

JOURNAL

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Editor: JEAN-FLAVIEN LALIVE

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Editorial FROM DELHI TO LAGOS

The African Conference on The Rule of Law (Lagos, January 1961)

LAW OF LAGOS

CONCLUSIONS OF THE CONFERENCE

DRAFT OUTLINE FOR THE NATIONAL
REPORTS

GABRIEL D'ARBOUSSIER

THE SIGNIFICANCE OF THE LAGOS
CONFERENCE

T. O. ELIAS

REFLECTIONS ON THE LAW OF LAGOS

PREVENTIVE DETENTION UNDER DIFFERENT LEGAL SYSTEMS

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3

The African Conference on The Rule of Law (Lagos, January 1961)

	LAW OF LAGOS	9
	CONCLUSIONS OF THE CONFERENCE	10
	DRAFT OUTLINE FOR THE NATIONAL REPORTS	19
<i>Gabriel d'Arboussier</i>	THE SIGNIFICANCE OF THE LAGOS CONFERENCE	22
<i>T. O. Elias</i>	REFLECTIONS ON THE LAW OF LAGOS	25

PREVENTIVE DETENTION UNDER DIFFERENT LEGAL SYSTEMS

<i>Zelman Cowen</i>	PREVENTIVE DETENTION IN AUSTRALIA	29
<i>Rachael Richards</i>		
<i>U Hla Aung</i>	THE LAW OF PREVENTIVE DETENTION IN BURMA	47
<i>Kazimierz Grzybowski</i>	PROTECTION OF PERSONAL LIBERTY IN THE CRIMINAL PROCEDURES OF EASTERN EUROPE	69
<i>Vivian Bose</i>	PREVENTIVE DETENTION IN INDIA	87
<i>Hakaru Abe</i>	THE FORMER JAPANESE SYSTEM OF PREVENTIVE DETENTION	99
<i>Arturo A. Alafritz</i>	PREVENTIVE AND ADMINISTRATIVE DETENTION AS IT PERTAINS TO THE PHILIPPINES	109
<i>Bernard Brown</i>	ADMINISTRATIVE INTERNMENT IN SINGAPORE	126
<i>Vladimir Gsovski</i>	PREVENTIVE AND ADMINISTRATIVE DETENTION IN THE USSR	135
	BOOK REVIEWS (turn overleaf)	151

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BOOK REVIEWS

<i>American Association of Law Libraries</i>	Index to Foreign Legal Periodicals	151
<i>W. Friedmann</i>	Law in a Changing Society	151
<i>K. L. Roskam</i>	Apartheid and Discrimination	153
<i>Zaccaria Giacometti</i>	Allgemeine Lehren des rechtsstaatlichen Verwaltungsrecht des Rechtsstaates	154
<i>Rudolf Schlesinger</i>	Comparative Law	157
<i>Nicolas Veicopoulos</i>	Traité des territoires dépendants	158
<i>Milton Katz and Kingman Brewster</i>	International Transactions and Relations, Cases and Materials	159
<i>N. K. Dixit and Neglur Rangath</i>	Private International Law	160
<i>Institute for East European Law</i>	Jahrbuch für Ostrecht	161
<i>David Footman</i>	International Communism	163
<i>Rolf Schüsseler</i>	Die Rechtsverletzungen im sozialistischen Staat und ihre Bekämpfung	164
<i>Ladislav Mezöfi</i>	Die ungarischen Strafgesetze	165
<i>Benvenuto Samson</i>	Grundzüge des mitteldeutschen Wirtschaftsrechts	166
<i>S. K. Das</i>	Japanese Occupation and Ex Post Facto Legislation in Malaya	167

EDITORIAL

FROM DELHI TO LAGOS

The Rule of Law has recently been the subject of increased attention which has extended beyond the professional interest of the legal community. There appears to be a growing realization on the part of the general public of the necessity for integrating in practice the concepts of peace and justice, of law and order and of human rights and freedom. Some nations which are fortunate to have a system of government dedicated to the Rule of Law carry on and develop these concepts in an atmosphere of responsibility and understanding. Other nations, however, witness violations or complete denial of civil rights. It is in connection with the latter nations that the International Commission of Jurists has in the past few months received requests for investigation and analysis of certain situations constituting actual or potential threats to fundamental human rights.

In order to fulfill one of its major tasks, that of being a "watch-dog of civil liberties" seeking to mobilize world legal opinion whenever a general and systematic violation of the Rule of Law exists, the Commission is engaged in a number of special studies. These studies and reports based thereon are primarily devoted to countries whose system of government and administration of justice violate or imperil those principles of the Rule of Law which have since the Congress of Delhi served as criteria for the Commission's investigations. Most recently, the Commission published a documented Report on *South Africa and the Rule of Law* (November 1960). Currently under preparation are reports analyzing the legal situation in Cuba, the Dominican Republic and Spain. Attention is also being given to the serious problems arising from the conditions in Portugal, with emphasis on the tension in her African territories.

There are certainly many countries in various parts of the world where the establishment or strengthening of the Rule of Law may lead to an improvement of the life and security of peoples and remove a serious threat to international peace. Aware of the expanding scope of its activities and of its increasing responsibilities, the Commission trusts that its National Sections and other associates will follow carefully the application of the principles of the Rule of Law in their respective countries and contribute to the promotion and defence thereof. The international Survey on the Rule of Law currently being undertaken by the Commission constitutes a positive step in the accomplishment of this purpose.

An African Conference on the Rule of Law was organized by the Commission in Lagos, Nigeria on January 3-7, 1961. The Conference was the first step in a long-range program to develop the Commission's relations with jurists from African countries and to encourage an exchange of views and legal information among themselves as well as with the rest of the international legal community. Preparations for the Conference were carried on for over a year, and consultations were held with leading African scholars and practitioners in search of an agenda which would be based on the *Conclusions* of Delhi and project the principles of the Rule of Law established therein to the realities confronting the old as well as the new countries of Africa. Technical limitations and practical considerations did not permit a Conference that would be attended by lawyers from all African countries; invitations were therefore limited to the area south of the Sahara. The Commission hopes, however, that a regional Conference of jurists from Mediterranean states will in the near future offer an opportunity of bringing together those jurists who could not be included in the Conference at Lagos.

Participants at the Conference came from 23 African countries and 9 other countries of Asia, Europe and North America. A total of 194 jurists - judges, teachers of law, practitioners - assembled in Lagos in their private capacity to discuss the agenda of the Conference. The discussions were based on a questionnaire which was sent to the invitees prior to the actual meeting and which outlined the major topics proposed for discussion in three committees. Answers were received from most of the countries whose lawyers appeared at the Conference. These replies formed the background both for the general report prepared by the General Rapporteur of the Conference, Dr. T. O. Elias, and for the working papers submitted to each Committee by its Rapporteur.

The Committees discussed their respective agendas for three days. The First Committee entitled "*Human Rights and Government Security - the Legislative, Executive and Judiciary*" gave full consideration to the problems arising out of delegated powers of the Executive to make rules and regulations with legislative effect. Concern was also expressed over legislative or executive action resulting in a situation of perpetual state of emergency with its detrimental effects on the protection of fundamental human rights. Although the Committee was seized with serious complaints raised by lawyers from some dependent territories with unresolved problems of multi-racial communities, there was clearly a desire to avoid political issues. The participants felt strongly that the Rule of Law has to be promoted in all countries regardless of their degree of independence. This feeling, and a most important assertion that "the Rule of Law cannot be fully realized unless legislative bodies have

been established in accordance with the will of the people who have adopted their Constitution freely" were incorporated in the *Law of Lagos*. Furthermore, the Committee proposed to the Conference that, in view of "allegations that discriminatory legislation based on race, colour or creed exists to the detriment of fundamental human rights of large sections of the population", the International Commission of Jurists be requested to examine and report on the legal conditions in Africa and elsewhere with particular regard to the existence of the Rule of Law.

The Second Committee discussed in detail certain aspects of the general subject "*Human Rights and Aspects of Criminal and Administrative Law*". Specifically treated, in the following order, were the right to bail, deprivation of personal liberty on grounds of public security and the extent to which certain activities of the Executive are subject to review in the courts. In connection with the latter point it was emphasized that if the legislation authorizing the activities of the Executive is in any way discriminatory, the right to judicial review becomes meaningless, as evidenced by the plight of large segments of the African population who are subjected to such discriminatory legislation. With this point in mind, and referring to the *Conclusions of Delhi*, the Committee unanimously condemned discriminatory legislation with respect to race, religion, sex or other such reasons not affording a proper basis for making a distinction between human beings, classes or minorities. Further, with respect to personal liberty it was held that, except during a public emergency, preventive detention without trial is contrary to the Rule of Law. Finally, certain general criteria with regard to the refusal and granting of bail before and after trial (pending appeal) were accepted by the Second Committee which also expressed the wish that greater use be made of the summons to obviate the necessity for bail.

The attention of the Third Committee centered on the "*Responsibility of the Judiciary and of the Bar for the Protection of the Rights of the Individual in Society*". The differences between Common Law and French civil law systems became particularly apparent during the discussions of this Committee. The exchanges of experience were in this respect extremely valuable and offered an opportunity of surveying the administration of justice under different legal systems. For example, the scope of jurisdiction of so-called native courts and of the application of customary law in penal proceedings vary sharply in English and French-speaking areas. It was recommended that all customary, traditional or local law should be administered by the ordinary courts, but that in any case the principles of the Rule of Law should apply in all jurisdictions. The practice of exercising judicial powers, especially in criminal matters, by laymen or members of the Executive was declared

violative of the Rule of Law. The Third Committee favoured effective legislative safeguards to protect the Judiciary from legislative interference and recommended in particular the setting up of a Judicial Service Commission entrusted with powers of appointing, promoting and removing judges. With reference to the Bar, the Committee felt strongly that the legal profession should be free from Executive interference in administering its affairs, controlling the admission to the profession and supervising the discipline of its members. It was recommended that steps be taken to establish an effective system of Legal Aid. Finally, the Third Committee declared the principle of retroactive legislation to be inconsistent with the Rule of Law. The *Conclusions* of the Delhi Congress referring to the Judiciary and the Legal Profession under the Rule of Law were reaffirmed *in toto* and appended to the *Conclusions* of this Committee.

