.* By Moses Moskowitz. [New York: Oceana Publications, Inc. 1958. 239 pages. \$ 3.95.]

Mr. Moskowitz has represented the Consultative Council of Jewish Organizations at the United Nations since 1947, the year in



which it was admitted to consultative status with the Economic and Social Council. As he himself says, "this book is the outgrowth of almost twelve years of close observation of the work of the United Nations in the field of human rights."

The author comments severely on the failure to achieve positive results in the international protection of human rights, and, whilst drawing attention to the relevant Charter provisions, he spends little time on verbal analysis of these provisions and gives a sad but cogent reason when he shortly and emphatically states at page 35: "The use of [the legal powers of the United Nations] and the liberal or strict interpretation of the Charter depend upon the interplay of political forces and interests and upon the particular political alignment at the moment. This applies as much in the field of human rights as in the field of political and security affairs."

The author reviews the specific cases which have occupied the attention of the United Nations in the field of human rights. In this chapter and the chapter on "General Promotion of Human Rights" he points out the emasculation of the original objective of implementation by the recognition by both the Commission on Human Rights and the Economic and Social Council that they had no power to take any action on complaints regarding human rights. This he regards as a renunciation of their right to do so, but it would have been fairer to say simply that it was a recognition of the hard facts of international politics. It is difficult to believe that then or now any other view would reflect current attitudes of even the majority of member States.

The book contains a certain amount of the crusader's impatience but never becomes polemical. The final chapter, "Conclusions," is an eloquent plea for protection by international covenants in which the author argues strongly that moral force is not enough, but he also points out the extreme sensitivity of States even to studies and analyses which reflect adversely on their internal conditions. It may be suggested that this is in part a sensitivity to implicit moral condemnation, but, of course, this is in itself an insufficient basis for protecting human rights. Nevertheless, the efficacy of international agreements can be over-estimated and that of moral persuasion under-estimated.

The author's criticisms are, on the whole, constructive and merit careful study. His advocacy of an Attorney General for Human Rights, as was proposed by Uruguay, depends unfortunately on the acceptance of enforceable jurisdiction, but granted that tremendous step forward, is a valuable suggestion for two main reasons: firstly, the separation of legal issues from politically inspired initiatives, and, secondly, the assurance that an initiative will be taken.

The book that escapes adverse criticism by the reviewer is indeed rare, and there are several criticisms of a minor nature that

can be made against this generally commendable work. It would, however, be churlish to devote a disproportionate amount of space to these, and the most important alone will be mentioned. Unfortunately, the index, of three pages only, is by no means adequate, though it is accurate as far as it goes. For example, the question of domestic jurisdiction [Article 2(7)] is a recurrent theme, and is not confined to the pages mentioned in the index.

DONALD THOMPSON

*La Jurisprudence de la Cour internationale de Justice.* By Edvard Hambro. [II. 1952-1958. Leyden: A.-W. Sythoff, 1960, 376 pp., bibliography index.]

This second volume of Professor Hambro's useful reference work on the jurisdiction of the International Court of Justice will be appreciated by international lawyers as well as by other members of the profession concerned with the establishment of the Rule of Law in relations between both nations and individuals. The book contains relevant materials from a period which was one of constant growth of the Court's activities. The extracts from its judgments, advisory opinions and decrees are entered following a well-conceived systematic pattern. While Professor Hambro's collection is not an original work, it is certainly a most valuable contribution to the literature on the International Court. Its usefulness for research and study purposes is further enhanced by a comprehensive bibliography on each case submitted to the Court and by an exact and detailed index.

J.-F. L.

*The European Commission of Human Rights, Documents and Decisions, 1955-1956-1957.* [The Hague: Martinus Nijhoff. 1959. XIII and 276 pages.]

The Directorate of Human Rights of the Council of Europe has had the felicitous idea of publishing in this volume, the first in a series, the texts of all the basic documents relating to human rights. The book also includes valuable information on the machinery for the protection of human rights and fundamental freedoms which was set up by the Rome Convention of 1950. There is no need here to dwell on the importance and on the entry into effect of that Convention. The International Commission of Jurists has already devoted a number of articles to this topic [cf. *Journal*, Vol. 1, No. 2 (Spring-Summer 1958), pp. 212 *et seq.*, *Bulletins* No. 7 (October 1957), p. 3; No. 8 (December 1958), p. 4; No. 9 (August 1959), p. 5.]

There is also a selection of decisions by the European Commission up to the end of 1957. This section devoted to case-law is of the greatest interest and shows the importance of the pioneer work carried out by the European Commission. Its work is being followed with great attention by African, Latin American and Asian jurists who are considering the creation in some appropriate way of a system for the protection of human rights, or who are in fact already in the process of setting up such a system.

It is a pity that there is such a long interval between the period under review and the date of publication. The book covers the period up to the end of 1957, but the introduction is dated November 20, 1958, and the book was published about a year later. In this field development is rapid and the invaluable pioneer work by the European Commission would gain still further in value if it became known more quickly. The work (is it a Yearbook or not?) contains a useful bibliography of the main publications on the European Commission for Human Rights. It is always intriguing to ask what the test is for determining whether a particular publication falls into this category, and on this point the method adopted by the *Yearbook* of the International Court of Justice seems preferable: the bibliographies are well-nigh exhaustive. These are minor points, however, and in no way alter the fact that this book is required reading for all who are concerned with the effective protection of human rights.

J.-F. L.

*European Yearbook, Vol. V.* Published under the Auspices of the Council of Europe. [The Hague: Martinus Nijhoff. 1959. XIX and 755 pp. 41 guilders net.]