Acting upon a motion from the floor of the First Committee, an *ad hoc* sub-committee presided over by Mr. J. B. Danquah from Ghana drafted a general resolution which was later edited into the *Law of Lagos* and reaffirmed the *Act of Athens* (1955) and the *Declaration of Delhi* (1959) with special reference to Africa. An important section of the *Law of Lagos* set forth a declaration inviting the African Governments to study the possibility of adopting an African Convention of Human Rights that would protect individuals aggrieved by a violation of public or private law and enable them to seek redress before an international tribunal of appropriate jurisdiction. Though the realization of this project may not be within easy reach, it offers a major opportunity for positive action by the Commission's National Sections in Africa and opens great prospects for strengthening the Rule of Law on that continent.

The Lagos Conference confirmed that the general principles of the Rule of Law, as outlined in New Delhi, have universal validity. One speaker after another stressed that the Rule of Law is not limited to any specific legal or economic system, nor to any geographical area or political doctrine. The main lesson of the Lagos Conference would seem to be the universality of the Rule of Law and the mutual interdependence of its advocates throughout the world. The International Commission of Jurists was happy to witness the zeal and determination with which African jurists assume their share in this global effort, and was particularly pleased to witness the fruitful exchange of information between lawyers of French and English legal backgrounds. It was also gratifying to have such a representative and distinguished body of the African legal community attending this first African Conference on the Rule of Law. It is, however, regrettable that the Conference had to convene in the absence of lawyers from some countries who would have been sincerely welcome at Lagos. Several of these countries do not have

any African lawyers; in others, like Angola and Mozambique, conditions are not conducive to a free exchange of opinion. In the case of Guinea, the Commission had invited three leading jurists and was looking forward to their participation: it was regretted that the Ministry of Justice refused the invitations on their behalf. As it is, the Lagos Conference was attended by lawyers from a large majority of the African countries south of the Sahara.

The present issue of the *Journal* will acquaint the readers with the texts of the *Conclusions* passed at the African Conference and with the *Law of Lagos*. Evaluations of the impact of the Conference from the General Rapporteur of the Conference, Dr. T. O. Elias, Attorney General and Minister of Justice of the Federation of Nigeria and M. Gabriel d'Arboussier, Minister of Justice of the Senegal and First Vice-Chairman of the Conference, will complete the picture of this important event.

In contrast to previous issues, the articles contained in this *Journal* are limited to one main topic which has recently occupied the minds and stirred the conscience of lawyers in many parts of the world; namely preventive detention (i.e. the deprivation of liberty for purposes of public security or the administration of justice or on charges other than a specific criminal offence). A year ago the Commission sent to representative jurists on all continents a questionnaire and asked them to submit papers on the situation in their countries. The questionnaire covered the following points:

1. The authority for ordering preventive detention or deprivation of liberty for purposes of public security or the administration of justice or on charges other than a specific criminal offence; the duration and conditions of such measures;
2. The grounds on which such preventive detention or deprivation of liberty can be ordered (charges of a specific criminal offence, other grounds, etc.);
3. By whom such orders are made;
4. Whether there is any necessity for a person to be told in specific terms why his detention or deprivation of liberty is ordered;
5. The question of the authority's discretionary power, and, more specifically, whether the grounds on which such detention or deprivation of liberty is ordered are open to review in the courts or to any other form of effective redress;

6. The substantive and procedural rights of a detainee or proposed detainee in any proceedings where the question of his detention or proposed detention is before the appropriate authorities, including in particular the right to legal representation;
7. Examples of specific cases in the jurisdiction under consideration against whom such orders have been made, with figures illustrating the frequency of such occurrences.

As this issue goes to print, there is enough material for one more number of the *Journal*. The articles included in this issue were selected on the basis of date of receipt by the Commission, and no effort was made to observe a geographical or political proportion. The reader will thus find a geographical cross-section reflecting various legal systems and will notice the variety of approach of the individual contributors.

It is with deep sorrow that I announce the death of one of the contributors to this issue, a distinguished legal scholar and friend of the Commission, Dr. Vladimir Gsovski, Chief of the European Law Division, Law Library, Library of Congress, Washington. Dr. Gsovski was an outstanding jurist with broad culture and deep understanding of the legal problems of our time. He participated prominently at the International Congress of Jurists in Athens in 1955 and had at various other opportunities closely collaborated with the Commission. His loss will be keenly felt in the field of comparative law and Soviet studies where Dr. Gsovski did pioneering work and remained till his last day a most active and penetrating expert. The article appearing in this issue is his last writing; it was completed less than two months before his untimely death.

There are listed on the cover of the *Journal* the members of its Advisory Board which will henceforth be of a permanent nature. The Advisory Board includes seven Professors of Law and a Supreme Court Judge of international reputation. The reader will be familiar with the names of most of these distinguished personalities who have kindly agreed to help make the *Journal* sensitive to trends of legal thought throughout the world and to maintain the high standards of its contents. I am confident that their co-operation will yield excellent results, and their guidance is sincerely welcomed by those who share responsibility for the Commission's publications.

JEAN-FLAVIEN LALIVE
Secretary-General

LAW OF LAGOS

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

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

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

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

NOW SOLEMNLY

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

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

Declares

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

This Resolution shall be known as the Law of Lagos.

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

AFRICAN CONFERENCE ON THE RULE OF LAW

**LAGOS, NIGERIA
1961**

CONCLUSIONS

COMMITTEE I

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

CLAUSE I

1. The exigencies of modern society necessitate the practice of the Legislature delegating to the Executive the power to make rules having the force of legislation.
2. The power of the Executive to make rules or regulations having legislative effect should derive from the express mandate of the Legislature; these rules and regulations should be subject to approval by that body. The object and scope of such executive power should be clearly defined.
3. The Judiciary should be given the jurisdiction to determine in every case upon application whether the circumstances have arisen or the conditions have been fulfilled under which such power is to be or has been exercised.
4. Every constitution should provide that, except during a period of emergency, legislation should as far as possible be delegated only in respect of matters of economic and social character and that the exercise of such powers should not infringe upon fundamental human rights.
5. The proclamation of a state of emergency is a matter of most serious concern as it directly affects and may infringe upon human rights. It is the sense of the Conference that the dangers of survival of the nation such as arise from a sudden military challenge may call for urgent and drastic measures by the Executive which by the nature of things are susceptible only to *a posteriori* legislative

ratification and judicial review. In any other case, however, it is the Parliament duly convened for the purpose that should declare whether or not the state of emergency exists. Wherever it is impossible or inexpedient to summon Parliament for this purpose, for example during Parliamentary recess, the Executive should be competent to declare a state of emergency, but in such a case Parliament should meet as soon as possible thereafter.

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

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

CLAUSE II

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

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

COMMITTEE II

Human Rights and Aspects of Criminal and Administrative Law

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

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

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

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

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

2. While recognizing that inquiry into the merits of the propriety of an individual administrative act by the Executive may in many cases not be appropriate for the ordinary courts, it is agreed that there should be available to the person aggrieved a right of access to:

- (a) a hierarchy of administrative courts of independent jurisdiction; or
- (b) where these do not exist, to an administrative tribunal subject to the overriding authority of the ordinary courts.

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

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

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

- (b) that the aggrieved person shall be given a fair hearing; and
- (c) that the grounds given by the Executive for its action shall not be regarded as conclusive but shall be objectively considered by the court.

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

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

(ii) During a period of public emergency, legislation often authorizes preventive detention of an individual if the Executive finds that public security so requires. Such legislation should provide the individual with safeguards against continuing arbitrary confinement by requiring a prompt administrative hearing and decision upon the need and justification for detention with a right to judicial review. It should be required that any declaration of public emergency by the Executive be reported to and subject to ratification by the Legislature. Moreover, both the declaration of public emergency and any consequent detention of individuals should be effective only for a specified and limited period of time (not exceeding six months).

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

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

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

7. The power to grant bail is a judicial function which shall not be subject to control by the Executive. Although a court should hear

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

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

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

COMMITTEE III

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

The Conference reaffirms the *Conclusions* reached by the Fourth Committee of the International Congress of Jurists, New Delhi, India, 1959, which are appended hereto; and having regard to the particular problems of emerging states, wishes to emphasize certain points in particular, and to add others.

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

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

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

- (a) that these powers should not be put into the hands of the Executive or the Legislative, but should be entrusted exclusively to an independent organ such as the Judicial Service Commission of Nigeria or the *Conseil supérieur de la magistrature* in the African French-speaking countries;
 - (b) that in any country in which the independence of the Judiciary is not already fully secured in accordance with these principles, they should be implemented immediately in respect of all judges, especially those having criminal jurisdiction.
4. It is recommended that all customary, traditional or local law should be administered by the ordinary courts of the land, and emphasized that for so long as that law is administered by special courts, all the principles enunciated here and at New Delhi, for safeguarding the Rule of Law, apply to those courts.
5. The practise whereby in certain territories judicial powers, especially in criminal matters, are exercised by persons who have no adequate legal training or experience, or who as administrative officers are subject to the control of the Executive is one which falls short of the Rule of Law.
6. (a) To maintain the respect for the Rule of Law it is necessary that the legal profession should be free from any interference.
- (b) In countries where an organised Bar exists, the lawyers themselves should have the right to control the admission to the profession and the discipline of the members according to rules established by law.
- (c) In countries where an organised Bar does not exist, the power to discipline lawyers should be exercised by the Judiciary in consultation with senior practising lawyers and never by the Executive.
7. The Conference reaffirms Clause X of the *Conclusions* of the Fourth Committee at New Delhi, and recommends that all steps should be taken to ensure equal access to law for both rich and poor, especially by a provision for and an organisation of a system of Legal Aid in both criminal and civil matters.
8. The Conference expressly re-affirms the principle that retro-active legislation especially in criminal matters is inconsistent with the Rule of Law.

Appendix**REPORT OF COMMITTEE IV****INTERNATIONAL CONGRESS OF JURISTS,
NEW DELHI, 1959****The Judiciary and the Legal Profession under the Rule of Law****CLAUSE I**

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

CLAUSE II

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

CLAUSE III

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

CLAUSE IV

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

CLAUSE V

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

CLAUSE VI

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

CLAUSE VII

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

CLAUSE VIII

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

CLAUSE IX

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

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

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

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

CLAUSE X

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

Lagos, Nigeria

January 7, 1961

[Preliminary note. Several months prior to the convocation of the African Conference on the Rule of Law at Lagos the Secretariat of the International Commission of Jurists prepared a Draft Outline for the National Reports of each of the three Committees. The Draft Outline was sent to all those invited to participate in the Conference with a request that they prepare a report on the legal systems of their respective countries in connection with each one of the points contained in the Draft Outline. The text of the Draft Outline is set forth immediately below:]

DRAFT OUTLINE FOR THE NATIONAL REPORTS FOR THE AFRICAN CONFERENCE ON THE RULE OF LAW

COMMITTEE I

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

1. (a) – The extent, if any, to which any organ of the Executive has power to make rules or regulations having legal effect without express constitutional or legislative authority.