The jurist who endeavours to find his way through the maze of European organisations will do well to consult the *European Yearbooks* and especially this fifth volume. Examination of these organisations sometimes leaves an impression of chaos. This impression will not altogether be dispelled by this work, but the reader will find a "chaos of clear ideas" and will be less pessimistic than Salvador de Madariaga, whose brilliant contribution "Critique de l'Europe" is the opening article of the *Yearbook*. This article is, of course, an example of the vigour and liveliness of thought for which its author is well-known.

Like its precursors, the present volume has two parts: a number of articles and a sizeable section consisting of documents. In that section are to be found texts and commentaries on the various tribunals and courts of justice which, in the Madariaga phrase,

"encombrent l'espace international." It is clear that in the administration of justice it would have been more rational to use existing institutions and to submit differences to a special division of the International Court of Justice at The Hague. This would, despite certain technical differences, have been perfectly possible.

Of particular interest for readers of the *Journal* are the following documents:

"European Convention for the Peaceful Settlement of Disputes, (pp. 347 ff.); European Convention on Extradition (pp. 363 ff.); Protocol on the Statute of the Court of Justice of the European Economic Community (p. 439); Treaty establishing the European Atomic Energy Community (Euratom), (pp. 455 ff. in particular, pp. 521 ff., Article 136 to 160, on the Court of Justice); Protocol on the Statute of the Court of Justice of the European Atomic Energy Community (pp. 571-587); Convention relating to certain Institutions common to the European Communities, Section II, "The Court of Justice", (pp. 591-93)."

The documents are in both French and English, whilst the articles appear in one of these languages, followed by a summary in the other. It is to be regretted that a volume of such a high standard and otherwise so well presented be spoiled by numerous printing errors.

J.-F. L.

*"Le Pouvoir Soviétique"; Introduction à l'étude de ses institutions.*  
By Henri Chambre [Paris: R. Pichon et R. Durand-Auzias, 1959. 168 pp., bibliography.]

One of the difficulties with which Western countries are always confronted when attempting to form a judgement on the Soviet Union and its institutions is the fact that on both sides the same words are used to apply to fundamentally differing concepts. Thus merely comparing the text of the constitutions of the various countries does not provide any certainty as to whether or not one is dealing with similar legal systems, similar state bodies and institutions; the forms of democracy do not guarantee in themselves a democratic government, and the question whether a particular state is constitutional or not can only be ascertained from a close study of the practical functioning of that constitution in reality.

It is for this reason that a presentation of the Soviet system of government which is based on the really decisive factors and not merely on the text of the constitution and laws is of quite special value. Henri Chambre, who is known above all for his excellent

book, "Le Marxisme en Union Soviétique", has adopted this important principle and thereby achieved an analysis which, while brief, is nevertheless most successful in the balance of its emphases. He sees the aims and limitations of the exercise of political power not in the Soviet constitution but independently of it as inherent in the particular structure of a one party state. The legal system is thus subordinate to the ideology, which exercises a decisive influence on it. In describing the Soviet system of government one should not commence with the constitutional principles and the formal system of law, but rather with the source of power whence laws and policy of the state are determined: the Party. Therefore the author starts by analysing the structure and function of the Communist Party and only later concerns himself with the specific features of the Soviet state, its Executive, Legislature and Judiciary. A further chapter deals with the economic institutions, the planned economy, the trade unions, etc. In his conclusions *Chambre* rightly emphasises the essential element which differentiates the Soviet State from truly constitutional systems: in contrast to the latter it is not subject to the law, i.e. it does not admit the principle that the state and its institutions are bound by the laws they have enacted. Only when this has been established is it possible – and demonstrating this is a great merit – to interpret the recent legal reforms as a strengthening of legal stability which does not however reflect a fundamental change towards the implementation of the Rule of Law.

It goes without saying that one cannot expect all the aspects of this subject to have been exhausted in the space of little more than 160 pages. Many problems, e.g. the influence of the bureaucracy, have hardly been touched upon. In this book, however, as in the first volume of this new series "Comment ils sont gouvernés", on the U.S.A. (see p. 235), the author has succeeded in presenting the essential features of the state in question and thereby in giving a valuable picture, correct in its assessment and presentation, of the constitutional reality in this most important of the Communist states.

CURT GASTEYGER

*Les Etats-Unis.* By André Tunc. In the series "Comment ils sont gouvernés" published under the direction of Georges Burdeau. [Paris: Librairie Générale de droit et de la jurisprudence, R. Pichon et R. Durand-Auzias. 1959. 284 pp.]

Professor André Tunc of the Universities of Grenoble and Paris has acquired a well-deserved reputation of a leading European expert on the legal system of the United States. One could add without exaggeration that his observations on America and Americans, often critical but always sympathetic, rank him with Alexis de Tocqueville

as the two Frenchmen whose knowledge of the spirit of the United States produced the most penetrating analyses of their public life.

A profound monography on the sources and techniques of the law of the United States, written jointly by Professor Tunc and Mme Suzanne Tunc, has won broad international acclaim since its publication in 1955. The smaller and less scholarly book under review here is however not less impressive. It sketches the past and present of the United States in the varied aspects of its sociological and political manifestations and is particularly succesful in short and penetrating comments which emphasize the main characteristics of American psychology without drifting into easy generalizations. The chapter on the Components of Political Life, for instance, contains on less than 60 pages a wealth of observations and judgments which alone make the book a most useful introduction to the *mores* of America.