(b) – The availability of, and grounds for, judicial review of such laws.

2. (a) – Restrictions in the Constitution on the power of the Legislature to delegate legislative functions to any Executive organ.

(b) – If there are no such constitutional restrictions, a survey of legal provisions or rules of practice, if any, which restrict the competence of the Legislature in this respect.

3. – The authority deciding whether a state of public emergency exists.

4. – The availability of judicial investigation and determination, in any ordinary or special court, whether a state of public emergency exists.

5. (a) – Whether the Executive or any organ of the Executive has autonomous power to legislate in a time of public emergency. legal restrictions on this power.

(b) – If so, whether there are any constitutional or other

(c) – The possibility of judicial review of such laws.

COMMITTEE II

Human Rights and Aspects of Criminal and Administrative Law

1. – The extent to which the following activities of the Executive are subject to review in the courts:

- (a) – restraints imposed on freedom of assembly;
- (b) – deprivation of liberties under licence or other form of permission to carry on any lawful calling;
- (c) – refusal under licencing control to permit the pursuit of any lawful calling;
- (d) – deprivation of citizenship;
- (e) – deportation of aliens;
- (f) – restraints imposed by seizure or ban on freedom of literary expression;
- (g) – acts interfering with freedom to travel within or outside the country;
- (h) – compulsory acquisition of privately-owned property without adequate compensation;
- (i) – interference with any rights guaranteed by the Constitution.

2. – What, if any, are the circumstances in which it is possible for a person to be deprived of his liberty on grounds of public security other than on a charge of a specific criminal offence.

3. (a) – If there are such circumstances, what is in this context the interpretation of “public security” by the authorities.

(b) – Whether public security in this context is defined by law.

(c) – Whether it is interpreted by the courts by means of review or otherwise.

(d) – Whether detention of this kind is consequent upon judicial trial or whether there can be an appeal to a judicial authority.

4. – The right to bail:

(a) – The extent and limitations of the right to apply for bail;

(b) – The authority (authorities) empowered to grant or refuse bail;

(c) – Constitutional or other legal requirements governing the reasonableness of bail and the criteria by which such reasonableness is determined.

(d) – Provisions, if any, for appeal against the refusal of bail.

COMMITTEE III

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

1. – Existing legal provisions or established practice safeguarding the independence of the Judiciary in matters of:

(a) – appointments of Judges;

(b) – tenure, with particular regard to possible interference by the Legislative and/or Executive;

(c) – dismissal.

2. – The authority competent to fix the general structure of courts and the organization of judicial business.

3. – Whether rules of the Constitution, statutes or rules of practice ensure that legislative power shall not be exercised to affect the course of a pending or impending case in the courts.

4. (a) – The extent to which the legal profession as an organized body is free to manage its own affairs.

(b) – Other bodies which exercise or share supervisory powers over the legal profession and the effect of such interference on the independence of the Bar.

5. – The guarantees of equal access to law:

(a) – The availability in principle of legal advice and if necessary legal representation irrespective of means in connection with criminal and civil causes.

(b) – If such possibility exists, what restrictions if any are imposed on the right to free or financially-assisted legal advice or representation.

(c) – To what extent are members of the legal profession prepared to offer their services without fee or at a lower fee in cases where life, liberty, property or reputation are at stake.

(d) – If there is a scheme of free and assisted legal aid or advice in operation, are the participating lawyers of the requisite standing and experience?

6. – The general standing of the Judiciary and of the Bar in the community and their out of court assistance to the Legislative and Executive in upholding and strengthening the Rule of Law.

THE SIGNIFICANCE OF THE LAGOS CONFERENCE

There is a twofold symbolic value in the fact that 194 judges, professors, barristers and legal practitioners from 23 countries in Africa and 9 countries of other continents chose to meet at Lagos in January, 1961 to discuss the Rule of Law. In the first place, this choice demonstrates that the days have ended when Africans had to leave Africa in order to meet; these meetings have now become possible in Africa itself. In the second place, this choice permits the gratifying conclusion that since the States of Africa acceded to independence the continent has become a home of freedom.

A signal service is rendered to Africa by the initiative undertaken by the International Commission of Jurists which facilitates intellectual exchange by means of human contact, thus allowing communication between the French and English-speaking countries and helping to overcome the barriers of language.

The Congress held at Delhi in January, 1959 stressed the dynamic character of the principle of legality, the purpose of which is "not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised". The achievement of the conditions set forth in the Declaration of Delhi is a lengthy process calling for a succession of economic plans spread over long periods in view of the application thereof to developing countries with limited means for investment.

In those countries where the State is practically the sole source of all forms of welfare, either through its civil service or through the co-operative and nationalised production agencies, and where there are no factors creating self-supporting stability, there is a great danger that the continuity and authority of the State will be perpetually in doubt.

Revolution resulting in dictatorship or in faction monopolising energies and sapping national awareness is something of which several countries in South America have provided examples which should be given serious consideration. It is one of the dangers that the developing countries must face if they are to attain their primary aim of the liberation of man.

Does this mean, then, that such problems do not occur in industrialised countries? It certainly does not, but the gravity is less.

That is why two frequently contradictory concepts were brought up at Lagos: "individual freedom" and "necessary state authority". Some of the participants questioned whether specifically African needs do not call for the recognition of a specifically African legality. This may be recognised without falling into contradiction, for there is a universal principle of legality according to which all political, economic and juridical institutions should be conceived for man and not *vice versa*, while there are at the same time principles of legality peculiar to Africa.

Remaining true to the purpose of the International Commission of Jurists of selecting institutions and procedures aimed at promoting the full development of human personality, the Lagos Conference specified the due substance of written law indispensable for observance of the principle of legality, in the light of specifically African needs.

What I wish particularly to emphasize is the fact that in Africa the liberation of man, the ultimate aim of the universal principle of the Rule of Law cannot be attained except through observance of the essential requirements of independence, unity, democracy and economic development.

Similarly, principles of law applied in Africa must achieve a synthesis between more recent and customary law.

The resolutions adopted at Lagos endeavoured to state definite rules regarding the relations between the three powers, or, as contemporary jurists put it more correctly, the three functions of legislature, government and judiciary, in order to safeguard individual freedom without compromising continuity of the State. It must be recognised that although these two principles aim at complementary goals, they conflict in their practical application. For the State, far from being a de-personalised juridical entity, has representative human agencies with interests that do not necessarily coincide with the State itself.

It is at this point that it is necessary to have reciprocal guarantees which should be set forth in constitutions or legislation to prevent institutions being diverted from their aim.

In order to avoid the perils of dictatorship or "technocracy" this legal machinery must be supplemented by the action of the dominant party.

Between the traditional conception in capitalist countries of political parties entering national life only at elections in order to influence the electors' choice, and the view in totalitarian countries where only one party is recognised and its decisions have legal force and no opposition is allowed, we believe there is room for a more democratic procedure.

Fully aware that sectarianism and imposed intellectual and moral guidance are often factors of stagnation and obscurantism, Africa intends to benefit by progress derived from freedom of

thought and expression combined with intellectual daring and integrity. Political opposition must, therefore, be legally recognised as long as it does not seek to impose its will through methods of brute force which are in themselves a negation of freedom.

On the other hand, once elections are over, the prevailing party does not go back into a state of semi-somnolence until the electorate is called upon the next time. It remains closely associated with the national life through the men it has brought into power. This ensures constant influence on the conduct of national affairs, the governments being informed as directly as possible of the people's needs and of the true consequences of action undertaken or projected. This also enhances the efficiency of government action as it is disseminated, interpreted and sustained by the prevailing party as a whole. That, I conclude, is the most significant aspect of this first African Conference on the Rule of Law.

In its sponsorship of the Lagos Conference, the International Commission of Jurists has made an impressive contribution to the fulfilment of our wishes for the future of Africa – our wish for liberation and for unity. Liberation has almost achieved completion. Unity is difficult to bring about, but African solidarity, sustained by the efforts of men of good will and of true faith throughout the world, will enable our generation to lay the foundations on which our children may raise the permanent monument which our peoples owe to humanity in its quest for justice, liberty and fraternity.

In this manner this continent will fulfil the mission for which it is predestined by the particular aptitude of its peoples formed by continuous new additions of ethnic groups merging together and of different civilisations combining to contribute to the birth of universal civilisation.

Gabriel d'ARBOUSSIER *

* Minister of Justice of the Republic of Senegal

REFLECTIONS ON THE LAW OF LAGOS

The International Commission of Jurists held their first African Conference on the Rule of Law in Lagos from January 3 to 7, 1961. There were altogether 194 Judges, practising lawyers and teachers of law from 23 African and 9 other countries. The general theme of the Conference was "Government Action, State Security, and Human Rights" which, for the purpose of detailed discussion, was sub-divided into: (i) Human Rights and Government Security – the Legislative, the Executive and the Judiciary; (ii) Human Rights and Aspects of Criminal and Administrative Law; and (iii) The Responsibility of the Judiciary and of the Bar for the Protection of the Rights of the Individual in Society. For each of these sub-headings a Committee was appointed and after a week's debate Conclusions were adopted, the texts of which can be found on pages 10–18 of this *Journal*.

The stated objectives of the Conference were:

- (a) To discuss the major problems concerning the Bench and the Bar in Africa, with an emphasis on the principles of the Rule of Law, as elaborated by the International Congress of Jurists at New Delhi;
- (b) To enable lawyers from areas of different cultural backgrounds and legal traditions in Africa to familiarize themselves with the varying viewpoints of their colleagues, and to examine possible common grounds for future African legal developments;
- (c) to promote an exchange of experiences and opinions between African lawyers and prominent jurists from other continents on legal matters of current importance in newly independent States;
- (d) to develop closer personal and organizational ties between the International Commission of Jurists and Bar Associations, the Judiciary and legal study and research groups in Africa;
- (e) to explore ways in which the International Commission of Jurists can assist in the training of future lawyers and in strengthening the independence and prestige of the Judiciary and the Bar;
- (f) to study the possibilities of establishing a long-range programme in Africa by the International Commission of Jurists.