The layout of Professor Tune's book is based on two main parts; a historical sketch and a description of the sociological framework is followed by a systematic treatise of the mechanism of political life, divided in chapters on Parties and Elections, the Congress, the President, the Administration, the Courts and the States. The length of these chapters varies from 13 to 38 pages, but the necessary condensation does in no way impair the clarity of the presentation and the precision of the analysis.

It is in the concluding chapter where the author's interpretation of the role of the United States in the world will no doubt evoke some criticism. Judgments on institutions are usually less controversial than views on personalities and the brevity of comment on such complex matters like the American foreign policy must necessarily bring out some stereotypes. But no one can dismiss the forceful plea for responsible leadership with which Professor Tunc sums up his brilliant study: an international New Deal, converting to the use of indigent peoples some of America's economic power and associating with it other prosperous nations may in the author's opinion become the ultimate salvation of Western democracy and our civilization.

V. M. K.

*Political and Civil Rights in the United States.* A collection of legal and related materials by Thomas I. Emerson, Professor of Law, Yale University, and David Haber, Professor of Law, Rutgers University. [Buffalo, New York: Denis & Co., Inc. 2d ed. 1958. 2 volumes. 1536 pp., table of cases, index.]

*Equal Justice Under Law; The American Legal System.* By Carroll C. Moreland. [New York: Oceana Publications Inc. 1957. 128 pp., bibliography, index.]

*Law of Civil Rights and Civil Liberties.* By Edwin S. Newman, LL. B.  
[New York: Oceana Publications Inc. 1957. 94 pp., index]

The article by Kenneth Greenawalt on the Legal Aspects of Civil Liberties in the United States and Their Recent Developments, published in Vol. 2, No. 1 of the *Journal of the International Commission of Jurists*, has been most favourably received by the readers of this periodical. The interest in the protection of the rights and liberties of the citizens of the United States has grown with the realization that the Constitution of 1787 – the oldest living fundamental law of the world – owes its continued vitality to the American readiness to experiment, improvise and adjust without compromising on the basic issues that underlie the practices of individual freedom and political democracy.

The urgent need “to frame a more perfect Union” found its expression in provisions establishing an effective central government; but the authors of the Constitution were concerned in an equal measure with setting strict limits to the interference of authorities with private life and with that unrestricted play of economic and social forces which was then held to be the ultimate manifestation of freedom.

Hundred and sixty years later, the relationship between the Government and the individual in a democratic system appears substantially modified. The State has been compelled or invited to assume many tasks which private initiative and private charity proved unable to discharge with a detached interest in the common weal; many regulatory functions were taken over by the authorities in times of emergency and their continued exercise has been sanctioned or tolerated ever since. The government has ceased to be feared as the potential invader of an individual's privacy; its carefully circumscribed and effectively controlled intervention became a stabilizing factor in a society of intricate industrial, commercial and domestic relations, girding a world in which distance has lost its restrictive meaning.

Considering the expansion of the legitimate pursuits of the modern democratic state, an 18th century Constitution would be out of date unless it too possessed a capacity for growth symptomatic of our changing world. The United States Constitution has proved to be remarkably adaptable when confronted with the stupendous development of the nation's economy and the gradual yet not less revolutionary changes in its social structure. The supreme test of the Constitution is, however, in the field of civil rights. Its breadth has changed but little since the adoption of the first ten Amendments in 1789 and the Thirteenth, Fourteenth and Fifteenth Amendments in the years 1865–1869. Its depth, however, is subject to a steady revision prompted by the growing awareness of the direct bearing

of social economic, cultural and educational conditions on the concept of equal justice under law. The decisions passed in this spirit by the Supreme Court of the United States have in the recent years vindicated the trust in the evolutionary interpretation of the Constitution through judicial review, one of the keystones of the American system.

A student of this creative role of the American judiciary as well as of the relative contribution of the three branches of government to the preservation and extension of constitutional freedoms will find excellent material in the two volumes by Emerson and Haber, *Political and Civil Rights in the United States*. Conceived first as a collection of reading materials for students of advanced constitutional law courses, the scope of the work has been expanded so as to cover not only the principal decisions of the US Supreme Court, States Supreme Courts and lower Federal courts, but also Acts of Congress, excerpts from government publications, resolutions of Bar associations and their bodies, selections from books, law review articles, case notes, codes of entertainment media, newspaper stories, all connected by comprehensive comments of the authors.

This wealth of material is organized in seven chapters covering the entire field of political and civil rights in a modern state: the Right to Security of the Person, the Right of Franchise, Freedom of Speech (two chapters), Academic Freedom, Freedom of Religion, Discrimination. The chapters on Freedom of Speech and Discrimination are followed by valuable bibliographical notes. A table of Cases and Index wind up the work, the usefulness of which is attested by two printings of its first edition and a second edition, revised and substantially expanded.

There is no exaggeration in Robert M. Hutchins' introductory statement that "these cases and materials will force the reader to re-think the most fundamental questions: the purpose of human life and of organized society; the relation of man to the State; the conflict between freedom and security; and even... the nature of truth itself." From the viewpoint of the International Commission of Jurists, they also bear out the dynamic nature of the Rule of Law.

Two less scholarly and comprehensive but nevertheless informative books can be recommended to foreign lawyers interested in the American legal system in general and its protection of civil rights and liberties in particular. Mr. Moreland's *Equal Justice Under Law* describes the constitutional guarantees and the organization of Federal and State courts. It contains further the Bill of Rights and a very useful comparative table of the application of its provisions to the several States. A chart of the Federal Court System, the Canons of Judicial and Professional Ethics of the American Bar Association and a substantial bibliography complement this concise and instructive book.



Mr. Newman's *Law of Civil Rights and Civil Liberties* was written with the informed layman in mind. Divided in two sections, Civil Liberties (Freedom of Expression, Personal Liberty) and Civil Rights (Federal Protection, State Protection), it offers a quick survey of the definitions, terms and regulations pertaining to its subject with special emphasis on the progress of desegregation in the Southern States. It provides an introductory note to a field of law of which the author proves his mastery even in this popular abbreviation.

V. M. K.

*Les Institutions Françaises, racontées aux Français.* By Emmanuel Blanc, avocat à la Cour de Paris. [Paris: Les Editions de Minuit. 1959. 457 pp.]

Mr. Blanc, an advocate at the Court of Paris, has chosen a strangely narrow title for his excellent work. Foreign readers too, and especially jurists, will find in his book an illuminating account of the legal institutions of present-day France.

The book is divided into two parts: the first deals with private law (domestic, economic and professional life), the second with public law (judicial, administrative and political life). It is designed for the general reader rather than the specialist and this no doubt explains the somewhat brief account of certain topics such as that of civil liberties. On this subject the picture presented by the author is a little too indulgent, and no mention is made of the disturbing tendencies which have been noticed over the past few years in this area. Such matters as preventive detention and assigned residence could have been mentioned. Nevertheless M. Blanc has succeeded in producing a remarkable general survey and his chapter on the complex structure of the French legal system is, for example, particularly worth reading.

The book is written in a lively, readable style which often stimulates the reader's appetite to learn more. A select bibliography would be useful and welcome, and perhaps the author will include one in his second edition. He has, however, provided a very good index, which enables the reader to make ready reference to the book.

J.-F. L.

*The Federal States and Their Judiciary.* By W. J. Wagner, Professor of Notre Dame University, Indiana. [The Hague: Mouton & Co. 1959. 390 pp., table of authors and materials.]

Professor Wagner is a firm believer in the future of federalism. Active in the international movement promoting federalist ideas, he chose and developed the theme of his book in the spirit of its motto from Dicey: "Federalism . . . means legalism – the predominance of the judiciary in the constitution – the prevalence of a spirit of legality

among the people." The optimistic attitude of the author towards the future of the federal system within individual states as well as between them is reflected in the consistency of his arguments and the forcefulness of their presentation. His concept of federalism under the conditions of modern society is based on a clear and unequivocal supremacy of the federal authority, on a *delegation* of power from the central to the component units rather than on a *reservation* of power by the latter. Admitting that the classical models of federated states, such as the United States of America and Switzerland, were created by their constituent states, he quotes Brazil as a typical example of a federal system established by the central government. To preserve the essence of the federal pattern, such a division of powers "from above" cannot of course be determined, let alone altered, by the central government without the consent of at least the majority of the members of the federation. The author points out correctly that a revocable authority delegated by the central government to local units would in fact "give birth only to an autonomy, instead of a federal phenomenon according to the traditional standards."

Professor Wagner based his book primarily on the federal system of the United States. The long tradition of that country's federal judiciary and the wealth of sources available on its theory and practice justify some disproportion, though the layout of the book and the division of the material underscore the emphasis on the United States more than befits a broad comparative study. Other countries discussed under the four main headings (The Federal States, Principles of the Federal System of Courts, Federal Jurisdiction, the Supreme Courts) are Switzerland, Australia, Canada, Argentina, Brazil, and Mexico. A special chapter is devoted to "countries which are not well established federations", among which the author counts the Soviet Union, Yugoslavia, the German Federal Republic, the Union of South Africa and Venezuela.

The author draws his conclusions from a solid background of knowledge and reference, impressively listed and conveniently indexed on 13 pages of authors and materials cited. The amount of work that went into the preparation of the book deserves special credit in view of the pioneering nature of Professor Wagner's study. It is indeed surprising that his specific subject has until recently found so little favour with scholars in the field of comparative law. Thus the present contribution represents a needed and welcome addition to legal literature on the problems of federalism, which, as the author convincingly argues, promotes through the limitation and decentralization of power genuine democracy and brings freedom to the constituent members of a federal state as well as to its individual citizens.

V. M. K.

*Studien des Instituts für Ostrecht, München* (Studies of the Eastern Law Institute, Munich):

Vol. 1: *Fragen des Staatsrechts im Ostblock*, 95 pp.; Vol. 2: *Fragen der Gerichtsverfassung im Ostblock*, 92 pp.; Vol. 3: *Das Strafrecht der UdSSR de lege ferenda* (Friedrich-Christian Schroeder), 70 pp.; Vol. 4: *Die Organisation der sowjetischen Anwaltschaft* (Andreas Bilinsky), 50 pp.; Vol. 5: *Das Eigentum im Ostblock*, 113 pp.; Vol. 6: *Der Rechtsanwalt im Ostblock*, 86 pp.; Vol. 7: *Das Arbeitsrecht im Ostblock*, 112 pp.; Vol. 8: *Bürger und Verwaltungsrechtsschutz in der SBZ und im Ostblock*, 75 pp.; Sonderband: *Die Verfassung der "Deutschen Demokratischen Republik"* (Werner Schulz), 102 pp. (all volumes published by "Verlag für Internationalen Kulturaustausch, Frankfurt/Herrenalb, 1958-1959).