No-one who was present at this Conference could possibly doubt that it was a great success, from whatever point of view the events of the week might be considered. For the first time in the history of the continent of Africa there were assembled jurists from both the English-speaking and the French-speaking African territories, the United Kingdom, North America and Asia, discussing most of the problems of legal and constitutional importance to the newly emergent nations of the world in an atmosphere of sober judgment. Each of the items on the agenda was subjected to the most searching analysis, debate, and criticism by some of the acutest minds in the legal world. What illuminated the discussions was not so much the intellectual orientation of the participants as the depth and conviction given to them by the variety of experiences which were made available to all by people from different legal backgrounds.

The Anglo-American legal and constitutional traditions found themselves frequently set side by side with the civil law systems of the continent of Europe, especially as represented by France, Holland, and the other countries. This had the valuable result of enabling the two main streams of legal thought to be confronted one with the other as never before at such a meeting of jurists. Both sides were able to see in a clearer perspective some, at least, of the differences of approach which characterize their legal institutions. The result was often the gaining of deeper insight into those common areas of human endeavour in the legal and judicial spheres, such as few other occasions could have afforded the participants.

As far as Africa is concerned, never before have African lawyers and judges had such an opportunity to study their common problems together, with a rational and sympathetic understanding. There is no doubt that the language barrier was at times hard to overcome; there were often occasions when some of the French- and the English-speaking Africans wanted to become more closely acquainted, but found their warmth and enthusiasm seriously restrained by want of communication. No-one was more conscious of the need today for the emerging African leaders to become bilingual at least in English and French, so that the pursuit of the common purposes could be made more rewarding and more realistic. But this is not to say that language was an effective handicap at this Conference, because the arrangements made for simultaneous interpretation in both the House of Representatives and the adjoining House of the Senate, in which the Conference and its Committees sat throughout, virtually removed most of the complaints that might have been made on the ground of want of communication. Besides, the Secretary-General and most of his professional staff were bilingual in English and French as were a number of the participants themselves from both the English and French-speaking territories.

It was against this background that the intensive deliberations of the three Committees and of the Plenary Sessions themselves must be viewed by anyone desiring to see the whole Conference in its proper perspective.

Another important achievement of the Conference was the opportunity it afforded to the three main groups of participants: the Judges from these far-flung areas were able to compare notes, one with the other, on the common problems of judicial administration and of the Judge's role in the maintenance of law and order; the practitioners of the law were also enabled to consider the common problems of advocacy and of the responsibility of the lawyers to their several communities; while the teachers of the law from different academic backgrounds took a keen interest in the common problems of legal education, legal analysis, and the difficulties attending the newly-formed legal institutions in Africa in the light of the long-established traditions of the older democracies.

But probably the most crucial issue in the discussions was the concern felt by all the participants for the observance of the fundamental human rights and the limits within which these should be fostered with due regard for the security of the State. Most participants deplored all attempts by Governments to muzzle reasonable criticism of their actions by well-disposed persons anxious for the supremacy of the Rule of Law, and everyone felt that there should be real freedom of expression and of the press but that the need for State security should not be overlooked. It was generally agreed that, wherever possible, measures taken by the State which are likely to result in the curtailment of one of the fundamental liberties of the subject should be promptly reported to the Parliament of the territory concerned, so that the whole question could be fully and publicly dealt with. The main difficulty in arriving at any permanent solution of the problem was, of course, the impossibility of setting a universally acceptable limit to what can be done in the interests of the preservation of the State on the one hand, and the guaranteeing of individual freedoms on the other. The question was frankly recognized as one of the perennial problems of political philosophy which must be constantly kept in view, if only for the purpose of checking possible excesses on the part of the Executive.

It will thus be seen that the Commission has achieved its main purpose of holding such an international assembly of lawyers as Judges, practitioners and teachers. Difficult problems were discussed frankly and objectively, in an atmosphere that was noticeably free from rancour and bigotry. All the participants agreed that the problems discussed throughout the week were of universal importance and might have been discussed with equal vigour and insight in London, Paris, Peru, or Brazzaville. That was why an attempt by a small group of African participants to set up what would have

amounted to an African equivalent of the International Commission of Jurists did not excite enthusiasm among the overwhelming majority of those present. As long as the International Commission of Jurists continues to uphold the Rule of Law and to champion its cause wherever it is being challenged or endangered, all the African countries will continue to give it their whole-hearted support and encouragement.

T. O. ELIAS *

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PREVENTIVE DETENTION UNDER DIFFERENT LEGAL SYSTEMS

"The function of law, its dignity and the concept of natural equity for man requires that from beginning to end punitive action shall be based not upon arbitrariness and passion but upon clear and firm juridical procedure. This requires that there be at the very least judicial action, however brief . . . Arrest, the first step of punitive action, must not follow caprice but must respect judicial procedure. It is not permissible that a man who is without guilt be arbitrarily arrested and simply disappear into prison. It is a mockery of justice to send someone to a concentration camp and to hold him there without normal legal process.

Extract from the message of His Holiness Pope Pius XII at the 6th International Congress of Penal Law held in Rome, September 26, 1953.

PREVENTIVE DETENTION IN AUSTRALIA

I. GENERAL PRINCIPLES OF AUSTRALIAN LAW

Australia is basically a Common Law country and its rules relating to the freedom of the individual are therefore very similar to those of Britain. Preventive detention is alien to the basic principles of the common law, and it follows that in Australia it will only be exercised in exceptional circumstances.

In the first place the general common law rule with regard to arrest is that no man shall be arrested except for reasonable cause allowed by the law, and the reasonableness of any arrest is open to examination by the courts. A person may not be arrested without warrant by a private individual except where he has committed a felony or a serious breach of the peace actually in the presence of the individual, or where a felony has been committed and there are reasonable grounds to suspect that it was committed by him or if the arrest has been expressly authorised by statute. A constable may make an arrest without warrant in all these cases, and also where he has reasonable grounds for suspecting the person concerned of having committed a felony even though no felony was in fact committed.

The Australian rules are variations of these principles, in some states almost identical, and in some states wider. The Commonwealth of Australia has adopted them in so far as they apply to breaches of the peace. The Crimes Act 1914—1950, Section 8, provides that “the powers of arrest without warrant possessed by a constable, or by any person under the Common Law with respect to breaches of the peace, may be exercised by any constable or by any person as the case may be, with regard to offences against this Act which involve any breach of the peace”. Section 8(A) then provides that any constable may make an arrest without warrant if he has reasonable grounds to believe that the person has committed an offence against the law of the Commonwealth, and that proceedings by summons would not be effective.

The individual states each have slightly different rules relating to arrest without warrant, and these generally appear to bestow wider powers on the private individual than do the common law rules.

For instance, in South Australia,¹ any individual may, without warrant, arrest a person found committing an offence, or in possession of property concerning which there is reason to suspect a felony has been committed; and he may arrest any person found loitering at night if there are reasonable grounds for supposing he has committed or is about to commit a felony.

In New South Wales,² however, an individual may only make an arrest without a warrant where the offender is in the act of committing the offence, or immediately after he has committed it; there is also a somewhat vague provision that an arrest without warrant may be made of a person who has committed a felony for which he has not been tried – there is no requirement that the felony must have been committed in the presence of the person making the arrest, or that there should be reasonable cause to believe the felony was committed. It is a contradiction to say “any person who has committed a felony for which he has not been tried”, for until he has been tried the law presumes that he has committed no felony. It is therefore difficult to see how a lawful arrest could be made under this provision.

In Tasmania it is the duty³ of an individual to arrest persons found committing crimes which amount to felonies, whereas in most other states the power is framed in terms of a discretion.

The Queensland Criminal Code states that if practicable the individual making the arrest must give notice of the cause of arrest to the person arrested, but failure to do this does not make the arrest unlawful. No other state makes any such provision, and each will therefore follow the Common Law rule, upheld in the English case of *Christie v. Leachinsky*,⁴ that an arrest without warrant, whether made by a police officer or a private citizen, can be justified only if the person is told the reason for the arrest, unless there are special circumstances which render it unnecessary or unreasonable to inform the person.

Many individual statutes provide that powers of arrest without warrant shall exist in particular circumstances. For instance, under the Migration Act 1958 (Commonwealth), if a deportation order is in force an officer may arrest without warrant any person he reasonably supposes to be a deportee, and keep him in custody as a deportee; but the person arrested must be informed of the reason for his arrest,⁵ and if he makes a statutory declaration that he is not a deportee within 48 hours after the arrest he must be

¹ Criminal Law Consolidation Act 1935—52, Section 271.

² Crimes Act 1900, Section 352 (Reprinted 1957).

³ Criminal Code Section 27.

⁴ (1947) A.C. 573.

⁵ Section 39(1).

taken before a prescribed authority appointed by the Minister for Immigration,⁶ who will inquire into the reasonableness of the grounds for supposing that he is a deportee; if he is not taken before the authority within 48 hours of signing the declaration he must be released. The Victorian Crimes Act 1958⁷ provides for the arrest without warrant of any person whom a police officer has reasonable grounds to suspect was once convicted of a felony in Great Britain or Ireland or any part of the Dominions and has since entered Victoria. In Western Australia the Native Welfare Act 1905-1954⁸ states that "it shall be lawful to arrest without warrant any native who offends against any of the provisions of this act".

There are many other examples and in fact the powers of arrest without warrant are wide, but the Common Law provides for redress for unlawful arrest or imprisonment by means of a prosecution. Also provisions are generally made for a time limit within which the arrested person must be charged. For instance, the Victorian Justices Act, Section 39(2) provides that if it is not practicable to bring such a person before a justice or court of petty sessions within 24 hours after he is taken into custody, then, provided the offence does not appear to be one of a serious nature, he must be discharged, upon entering into a recognisance, on condition that he will appear before a justice or court of petty sessions on a particular date.

The individual is therefore protected against unlawful arrest by rules of Common and statutory law, and these combined with the rules relating to *habeas corpus* fairly justify the application to Australia of the spirit of Dicey's words "... No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the law... if any man, woman or child is, or is asserted on apparently good grounds to be deprived of liberty, the court will always issue a writ of *habeas corpus* to anyone who has the aggrieved person in his custody, to have such person brought before the Court, and if he is suffering restraint without lawful cause, set him free... The *Habeas Corpus* Acts... have done for the liberty of Englishmen more than could have been achieved by any declaration of rights."⁹

It can be argued that in theory the value of this right could easily be made non-existent, for "a distinct breach of the law established in the ordinary legal manner before the ordinary courts

⁶ Section 40.

⁷ Section 336.

⁸ Section 55.