The study of Communist law as part of the Soviet system was already before the war an important branch of German legal research work on Eastern Europe. The postwar expansion of Soviet influence over Eastern Europe lent new dimensions to the study and significance of Soviet law. This became particularly true for Germany the Eastern part of which fell under Communist rule and caused, apart from the country's political division, a sharp split in the hitherto generally accepted conceptions of law. While at many universities a special department for the study of Eastern European affairs was set up it was as late as in 1957 that an institute exclusively devoted to research work on Eastern law was founded, the "Institut für Ostrecht" at Munich. Its aim is not only to provide students with a well-equipped and documented centre but also to disseminate by means of publications and seminars the facts and findings of the Institute. The series of studies the Institute has since published are most useful contributions to research in this field. Most of the studies result from lectures held at several seminars and dealing with different aspects of Eastern European law.

The first of the eight volumes already published gives a general introduction to the theory and practice of totalitarian states and the "making" of Communist law. On this subject valuable contributions were made by Prof. Peter Schneider (Principles of Totalitarian Legal Thought) and Prof. Reinhart Maurach (The Constitutional Development of the Soviet Union) as well as by three other authors (Rabl, Drath, Mampel) who deal with the establishment and functioning of the Communist regime in the Eastern European countries. Their presentation of the main features of Communist legal practice common to all Communist ruled states are all the more useful since the following volumes contain a detailed account on specific branches of their legal order based on such common

ideological and political foundations. Thus, Volume 2 covers problems of the judiciary and judicial proceedings in the Soviet Union (Maurach), Hungary (Magyar), Poland (Geilke) and Eastern Germany (Rosenthal); Volumes 4 and 6 pertain to a most important but often neglected subject (as far as its significance for the Communist system is concerned), namely the position of the practising lawyer and the Bar in the State: Andreas Bilinsky deals with the organisation of the Bar in the Soviet Union, Walther Rosenthal and Werner Schulz with that of Eastern Germany and Hungary, respectively; a corresponding chapter on the situation in the other People's Democracies was reprinted from the excellent work by Gsovski and Grzybowski, "Government, Law and Courts in the Soviet Union and Eastern Europe", (see above pp. 215-225). The main subject of Volume 7 is Labour Law, outlined in two basic papers by Paul Barton dealing with collective labour law and the role of the trade unions, and complemented by equally interesting contributions by Hans Niedermeier, Siegfried Mampel and again Andreas Bilinsky on related topics. In addition this volume contains some texts of relevant decrees (e.g. the law on the workers' councils in Poland), thus enabling the reader to peruse documentary material not otherwise easily available. Finally, the administrative jurisdiction in the Eastern bloc is dealt with in Volume 8 comprising articles by Messrs. Bilinsky, Baring and Schulz who draw attention to the idiosyncracies in the concept of "socialist legality" which are to be found in the administrative procedures in Eastern Germany and Hungary.

It may be that not all of the articles mentioned above are of the same perspicacity and thoroughness, some of them being limited to not more than a general outline of the subject. The series as a whole presents nevertheless a useful and reliable introduction to the understanding of the Communist legal system and its current development.

Two monographs remain to be mentioned. The first is by Friedrich-Christian Schroeder who writes in a most scholarly way on the Soviet Penal Law *de lege ferenda*. Although some aspects of this book are outdated by the laws enacted in December 1958 (see *Bulletin* No. 9 of the International Commission of Jurists) its basic ideas and criticisms retain their value. Werner Schulz is the author of the second book which is devoted to a careful and penetrating evaluation of the East German Constitution which has been in existence for ten years. The author argues with great force that the procedure by which this constitution was enacted was illegal and emphasises its peculiar features due to the special position of Germany as an occupied country and as an ideological battleground for two diametrically opposed social and ideological systems. An appendix to the book contains the full text of the East German Constitution

as well as illustrative quotations from Communist leaders on related legal issues. A short bibliography is added.

It is to be hoped that more volumes will follow in this useful and noteworthy series. The Institute in Munich and its staff deserve congratulation on their initiative and on their contributions to the understanding of Communist law.

C. G.

*"Dokumente zur Staatsordnung der Deutschen Demokratischen Republik"*. [Günther Albrecht, Editor; East Berlin: Deutscher Zentralverlag. 1959. 2 volumes, XXXII, 540 and 604 pp.]

These two volumes are intended as a comprehensive documentation of the national and supranational legal development of the German Democratic Republic (G.D.R.) from 1945-1958. They contain several hundred documents, notes, government statements, texts of acts of legislation and international agreements, a detailed bibliography and a table of contents, which however is no substitute for the missing index of documents.

The volumes are provided with a preface by Professor Herbert Kroeger, one of the leading legal theorists of East Germany. Those who had hoped for a thorough analysis of the basic features and main legal problems of that country were unfortunately disappointed: as in almost all publications from the Soviet Union and the "People's Democracies" we find here merely a strictly one-sided portrait and interpretation of the birth and development of the East German state. This is all the more to be regretted inasmuch as a documentation of this type undoubtedly offered an excellent opportunity for a comprehensive survey of the numerous legal problems which were of particular importance after the war. Instead of this, in a polemical comparison and contrast to West Germany, "whose structure runs counter to the trends in social development, and which will therefore not endure", the G.D.R. is presented as a state in which "power of the working classes was asserted in grim class struggles . . . which works in concert with all peace-loving democratic forces . . . and thus represents the future of Germany" (p. XIX). Statements of this kind which defy scientific evidence are supported by numerous quotations from Lenin and from the First Secretary of the Communist Party of the G.D.R. Walter Ulbricht. The documentation is of interest insofar as it throws light on the crucial development and legislation of the country. This influence may be seen most obviously in Professor Kroeger's preface, where he speaks of the "introduction of a socialist style of operations in the administration from the People's Chamber (Parliament) right down to the Parish Councils," and shows that the guiding legal concepts are expressed not only in the Constitution, but also in the resolutions