⁹ Law of the Constitution, 9th Edition, p. 183.

of the law" means little when it is remembered that law and legality are what the legislature makes them, and the legislature may choose to disregard the liberty of the individual; and this is in fact what happens to a great extent in times of emergency. The individual has some safeguard in the fact that the Commonwealth Parliament may only legislate with respect to particular subject-matters, and if it exceeds its powers the validity of its act can be questioned by the High Court. This occurred in the *Communist Party Case*¹⁰ of 1951, where the Communist Party Dissolution Act 1950 was held invalid – but it must be noticed that it was not held invalid on grounds of infringement of the rights of the individual or on any other ground of natural justice. Fullagar J. says "... there can be no presumption of the validity of Section 4 (of the Communist Party Dissolution Act) for the simple reason that there can be no presumption that the Australian Communist Party has done or is likely to do anything which would bring it within the defence power or the constitution preservation power... It should be observed... that nothing depends on the justice or injustice of the law in question. If the language of an Act of Parliament is clear, its merits and demerits are alike beside the point. It is the law and that is all."

The writ of *habeas corpus* is available not only where the original detention is unlawful, but also where a lawful arrest had been made but the person arrested is kept in prison without trial.

Although the Australian rules relating to *habeas corpus* are derived from the English Common Law and statutory provisions, they are not identical to the English rules. Under the English law there can be no appeal when a man has been set free by means of a writ of *habeas corpus*; this is not so in Australia. In the case of *Lloyd v. Wallach*, Isaacs J. said that in English law "... in the case of *habeas corpus*, the doctrine that once a man is set free, that is final in the sense that no appeal lies, has never been departed from... nevertheless... I am confirmed in my view that the powers granted to this Court in Section 73 of the Constitution are those of a general Court of Appeal, and not a Court of Error, not a court bound by the practice however clear and long sustained of any other Court of the Empire. I am therefore clearly of opinion that we have jurisdiction."¹¹ So the High Court has jurisdiction to hear an appeal where the discharge of the person concerned has been ordered on a writ of *habeas corpus*.

If the individual is legally arrested and *habeas corpus* affords him no relief his last safeguard lies in the rules of annual procedure. The accused must be presumed to be innocent until he is proved guilty; the burden of proof therefore lies on the prosecution, and the

¹⁰ (1951) 83 C.L.R.1.

¹¹ (1915) 20 C.L.R. 299 at 306.

quantum of proof required to convict the accused must be sufficient to leave no reasonable doubt as to his guilt. Even here, however, there are several statutory exceptions, for example under the various acts dealing with Aborigines; for instance, the Native Welfare Act 1905-1954¹² of Western Australia makes it an offence for any person other than a native to be within the boundaries of a reserve, unless he is superintendant, or has some other lawful authority, and "the proof of such lawful authority or excuse shall be upon the person charged". By the same Act, any person (except a native) who habitually lives with natives, or with any native not his wife or her husband shall be guilty of an offence, and every person living with a native of the opposite sex "shall be presumed in the absence of proof to the contrary to be cohabiting with her or him and it shall be presumed in the absence of proof to the contrary that she is not his wife or that he is not her husband."¹³ Similarly, the Aborigines Preservation and Protection Act 1939-1946 of Queensland provides that "Any person . . . who without lawful excuse, the proof whereof shall lie on him, is found in or within 5 chains of any such camp (i.e., any place where aborigines are camped) shall be guilty of an offence . . ."¹⁴

There are examples elsewhere in Australian law and usually they are cases in which the existence of certain facts are *prima facie* evidence of guilt; for instance, if a person is found in possession of goods which a constable suspects have been stolen or unlawfully obtained, then unless the person charged can give a satisfactory account as to how he came by such property, the facts alone will probably be sufficient to justify a conviction.

With regard to the right to legal representation, the late Sir Patrick Hastings, K.C., a successful English barrister, has said: "Perhaps it is only necessary to watch a litigant in person trying to conduct his own case unaided, floundering through a mass of evidence quite unable to express the simplest point in such a way that anyone can understand it, in order to realise at once that trained advocacy is an absolute necessity to justice; without the advocate Law as we understand it could not survive." At common law there is a general right to legal representation in court. The legislature may limit this right, but *prima facie*, when there is no express statutory provision to the contrary, any person has the right to appoint an agent on his behalf. This principle was expressed in the case of the *Queen v. Assessment Committee of Saint Mary Abbots, Kensington*¹⁵ in 1891 and was followed in Australia in 1916 in

¹² Sections 16, 17.

¹³ Section 47.

¹⁴ Section 30.

¹⁵ (1891) 1 Q.B. 378.

the case of the *King v. the Board of Appeal*.¹⁶ Barton J. said "Ordinarily, every person may at common law appoint an agent to represent his interests in all cases in which his personal presence to assert them is not a necessity of the case, either in its nature or by some law. I take it he has the same power at common law in respect of rights conferred on him by statute." So if a person is given a statutory right to bring his case before a tribunal or committee the common law rule will entitle him to representation, unless the statute expressly states otherwise.

The same rule probably applies to hearings by a quasi-judicial tribunal, for by common law all persons exercising quasi-judicial functions must have due regard to the principles of natural justice, and if these are not observed, the decision will be voidable.¹⁷ However there is little or no authority on the subject in Australia, for most regulations providing for the hearing of cases before quasi-judicial tribunals expressly state whether or not counsel is to be allowed. For example, Regulation 26 of the National Security (General) Regulations provided for the appointment of advisory committees to consider any objections made against detention orders issued under the National Security Act 1939-1946, and it was expressly mentioned that anyone bringing an objection before this body was entitled to be represented by counsel. Similarly, under the regulations for the Trial of War Criminals, the accused is expressly allowed legal representation.

Thus in spite of many exceptions, it is true to say that the Australian individual is protected against preventive detention in three ways. He can prosecute for unlawful arrest or unlawful imprisonment; he can apply for a writ of *habeas corpus* if he considers that he is unlawfully detained; and before he can be finally sentenced to imprisonment he must be tried in a fair and legal manner and will receive the benefit of any doubt as to his guilt.

II. PREVENTIVE DETENTION IN TIME OF WAR

However alien preventive detention may be to the basic principles of our law, there are probably few who would not agree that where abnormal conditions prevail it is inevitable that abnormal laws should be enacted and carried out to provide against those conditions.

"A state of war, therefore, justifies legislation by the Commonwealth Parliament in the exercise of the defence power, which makes many inroads on personal freedom. So where the security of the country is in danger there is justification for interference with the liberty of the

¹⁶ (1916) 22 C.L.R. 183.

¹⁷ *Dimes v. Grand Junction Canal Proprietors* (1852) 3 H. L. Cas 759.

individual in ways which would not be acceptable in peacetime. Individuals may profess ideas or carry on activities which in time of peace may be harmless, but which in time of war may interfere with the successful defence of the Commonwealth."

"It is recognised that the internment of such persons on mere suspicion without trial for some period not exceeding that of the war upon the opinion of a Minister that their liberty is prejudicial to the safety of the realm is a valid exercise of a plenary administrative discretion."¹⁸

From this judicial statement may be gathered the principle that in wartime not only may the legislature make laws which make drastic inroads on the liberty of the individual, but the exercise of such powers may be left to the discretion of one person — the Minister concerned.

An example can be found in the War Precautions Act of 1914, which was repealed in 1920. Section 4 states that "The Governor-General may make regulations for securing the public safety and the defence of the Commonwealth . . . and for such powers and imposing such duties as he thinks fit, with reference thereto, upon the Naval Board and the Military Board, and the members of the naval and military forces of the Commonwealth, and other persons." Under this Section the War Precautions Regulations 1915 were made, and by Regulation 55 (1) a provision was made that "where the Minister (for Defence) has reason to believe that any naturalised person is disaffected or disloyal, he may by warrant under his hand, order him to be detained in military custody in such place as he thinks fit during the continuance of the present state of war." The case of *Lloyd v. Wallach*¹⁹ arose under this regulation in 1915 and the question of the discretionary powers of a minister in such circumstances was dealt with. The facts were that Wallach, a naturalised Australian, was detained in military custody, and to a writ of *habeas corpus* issued out of the Supreme Court of Victoria, the military officer in whose custody he was returned a warrant under the hand of the Minister of Defence stating that the minister, upon information furnished to him, had reason to believe and did believe that Wallach was disaffected or disloyal. The minister was called as a witness, but refused on the ground of public policy to state the grounds of his belief, and the Supreme Court ordered the discharge of Wallach. The case then went on appeal to the High Court and it was held that the minister was properly called as a witness but was entitled to refuse to answer questions as to his belief, and as there was no evidence to challenge either the fact of his belief or the grounds for it, the detention under the warrant was justified. Griffith C. J. said: "I think that his belief is the sole

¹⁸ *Adelaide Co. of Jehovah's Witnesses v. Commonwealth* 1943, 67 C.L.R. 116 per Williams J.

¹⁹ (1915) 20 C.L.R. 299.

condition of his authority and that he is sole judge of the sufficiency of the materials on which he forms it . . . it would, in my opinion, be contrary to public policy, and, indeed, inconsistent with the character of the power itself, to allow any judicial inquiry on the subject in these proceedings." This case foreshadowed the English decision in *Liversidge v. Anderson*²⁰ twenty years later.

Lloyd v. Wallach was followed in 1947 in *Little v. The Commonwealth*.²¹ This case also held that Section 13(3) of the National Security Act 1939–1946 (now repealed), which provided that "no action shall lie against the Commonwealth, any Commonwealth officer, any constable . . . acting in pursuance of this section in respect of any arrest or detention in pursuance of this section . . .", will serve to protect an officer from an action if he had carried out an unlawful arrest or detention as a result of an honest mistake of fact or law. Dixon J. said "I think that there was no valid restriction order, direction or requirement for the Plaintiff to contravene or fail to comply with²² . . . but . . . clearly the purpose of a provision limiting or qualifying rights of action against officers and others acting under a statute would not be fulfilled by an interpretation excluding from its operation cases arising from mistaking the law or failing to comply with the requirements of the law²³ . . . I think that the words 'any arrest or detention in pursuance of this section, occurring in section 13(3) of the Nation Security Act 1939–46 cover an arrest or detention by a constable who with some facts to go on honestly thinks that what he has found or suspects is an offence against the Act committed or about to be committed by the person whom he arrests or detains notwithstanding that the arrest and detention are not actually justified and that his error or mistake is in whole or in part one of law."²⁴

The War Crimes Act 1945 provides for the arrest and custody pending trial of persons suspected of war crimes,²⁵ and empowers the Governor-General to make regulations relating to the laying of charges for war crimes, matters preliminary or incidental to the trial of war crimes, and the segregation, arrest and custody of persons charged with or suspected of having committed such crimes.²⁶

The Defence Act 1903–1956²⁶ makes provisions for the arrest and custody, pending trial, of members of the Defence Forces when not on war service. In the case of members of the Citizen

²⁰ (1942) A.C. 206.