of the various Party conferences. He informs us that "all the organs of state, from those of popular representation to the executive bodies, the judiciary, the organs of economic control and the civil servants should mobilise the population in the struggle for the victory of socialism". Thus it is already explicitly stated – and the documents provide a convincing proof – that the constitutional structure and legal system of the G.D.R. are, quite deliberately, put to the service of a political objective. Thus questions regarding the independence of the courts, or of the legal profession cannot be answered according to constitutional principles, but only with regard to political expediency. For this reason one cannot expect either from the preface or from the documentation itself, or for that matter, from the bibliography, which contains only East German and Soviet authors, a comprehensive and objective treatment of the subject, all Western notes and declarations regarding the German question being omitted. It is rather to be regarded as a compilation of documents, made with definite political aims in view, which, while useful and informative, has a limited value from the viewpoint of domestic and international law.

C. G.

*Les Barreaux dans le monde – Die Rechtsanwaltschaft in der Welt*, Volume I. Published for the Union internationale des avocats by Dalloz et Sirey, Paris. [1959. XV and 595 pages.]

The Union internationale des avocats has been for forty years fostering the spirit of co-operation and friendship among the members of the legal profession across national borders. Its meetings and working projects have supplied illustrative evidence of the manifold tasks confronting lawyers in a modern society and of the differences of organization between the professional groups to which they belong.

Out of the awareness of this variety grew a project which materialized in 1959 in form of an impressive bi-lingual volume of 600 pages published under the general editorship of Dr. Werner Kalsbach. The selection of a German rapporteur for this ambitious undertaking has been, in the introductory words of Robert Martin, not only a tribute to Dr. Kalsbach's broad knowledge and learning in the field of Bar Statutes, but also a recognition of the long and systematic study carried out in Germany on problems of the organization and training of the legal profession.

The book is divided in two parts. The first forms an independent comparative study written by Dr. Kalsbach and richly documented from Bar Statutes, Codes of Professional Ethics, other official sources and literature. The second contains a selection of monographs on the organization of the Bar in France, Norway, the

Netherlands, Switzerland, the United States and Yugoslavia, contributed by prominent lawyers of the countries under discussion. An attractive feature of the presentation of both parts is the arrangement of the French and German texts on opposing pages permitting easy orientation and comparison.

The selection of studies in this first volume of a planned series puts a heavy emphasis on Europe. The publishers intend however to cover subsequently other continents as well and it is this global scope of their work that will be of particular value for the realization of their purpose: to prove that the professional ideals of the Bar are – despite all national differences – common patrimony of all lawyers of the free world.

V. M. K.

*Les Jurisdictions Internationales – International Courts* (1958), published for the Union internationale des avocats by Dalloz et Sirey, Paris. 680 pp.

Under the editorship of Fernand Charles Jeantet, the Union internationale des avocats published a bilingual volume on various international jurisdictions accompanied by a complete documentation on the respective tribunals and commissions. Experts from a number of European countries analyze the history and functioning of judicial bodies ranging from the International Court of Justice to the administrative tribunals and appeals boards of UN agencies to conciliation and arbitration commissions on specific territorial problems. Practising lawyers of all shades of specialization, students of international law and economists will find this well documented publication of greatest interest. Its value is enhanced by the even quality of the French and English versions and the availability in both languages of texts of international conventions, agreements and statutes to some of which access is often difficult.

*Politica Internacional y Panamericanismo Ideal*. By Simon Planas-Suarez. [Buenos Aires: Lopez. 1959. 402 pp., index.]

The distinguished Venezuelan jurist and diplomat selected for his newest book articles and essays written by him in the years 1903–1956 and reflecting his profound thinking on Inter-American relations, Panamericanism, the effects of the wars of the 20th century on Latin America and on related issues of diplomacy and foreign policy. Despite of the span of fifty years between the first and last chapter, the book presents a remarkable picture of spiritual unity and balanced analytical judgment.

*Primo Congresso Internazionale Dei Magistrati*, Roma, 11-13 October 1958. [Milano: Dott. A. Giuffrè. 1959. 2 volumes, 1218 pp.]

The International Union of Judges, which maintains its headquarters in Rome, held there its first international congress from which resulted a valuable record of reports and discussions on the two main themes of the Congress: The Preparation of the Judge for the Exercise of the Judiciary Function, and The Character and Scope of International and Supranational Tribunals as they appear in present treaties and international conventions and as they may develop in the future. The two carefully edited and well organized volumes contain materials in English, French, German, Italian and Spanish; the individual contributions are of great value not only to the judge but to the practitioner of law and comparative jurist as well. An excellent typographical arrangement of the reports, discussions and charts adds to the usefulness of this impressive compilation.

*L'institution concentrationnaire en Russie*. By Paul Barton. [Paris: Plon, 1959. 520 pp., bibliography.]

The author is one of Europe's foremost experts on the Soviet system. A former trade union underground organizer under German occupation and a scholarly analyst of Marxism-Leninism, he approaches his task with a serious and well-founded sense of responsibility. His book, produced on behalf of the International Commission against Concentration Camp Practices and introduced by David Rousset, is a document based on solid research and incontrovertible evidence. These attributes do not make its reading easy and enjoyable, but certainly imperative for students of problems of human rights in areas largely withdrawn from the influence of world public opinion.

*Le Droit International Nouveau dans ses rapports avec la vie actuelle des peuples*. By Alejandro Alvarez. [Paris: Pedone. 1959. 636 pp.]

The author, a former Judge at the International Court of Justice and member of the Institut de France, approaches the subject from the viewpoint of the revolutionary changes affecting the lives and institutions of the peoples of the world since the outbreak of the Second World War. Comparing this "social cataclysm" with similar but less universal upheavals of 1789 and 1914, Professor Alvarez sketches briefly the problems confronting international law in recent years and proceeds to study in great detail the socio-



political effects of international developments throughout the ages with particular regard to the psychology of nations. From these analyses he derives conclusions as to the new bases of political, economic and social sciences which he finally projects in the field of international law. This challenging and in its structure novel book deserves a more thorough review than can be given in this issue; it constitutes a major contribution to the newly developing discipline of the dynamics of law in a changing world.

*Constitutions des Etats de la Communauté.* By P. F. Gonidec. [Paris: Sirey, 1959. 185 pp.]

The constitutions of the African Member States of the French Community are introduced in this useful volume by a comparative survey of the French Constitution of 1959 and those of the overseas Republics with particular reference to human rights and civil liberties, institutions, and political organs and their functioning.

*Les Constitutions du Proche et du Moyen-Orient.* By J. E. Godchot. With an introduction by Professor G. Vedel. [Paris: Sirey. 1957. 442 pp.]

A short historical summary precedes the texts of the constitutions of Afghanistan, Saudi Arabia, Egypt, Erythrea, Ethiopia, Greece, Iraq, Iran, Israel, Jordan, Lebanon, Libya, Sudan, Syria, Turkey and Yemen. Recent developments in some of these countries have made parts of the book obsolete, yet it remains to our knowledge the only one-volume collection of Near and Middle Eastern constitutions and continues to be a useful reference to comparative lawyers and students of this vital area.

*L'Association des pays d'outre-mer à la Communauté économique européenne.* By Pierre-Bernard Cousté. [Paris: Libraries techniques, 1959. 268 pp., bibliography, index.]

The emergence of new African countries and their desire for economic as well as political independence is one of the most important phenomena of our times. It affects and will considerably influence international relations, the distribution of wealth among nations, the manufacturing and trading pattern of world economics. The present book applies itself to the economic aspects of the problem and illustrates the possibilities of a close Afro-European co-operation in this field.

*Die Rom-Konvention für Menschenrechte in der Praxis der Strassburger Menschenrechtskommission.* By Hans Wiebringhaus. [Saarbrücken: West-Ost-Verlag G.m.b.H. 1959. 172 pp.]

The author succeeded to cover in this small booklet an impressive amount of material, ranging from a historical survey of the development of the notion of human rights to the texts of the most important documents based on the Rome Convention on the Protection of Human Rights and Fundamental Freedoms (1950). The Convention is expertly commented. Rules of Procedure of the European Commission of Human Rights are also reproduced in their original text and in an annotated version. This double presentation of the basic documents together with an excess of abbreviations complicate the easy perusal of an otherwise practical commentary.

*La Cinquième République.* By Maurice Duverger. [Paris: Presses Universitaires de France, 1959. 323 pp.]

Professor Duverger, whose comments of French constitutional and legal developments attract wide attention, analyzes the institutions of the Fifth Republic with a critical yet dispassionate view focused on the long-term aspects of the new system.

*La Missione del Giurista.* By Francesco Carnelutti. [Padova: Cedam, 1959. Pp. 14.]

The Italian National Section of the International Commission of Jurists - L'Associazione Italiana Giuristi - deserves credit for publishing this penetrating paper on the mission of the jurist. Professor Carnelutti presented in a comparatively brief address some crucial questions of legal philosophy and found, in accordance with the Conclusions of the Congress of New Delhi, the main new task of the lawyer in "the observation of variables in order to establish the constants."

*La Corte d'Assise. La Truffa Processuale.* By Avv. Prof. Pietro Ferdas. [Milano: Varese, Istituto Editoriale Cisalpino, 1960. 58 pp.]

Two short monographs on the jury trial and on fraud in judicial procedure. The author discusses the first within the framework of Italian practice and the second on a broader comparative basis.

V. M. K.

# NOTE ON PUBLICATIONS OF THE INTERNATIONAL COMMISSION OF JURISTS

Listed below are some recent publications of the International Commission of Jurists which are still available on request.

**Journal of the International Commission of Jurists**, issued bi-annually.  
Among the articles are:

*Volume I, no. 1, (Autumn 1957):*

The Quest of Polish Lawyers for Legality (Staff Study)  
The Rule of Law in Thailand by Sompong Sucharitkul  
The Treason Trial in South Africa by Gerald Gardiner  
The Soviet Procurement and the Right of the Individual Against the State  
by Dietrich A. Loeber  
The Legal Profession and the Law: The Bar in England and Wales by  
William W. Boulton  
Book Reviews

*Volume I, No. 2 (Spring-Summer 1958):*

Constitutional Protection of Civil Rights in India by Durga Das Basu  
The European Commission of Human Rights: Procedure and Jurisprudence by A. B. McNulty and Marc-André Eissen  
The Danish Parliamentary Commissioner for Civil and Military Government Administration by Stephan Hurwitz  
The Legal Profession and the Law: The Bar in France by Pierre Siré  
Judicial Procedure in the Soviet Union and in Eastern Europe by Vladimir Gsovski and Kazimierz Grzybowski, editors  
Wire-Tapping and Eavesdropping: A Comparative Survey by George Dobry  
Book Reviews

*Volume II, No. 1 (Spring-Summer 1959):*

International Congress of Jurists, New Delhi, India: The Declaration of Delhi, Conclusions of the Congress, Questionnaire and Working Paper on the Rule of Law, Reflections by V. Bose and N. S. Marsh  
The Layman and the Law in England by Sir Carlton Allen  
Legal Aspects of Civil Liberties in the United States and recent Developments by K. W. Greenawalt  
Judicial Independence in the Philippines by Vicente J. Francisco  
Book Reviews

**Bulletin of the International Commission of Jurists**, issued quarterly, publishes facts and current data on various aspects of the Rule of Law. Numbers 1 to 6 are out of print.