²¹ 75 C.L.R. 94.

²² At p. 107.

²³ At p. 111.

²⁴ At p. 113.

²⁵ Section 8(1).

²⁶ Section 14(b)(c)(d).

²⁷ Section 113.

Forces the arrest or custody shall not continue longer than the period for which the particular force to which the arrested person belongs remains under arms or on duty, or until he shall have "resumed civilian attire".

The various war-time regulations thus made broad provision for the detention of any person who endangered the security of the country whether he was British born, alien, or naturalised, and whether or not he was a civilian or a member of the armed forces; and once so detained such a person had little assurance of regaining his liberty before the war period was over. Under the regulations there were advisory committees to which he could protest against the detention, and there was nothing to stop him from writing to the Minister concerned; but efforts in a court of law to prove that the Minister could have no grounds for his suspicions were ineffective in face of the Minister's statement of his belief and the courts did not themselves inquire into the objective validity of that belief. This made drastic inroads into the common law protection of liberty and the internee, in an apparently hopeless position, had to resign himself to waiting for the return of the normal peacetime conditions that would restore his freedom to him at the same time, but as Lord MacMillan says in the English case of *Liversidge v. Anderson* 1942,²⁸ "At a time when it is the undoubted law of the land that a citizen may, by conscription or requisition, be compelled to give up his life and all that he possesses for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention."

The conditions of internment supported this view, for the regulations passed under the National Security Act ensured that the internee should be protected as far as possible from unnecessary hardship. For example, Regulation 9 of the National Security (Internment camp) Regulations provides that an internee could submit complaints regarding his treatment in the camp to an Official Visitor who would lay them before a Military Board; Regulation 10 stated that internees should be treated humanely and protected against acts of violence or insults; by Regulation 16, any property taken from an internee had to be cared for until it could be returned to him; and various other regulations were made for the provision of canteens, libraries, medical treatment, exercise and recreation. If an internee was accused of an offence other than against the regulations or the camp rules he could be prosecuted in an ordinary court of law; he had to be given a proper opportunity to prepare his defence and communicate with his legal adviser, and to find counsel for his defence.

²⁸ (1942) A.C. 206 at 257.

During the last war 7,877 internees were transported from other countries and interned in Australia as part of Australia's responsibility to the United Kingdom. The following chart shows the number of internees of each nationality and the countries from which they were transported.

OVERSEAS INTERNEES

<i>Nationalities</i>	German	Italian	Japanese	Sundries	Totals
<i>Countries from which transported:</i>					
United Kingdom	2,342	200			2,542
Straits Settlements	222	50			272
Palestine	664	170			834
Iran	494				494
Middle East	18				18
Singapore	12				12
New Guinea				525	525
New Caledonia	1	5	1,124	9	1,139
New Hebrides			34		34
Netherland East Indies			1,949		1,949
Solomon Islands			3	5	8
New Zealand			50		50
TOTALS	3,753	425	3,160	539	7,877

8,921 Australian residents were interned under the National Security Act, and these again can be divided into separate nationalities though the majority of them had probably acquired Australian citizenship.

LOCAL INTERNEES

Italian	4,754
German	2,013
Chinese	232
Javanese	702
Portugese	39
Japanese	1,141
Sundry	40
TOTAL	8,921

These figures do not include the numbers of internees who entered camps voluntarily with husbands or wives interned under the Act.

III. PEACETIME PREVENTIVE DETENTION

Even in peacetime, however, there are occasions on which preventive or administrative detention may be exercised. One example is the powers of Parliament to commit for contempt. By Section 49 of the Constitution "the powers, privileges and immunities

of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of the United Kingdom, and of its members and committees at the establishment of the Commonwealth." One of the most important privileges of the House of Commons is the privilege of committing for contempt, and the members of the House of Commons have the right to judge for themselves what is contempt, and to commit for that contempt by means of a warrant which merely states generally that a contempt of the House has been committed, without specifying the nature of the contempt. As, by Section 49 of the Constitution, the privileges of the House of Commons have been carried over into Australia, this particular privilege is exercisable, and if such a warrant is issued by Parliament it is sufficient answer to a writ of *habeas corpus*. This was settled in 1871 in the case of the *Speaker of the Legislative Assembly of Victoria v. Glass*,²⁹ which eventually came before the Privy Council. Lord Cairns delivering the judgment for the court said "Their Lordships are of opinion that the full privilege and power has been transferred to the Colony entire and that the warrant in this case has followed the possession of that privilege and power and is sufficient answer to the writ of *habeas corpus*."

This case was later followed in *Queen v. Richards Ex parte Fitzpatrick v. Browne*³⁰ in 1955 and Dixon C. J. said: "It seems clear . . . that section 49 carries with it the full powers of the House of Commons . . . we are therefore in a position of having before us a resolution of the House (of Representatives) and the warrants which conclusively show that a breach of privilege has been committed and the two persons who seek release are properly held . . . it follows that the application for the writs of *habeas corpus* should be refused." Leave to appeal in such cases will not be allowed – it was allowed in the *Speaker of the Legislative Assembly v. Glass*²⁹ on the ground that the question raised was one of public and general importance and was not merely a question between the Legislative Assembly and Glass, but since that case settled the law on the subject there has been no right of appeal.

The remaining examples of detention in peace-time are statutory – the provisions of the Migration Act 1958 furnish an example. One of the purposes of the Act is to prevent the entry into the Commonwealth of undesirable or prohibited immigrants, and to remove aliens from the Commonwealth when it appears to the Minister for Immigration that their conduct has been such (whether in Australia or elsewhere) that they should not be allowed

²⁹ (1871) L.R. 3 P.C. App. 560.

³⁰ (1955) 92 C.L.R. 165.

to remain in Australia; it contains several provisions relating to the arrest without warrant,³¹ detention³² and deportation³³ of such persons. Where the Minister for Immigration has made an order for the deportation of any person, then that person shall be kept in such custody as the Minister directs until deportation and at any port in Australia at which the ship calls after he has been placed on board, and on the ship until its departure from the last port of call in Australia.³⁴ However, a person in custody under this Act is allowed all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to the custody, and if a State Supreme Court or the High Court finds that there is no valid deportation order in force against him, it will order his release.³⁵

The Act also provides for the detention of any ship at any port for a reasonable time to enable an officer to search the ship for stowaways,³⁶ and for the detention of any ship from which a prohibited immigrant has, in the opinion of the Minister for Immigration or Collector of Customs entered the Commonwealth.³⁷ Several cases arose under the Immigration Act 1912-1949 (now replaced by the Migration Act) and one of the most important was *in re Yates; Ex parte Walsh and Johnson*. The case dealt, *inter alia*, with Section 8 AA of the Act, and the meaning of the word "immigrant". Section 8AA provides for the deportation from the Commonwealth of "any person not born in Australia" of whom the Minister is satisfied that he has been "concerned in Australia in acts directed towards hindering or obstructing, to the prejudice of the public, the transport of goods or the conveyance of passengers in relation to trade or commerce, with other countries or among the States, or the provision of services by any department or public authority of the Commonwealth" and whose presence in Australia is regarded by the Minister as being injurious to the peace, order or good government of the Commonwealth in relation to matters with respect to which Parliament has powers to make laws.

By Section 51 (xxvii) of the Constitution, the Parliament has power to make laws with respect to immigration and emigration, and it was held in *Walsh and Johnson's* case that Section 8AA of the Immigration Act is a valid exercise of this power only - it cannot apply to persons who are not immigrants. The Court held by a majority that when persons have immigrated to Australia and made

³¹ Sections 38, 39.

³² Sections 36, 39.

³³ Sections 14, 18.

³⁴ Section 39(6).

³⁵ Sections 39(8), 41.

³⁶ Section 9c(1).

³⁷ Section 10.

their permanent home there, thus becoming members of the Australian community, they are immigrants no longer, and the immigration power does not authorise Parliament to legislate with respect to such persons. The words of Section 8AA "any person not born in Australia" are therefore too wide, and the Section is only valid in so far as it applies to "immigrants". In this case Walsh, who was born in Ireland, and had made Australia his permanent home for 32 years, and Johnson, who was born in Holland and had made Australia his home for 15 years, were both held not to be immigrants, and therefore they could not be deported under the Immigration Act.

"Section 8AA is a valid exercise of the power to make laws with respect to immigration but it is not a valid exercise of any other power . . . As the applicants are, in my opinion, persons to whom the operation of the section, construed as a valid exercise of the immigration power, does not extend, it follows that no lawful cause is shown for the detention of either of them . . ." ³⁸ So according to this case, once an immigrant has become absorbed into the community he ceases to be an immigrant, and becomes protected by those rights possessed by the ordinary citizen.

But in the case of Koon Wing Lau ³⁹ in 1950 the opinion of the court was that a person does not cease to be an immigrant even after absorption into the community. The point remains unsettled, and so there is still doubt as to whether an immigrant can ever become as entirely protected as is the ordinary citizen, by those "fundamental principles which form the base of every British community". Unless he can cease to be an immigrant he may become liable to deportation under the Immigration Act; or he may come within the scope of Section 7 of the war-time Refugees Removal Act 1949, which provides for the deportation of refugees. It was held in Koon Wing Lau's case that custody pending deportation of a refugee cannot be for an unlimited period. Latham C. J. said "Section 7 (of the War-time Refugees Removal Act) does not create or purport to create a power to keep a deportee in custody for an unlimited period. The power to hold him in custody is only a power to do so pending deportation and until he is placed on board a vessel for deportation, on such a vessel and at ports at which the vessel calls. If it were shown that detention were not being used for these purposes the detention would be unauthorised and a writ of *habeas corpus* would provide an immediate remedy." ⁴⁰

The Crimes Act 1914-1959, Section 30, provides for deportation of members of unlawful associations who were not born in

³⁸ Per Knox C.J. at pp. 71-72.

³⁹ (1950) A.L.R. 97.

⁴⁰ At p. 556.