**Number 7 (October 1957):** In addition to an article on the United Nations and the Council of Europe, this issue contains a number of articles dealing with aspects of the Rule of Law in Canada, China, England, Sweden, Algeria, Cyprus, Czechoslovakia, Eastern Germany, Yugoslavia, Spain and Portugal

**Number 8 (December 1958):** This number deals also with various aspects of the Rule of Law and legal developments with regard to the Council of Europe, China, United States, Argentina, Spain, Hungary, Ceylon, Turkey, Sweden, Ghana, Yugoslavia, Iraq, Cuba, United Kingdom, Portugal and South Africa

**Number 9 (August 1959):** The Organization of American States and Human Rights. Aspects of the Rule of Law in Algeria, Cyprus, Soviet Union, South Africa, Spain, Hungary, Kenya, Cuba, Iraq, Rumania, Nyasaland, East Germany. United Nations and the European Court of Human Rights.

**Number 10 (January 1960):** Contains information on Ceylon, China, Czechoslovakia, Greece, India, Kenya, Poland, Tibet, and on United Nations and the World Refugee Year

**Newsletter of the International Commission of Jurists** describes current activities of the Commission :

**Number 1 (April 1957):** Commission action as related to the South African Treason Trial, the Hungarian Revolution, the Commission's inquiry into the practice of the Rule of Law, activities of National Sections, and the text of the Commission's Questionnaire on the Rule of Law

**Number 2 (July 1957):** A description of the Vienna Conference held by the International Commission of Jurists on the themes: "The Definition of and Procedure Applicable to a Political Crime" and "Legal Limitations on the Freedom of Opinion"

**Number 3 (January 1958):** "The Rule of Law In Free Societies", a Prospectus and a progress report on an international Congress of Jurists to be held in New Delhi in January 1959

**Number 4 (June 1958):** Notes on a world tour (Italy, Greece, Turkey, Iran, India, Thailand, Malaya, Philippines, Canada and United States), comments on legal developments in Hungary, Portugal and South Africa

**Number 5 (January 1959):** Preliminary remarks of the New Delhi Congress, summary of the "Working Paper on the Rule of Law", information on activities of National Sections

**Number 6 (March-April 1959):** The International Congress of Jurists held at New Delhi, India, January 5-10, 1959, summary of proceedings, "Declaration of Delhi" and Conclusions of the Congress, list of participants and observers

**Number 7 (September 1959):** The International Commission of Jurists: Today and Tomorrow (editorial), Essay Contest, Survey on the Rule of Law, Legal Inquiry Committee on Tibet, United Nations, National Sections, organizational notes

**Number 8 (February 1960):** The Rule of Law in daily Practice (editorial), Survey on the Rule of Law (a questionnaire), Report on Travels of Commission Representatives in Africa and the Middle East, Legal Inquiry Committee on Tibet, Essay Contest, National Sections

**The Rule of Law in the United States (1957):** A statement prepared in connection with the Delhi Congress by the Committee to Co-operate with the International Commission of Jurists, Section of the International and Comparative Law of the American Bar Association.

**The Rule of Law in Italy (1958):** A statement prepared in connection with the New Delhi Congress by the Italian Section of the International Commission of Jurists.

**The Rule of Law in the Federal Republic of Germany (1958):** A statement prepared in connection with the New Delhi Congress by the German Section of the International Commission of Jurists.

**The Hungarian Situation and the Rule of Law (April 1957):** Account of the Hague Conference on Hungary and compendium of the material submitted by the International Commission of Jurists to the United Nations Special Committee on the Problem of Hungary.

**The Continuing Challenge of the Hungarian Situation to the Rule of Law (June 1957):** Supplement to the above report, bringing the Hungarian situation up to June 1957

**Justice in Hungary Today (February 1958):** Supplement to the original report, bringing the Hungarian situation up to January 31, 1958

**The Question of Tibet and the Rule of Law, (July 1959):** Introduction, The Land and the People, Chronology of Events, Evidence on Chinese Activities in Tibet, The Position of Tibet in International Law, 21 Documents (The above is a preliminary report; a final report will be ready by the end of July 1960).

**International Commission of Jurists, Basic Facts, (June 1960):** a brochure on the objectives, organization and membership, history and development, activities and finances of the International Commission of Jurists

**The Rule of Law in a Free Society, (July 1960):** A report on the International Congress of Jurists, held in New Delhi, India, in January 1959. Foreword, Preface, Act of Athens, Declaration of Delhi, Conclusions of the Congress, List of Participants, Programme, Proceedings of the Congress, Questionnaire on the Rule of Law, Working Paper on the Rule of Law in a Free Society and Objectives, Organization, History and Activities of the International Commission of Jurists. pp. 348. (Price \$ 2.00).

Thanks to the generosity of individual jurists and legal institutions in a number of countries, the Commission has been able, upon request, to distribute free of charge its publications. The unprecedented increase of its readers has now made it imperative to invite them to contribute, in a small measure, to the additional printing cost. It has therefore been decided that with this issue of the *Journal* readers will have to pay a small subscription fee. On the other hand, the *Bulletin* and *Newsletter* will continue to be distributed free of charge.