Australia. Custody pending and during deportation will be at the discretion of the Attorney-General or an authorised officer of the Commonwealth. An association is unlawful if it advocates or encourages the overthrow, by revolution or sabotage, of the constitution of the established government of the Commonwealth or a state, or of any other civilized country; also, if it advocates the injury of Commonwealth property or of property used in trade with other countries or amongst the States, and if it encourages bringing the sovereign "into hatred and contempt."⁴¹

The Attorney-General can apply to the High Court of Australia, or to the State Supreme Court, for a declaration that a body is an unlawful association, and the burden of proving that it is not unlawful lies upon the association.⁴² "With such legislation, the sole defence of liberty is the common sense of the administration, the watchfulness of the courts, and the temper of public opinion."

The Customs Act 1901-1959 provides for the detention of persons suspected of smuggling or of bringing prohibited imports into or taking prohibited exports out of the country. A suspected person may be arrested without a warrant by any officer of Customs or police, but must be given a statement in writing of the reason for his arrest as soon as is practicable after the arrest.⁴³ He may then be detained until he can be taken before a Justice of the Peace without undue delay. The Justice may then either discharge him, or may commit him to gaol until he can be brought before justice and be dealt with according to the law, or he may admit him to bail.⁴⁴

Powers of detention which may possibly be regarded as being for the preservation of public security are created by the various State acts relating to public health and lunacy. For example, in Victoria, Section 127(2) of the Health Act 1958 enacts that persons found to be suffering from leprosy on the certificate of a health officer and two medical practitioners, shall be detained in a quarantine station until released by order of the Minister for Health; and if such a person refuses to enter the station, or escapes from it, he may be taken there with as much force as is necessary in the circumstances. Section 128(1) provides for the compulsory detention in a hospital or place of isolation, of any person found by a medical officer of health to be suffering from an infectious disease - "infectious disease" is defined by Section 3 of the Act, and includes tuberculosis, typhoid, cholera, smallpox and many others. Such a person will only be discharged when he will no longer endanger

⁴¹ Section 30A.

⁴² Section 3AA.

⁴³ Sections 210-212.

⁴⁴ Section 196(3).

the public health. Section 133 of the Act provides for occasions giving rise to a state of emergency. The Minister for Health is the sole judge of whether an emergency exists, and if he so decides, then the Commission of Public Health has wide powers of detaining persons in isolation.

Public security also depends to a certain extent on protection from the possible acts of a lunatic, and a lunatic himself must also be protected from cruelties that could be inflicted on him by the public. The Mental Hygiene Act 1958 of Victoria therefore enacts that if it can be proved before two justices of the peace on the evidence of two medical practitioners that a person is insane and that he was found wandering at large, or not under proper care and control, then the justices may order that he shall be detained in a mental hospital.⁴⁵ The order may be suspended if a relative or friend satisfies the justices that the person concerned will be properly taken care of. Voluntary patients and those committed by relatives can be discharged from hospital on the authority of the chief medical officer, but the act no makes provision for the release of those unfortunate patients who were found to be lunatic by inquisition.

Children too may be deprived of their liberty, and this may be regarded as being not only for the protection of the child, but also for the future protection of the public in that it is an attempt to prevent principles of crime from becoming rooted in the child's make-up. Under the Children's Welfare Act 1958 of Victoria a child deemed in need of care and protection may be apprehended without a warrant and taken before a Children's Court. If the Court is satisfied that the child is in need of care and attention then it may order that he should be admitted to the care of the Children's Welfare Department. The Director of Children's Welfare then becomes the sole guardian of the child and of his estate, and has the sole right to custody of the child. No warrant is necessary to authorize the detention of any child committed to the care of the Department, and the Director may deal with him in various ways which may or may not involve institutionalisation.

Certain comparatively mild powers of detention are also to be found in the procedural laws of the individual states, and these generally exist for the the sake of convenience. The Victorian Justices Act 1958 contains typical examples of these powers conferred on the courts or on Justices. By Section 54 of this Act, if an informer, prosecutor or witness refuses to give the full particulars as to his name, address and profession, he may be committed to gaol and kept in custody till after the trial; Section 55 provides that if it appears to any justice that a witness at the trial of an indictable

⁴⁵ Section 27.

offence is likely to abscond before giving evidence, the justice may issue a warrant for his arrest and commit him to gaol until the trial is over. The witness may instead, however, enter into a recognisance to secure his appearance at the trial.

The rules relating to bail, granted at the discretion of a justice on such security as he considers sufficient, enable the accused to retain his freedom for as long as possible (unless he is charged with treason or with a capital offence to which he has pleaded guilty) but if it is made to appear on oath to the justice that he is likely to abscond before the trial, the justice may issue his warrant, and commit him to gaol.⁴⁶

Section 196 provides for the imprisonment for a maximum of three weeks (or imposition of a fine) of jurors or witnesses who are found guilty of contempt of a court of general sessions on the oath of some credible person or on the view of the chairman of the court; and Section 211 provides for imprisonment for a maximum of three days for contempt of a court of petty sessions, by a warrant of the justice of the court.

Where detention for procedural purposes is enforced, the hardship suffered by an offender is mild, and it is justified many times over when it is considered that such precautions must be taken if injustice, inconvenience, and waste of time are all to be avoided.

Denning L. J. says in *Freedom Under the Law*, that "the law of England knows no colour bar, whether it be the colour of a man's skin or of his politics". This principle has not been entirely adopted in Australia, and every state, except Tasmania, has some sort of separate legislation for aborigines, which includes many provisions for the limitation of their freedom.

Most states forbid the removal of aborigines from the state or from the district in which they live, though this does not amount to detention within the state, for the aboriginal may choose to leave by his own means, and except in Western Australia this is not expressly made an offence (unless he attempts to leave a reserve). In Western Australia, natives are restricted as to where they may travel within the state, and this may possibly be regarded as a type of detention – it is certainly a deprivation of liberty. Section 10 of the Native Welfare Act 1905–54 provides that "in order that the spread of leprosy within the state may be limited" natives may not travel south of a certain line except for specified reasons, such as to enter a hospital or visit a specialist, when they will be granted a permit allowing them to leave for a certain time if they comply with certain conditions – this permit may be cancelled at any time and no reason need be given for its cancellation.

If this amounts to detention within the State, then perhaps the

⁴⁶ Section 31(2), Section 146, Section 153(2).

provisions of the Migration Act 1958 (Commonwealth) amount to detention within Australia. Under the Constitution, the Commonwealth Parliament has no general power to legislate with respect to aboriginals, yet Section 64 of the Migration Act makes it virtually impossible for an aboriginal to leave Australia except at the discretion of an immigration officer. Unless an aboriginal possesses a permit to leave the country, it is an offence for any person to take or send him out of Australia, or to make a contract or arrangement under which he is to leave Australia. An authorised officer may grant him this permit to leave within a certain time and in a certain manner, but the Act does not state on what grounds this discretion may be exercised, and so it is not clear as to whether or not failure to grant the permit could possibly amount to a form of detention. However, the Act does not expressly state that an aboriginal may not leave the country without the permit – apparently he may leave lawfully as long as no other person is involved in his departure.

There are provisions, in the state acts, which are more obviously detention provisions. By Sections 26 of the South Australian Aborigines Act (1934–1939), if an aboriginal is found suffering from venereal disease he may be detained in a lock-hospital until declared free from the disease. Also, by Section 38 any aboriginal child can be committed to an institution under the control of the Children's Welfare and Public Relief Board until he is eighteen – in New South Wales he may only be so committed if he is neglected or in need of control.⁴⁷

In Queensland⁴⁸ and South Australia⁴⁹ any aboriginal may be removed to and detained in a reserve, apparently for no particular cause; in New South Wales,⁵⁰ however, he may only be removed to a reserve if he is found living in insanitary or undesirable conditions, or is in need of control.

Aboriginals in most states are deprived of their liberty in many other ways – generally they are Australian citizens and are therefore deprived of many of the rights of citizenship; there are provisions against their receiving alcoholic liquor, and opium; also they may not generally consort with members of the opposite sex who are not aboriginals – this has been carried to such an extent in South Australia that it is an offence for a female aboriginal “to be found dressed in male attire and in the company of any male person other than aboriginal.”⁵¹

⁴⁷ Aborigines Protection Act 1909–43, Section 13.

⁴⁸ Aborigines Preservation & Protection Act 1939–46, Section 22.

⁴⁹ Aborigines Protection Act 1909–43, Section 8.

⁵⁰ Aborigines Act 1934–39, Section 17.

⁵¹ Aborigines Act 1934–39, Section 34.

IV. CONCLUSION

The average Australian citizen has little cause to complain where his liberty is concerned, for preventive detention is something that he will probably never come across in the whole of his lifetime, unless in the few cases that have been mentioned. In a less satisfactory position are those who were not actually born in Australia – they may be immigrants, aliens, refugees, or members of unlawful associations, and as such, potential deportees; but as Latham C. J. said in Koon Wing Lau's case, even as deportees they may apply for a writ of *habeas corpus* if kept too long in custody. It can therefore be said that in general no-one (apart from the aborigines) is entirely unprotected against the misfortunes of preventive or administrative detention, except perhaps in time of war. *

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THE LAW OF PREVENTIVE DETENTION IN BURMA

I. INTRODUCTION

The Nature and Origin of Preventive Detention

Preventive justice which consists in restraining a man from committing a crime which he may commit but has not yet committed or from doing some act injurious to the members of the community which he may do but has not yet done, is common to all systems of jurisprudence.¹ This concept of justice proceeds upon the principle that a person should be restrained from doing something which, if free or unfettered, it is reasonably probable that he would do.²

In Burma provisions concerning preventive detention can be found in Chapter 8 of the Code of Criminal Procedure under which persons who are a danger to society, such as habitual offenders, may be required to furnish security. If such security is not forthcoming, they may be committed to prison. Similar provisions can also be found in the Opium Act and the Dangerous Drugs Act. However, a new measure was introduced after the Second World War by the name of Public Order (Preservation) Act. This Act was promulgated by the Governor in 1947 and the purpose of the Act, as declared in its preamble, is "to make provisions for preserving peace and order in certain areas".³

The Act has its origin in the Defence of Burma Act, which is the Burmese counterpart of the Defence of the Realm Act, promulgated by His Majesty's Government for the successful prosecution of the war. The Act was designed to cope with an abnormal situation arising out of the war and to take such measures as may be necessary for preventing certain persons from committing offences which are likely to affect peace and order.

Section 5 enables a police officer not below the rank of a Sub-Inspector or someone specifically authorised by the Governor, to arrest without warrant any person whom he reasonably suspects of having acted, of acting or of being about to act (i) in any manner calculated to disturb the public tranquility or (ii) in a manner prejudicial to the safety of any area or of any industry, machinery or

¹ See *Maung Hla Gyaw v. The Commissioner of Police and one*. 1948 B.L.R. 764 at 766.

² *Ibid.*

³ See Act XVI of 1947. 2 *Burma Code* (1954) at 226.

building in any such place or area or (iii) in any manner prejudicial to the output or affecting the control of any such industry or machinery. Such a person could be detained for fifteen days during which period the fact of his detention would have to be reported to the Governor, who in turn would pass a final order as to his continued detention, restriction of movement or release.

Two months after the promulgation of the Public Order (Preservation) Act an amending Act⁴ was passed whereby Sections 5A and 5B were added. Section 5A(1) provides as follows:

"If the President of the Union is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of public order or from committing any prejudicial act it is necessary so to do, the President of the Union may make an order

- (a) directing such person to remove himself from the Union of Burma in such manner, by such time and by such route as may be specified in the order, and prohibiting his return to the Union of Burma;
- (b) directing that he be detained;
- (c) directing that, except in so far as he may be permitted by the provisions of the order, or by such authority or person as may be specified therein, he shall not be in any such area or place in the Union of Burma as may be specified in the order;
- (d) requiring him to reside or remain in such place or within such area in the Union of Burma as may be specified in the order, and if he is not already there to proceed to that place or area within such time as may be specified in the order;
- (e) requiring him to notify his movements in such manner, at such times and to such authority or persons as may be specified in the order;
- (f) imposing upon him such restrictions as may be specified in the order in respect of his employment or business, in respect of his association or communication with other persons, in respect of his control over minor children of whom he is parent or guardian, and in respect of his activities in relation to the dissemination of news or propagation of opinions;
- (g) prohibiting or restricting the possession or use by him of any such article or articles as may be specified in the order;
- (h) otherwise regulating his conduct in any such particular as may be specified in the order;

"Provided that no order under clause (a) of this subsection shall be made in respect of any citizen of the Union."

Section 5B deals with the taking of photographs and thumb impressions. In the same year another amending Act⁵ was promulgated

⁴ Act No. XXVIII of 1947.

⁵ Act LXXIX of 1947.

under which action could be taken in respect of persons wearing uniform without authority, and to prohibit movement, activity or drill of a military nature.

When Burma attained her independence in January 1948, an order called the Adaptation of Laws Order was made providing for, among other things, the substitution of the word "President" for "Governor" wherever it may occur. The Burmese legislature brought about another amending Act⁶ whereby the word "reasonable" appearing in Section 5 was deleted. This was followed by another amending Act⁷ under which the police officer or the person authorised, mentioned in Section 5 could, instead of making the arrest himself, issue an order of arrest.

Finally in 1953 another amending Act⁸ was passed adding to Section 5 the phrase "from committing any prejudicial act". Thus it would appear that a person may be detained or his life controlled in order to restrain him from committing a prejudicial act which is defined in the said amending Act to include the smuggling of opium, dangerous drugs, ores, concentrates, rice, rice products, paddy, timber, mineral oils, metals, metal scrap or precious stones. The commission of an offence under the Foreign Exchange Regulations or the Arms Act would also amount to a "prejudicial act".

It may be reasonable to say that there is some relation between offences under the Arms Act and the preservation of peace and order, but one cannot understand why smuggling of opium or timber or an offence under the Foreign Exchange Regulations would have anything to do with the preservation of peace and order. The Public Order (Preservation) Act is today made applicable to the whole of the Union of Burma and it has been freely used by the Executive during the past years. Consequently, a large number of cases have come up before the Supreme Court in connection with this Act.

In this brief paper an attempt will be made to examine this particular Act in the light of the pronouncements made by the Supreme Court of the Union of Burma with special reference to the relevant provisions of the Constitution.

II. PREVENTIVE DETENTION

Old and New Provisions

It may be useful in the first place to distinguish the old law of preventive detention from the new. As stated above⁹ there is

⁶ Act LXII of 1948.

⁷ Act XXXVI of 1949.

⁸ Act IV of 1953.

⁹ See pages 47-48, *supra*.

considerable difference between the preventive provisions of the Code of Criminal Procedure and those of the Public Order (Preservation) Act.¹⁰ In cases where action is being taken under the latter statute, the person concerned is not allowed to show cause against action proposed. There is seldom any proof in the legal sense, but action is frequently taken upon suspicion based on material which would not be evidence in a court of law. Another big difference is that under the Public Order (Preservation) Act, the order of detention is given by the Executive and not by the Judiciary. Furthermore detention under the Public Order (Preservation) Act may be indefinite.¹¹

Authority for Ordering Detention

Under Section 5 any police officer not below the rank of Sub-Inspector or someone specifically authorized by the President may order that a person be detained for fifteen days. During that period the detaining authority must report to the President who may issue a final order, under Section 5A, as to the continued detention, restriction of movements or release of the detainee. The President does not exercise this power personally. It is exercised by someone to whom the President's powers are delegated under Section 121 of the Constitution.¹²

It is the Union Government that exercise executive powers in the name of the President.¹³ The Officer ordering detention must do so according to his own discretion. If he acts automatically on the instruction of his superior authority, then the detention order is illegal.¹⁴

¹⁰ Similar view is taken by the Supreme Court in *Lim Lyan Hwat* (alias) *Lim Lway Gaung and another v. The Secretary Ministry of Home Affairs and another*, Criminal Miscellaneous Applications Nos. 20 and 71 of 1960. But the Court in a much earlier case had declared that "we can see no distinction in principle between the provisions of the Public Order (Preservation) Act and the preventive provisions of the Code of Criminal Procedure." See *Tinsa Maw Naing v. The Commissioner of Police, Rangoon and another*, 1950 B.L.R. (S.C.) 17 at 34.

¹¹ See Section 5A (1) (b).

¹² Section 121 (1) of the Constitution provides: "All executive action of the Union Government shall be expressed to be taken in the name of the President."

¹³ See also Section 13 of the General Clauses Act which says: "Where, by an Act of Parliament or any existing law as defined in Section 222 of the Constitution, any power is conferred, or any duty imposed, on the President of the Union, then that power shall be exercisable or that duty shall be performable, in his name by the Government." 1 *Burma Code* (1954), 2 at 6.

¹⁴ See *Daw Mya Tin v. The Deputy Commissioner, Shwebo and one*, 1949 B.L.R. (S.C.), 99.

Duration of Detention

Under ordinary Criminal Law a police officer has no authority to detain a person arrested without warrant for more than twenty-four hours¹⁵ unless a Magistrate authorises further detention of such person for fifteen days if investigation cannot be completed within twenty-four hours and if there are grounds for believing the accusation is well founded.¹⁶ In the case of a person arrested under a warrant the police officer must bring him before the court without unnecessary delay.¹⁷ Thus the longest period for which a person may be detained in police custody before inquiry and trial is fifteen days.

However, under the Public Order (Preservation) Act any person suspected of disturbing or being about to disturb public peace can be arrested by any police officer of the rank of Sub-Inspector and above, or any Government Officer authorised by the President of the Union, and detained for fifteen days without the President's order and for two months with his order.¹⁸ The President or his delegate can also order that any person be detained for an indefinite period if he is satisfied that such person will be a menace to public safety and maintenance of public order.¹⁹

Under the first proviso to sub-section (2) of Section 5 a person may be arrested without warrant and detained for not more than fifteen days. In the meantime the police officer making such arrest must submit his report to the President or to any officer empowered to act on his behalf. Under sub-section 4 the President or any officer empowered to act on his behalf can, if empowered by any law other than the one under sub-section 4, pass a final order for detaining the person up to two months. This period is permitted by the Act to enable investigation into the activities of the person detained.²⁰

If the detaining authority intended to order the detention of the detainee for more than two months, he can, on receipt of the report from the arresting officer, pass a final order straight away under Section 5A clause (b).²¹ Thus when the Commissioner of Police passed an order of detention for an indefinite period under Section

¹⁵ See Section 61, Code of Criminal Procedure, 8 Burma Code 181 (1954).

¹⁶ See Sections 167 (1) and 167 (2), *Ibid.*

¹⁷ See Section 81, *Ibid.*

¹⁸ See Sections 5 (1) and 5 (2) of the Public Order (Preservation) Act.

¹⁹ See Section 5A (1) (b) and Section 7, *Ibid.*

²⁰ See *U Zan v. The Deputy Commissioner, Insein and another*. 1951 B.L.R. (S.C.) 188.

²¹ *Ma Lone v. The Commissioner of Police, Rangoon and one*. 1949 B.L.R. (S.C.) 8; see also *Pakiya Ammal v. The Deputy Commissioner, Hanthawaddy and one*. 1949 B.L.R. (S.C.) 35.

5(4), it was held that he could not do this and that the detainees could not be detained for more than two months.²²

III. REMEDIES AVAILABLE

Power of the Supreme Court

The only remedy available to a person detained under the Public Order (Preservation) Act is to apply to the Supreme Court for a writ of *habeas corpus*. It is the only court in Burma which has jurisdiction to deal with the issue of directions in the nature of various writs under Article 25 of the Constitution.²³ Before the coming into force of the Constitution in 1948 it was the High Court of Judicature at Rangoon which used to deal with writ applications. However, after the attainment of independence the High Court in the case of *Kean Eng & Co. and three others v. The Custodian of Moveable Properties, Burma and one*²⁴ has declared that it has no power to issue prerogative writs and that Article 228 of the Constitution refers to law courts existing at the time of independence of Burma and not new courts established by a new Act.²⁵

Since preventive detention is a quasi-judicial act,²⁶ the Supreme Court can enquire into the legality of any decision of a judicial or quasi-judicial body affecting the liberty of subjects.²⁷ No legislative provision in the Union can validly exclude this court from inquiring

²² *Ma Lone's case, op. cit., supra.*

²³ Art. 25 of the Constitution provides:

- "(1). The right to move the Supreme Court by appropriate proceedings for the enforcement of any of the writs conferred by this chapter is hereby guaranteed.
- (2) Without prejudice to the powers that may be vested in this behalf in other Courts, the Supreme Court shall have power to issue directions in the nature of *Habeas Corpus, mandamus, prohibition, quo warranto* and *certiorari* appropriate to the rights guaranteed in this Chapter.
- (3) The right to enforce these remedies shall not be suspended unless, in times of war, invasion, rebellion, insurrection or grave emergency, the public safety may so require."

See also *Won Shwe Bee v. The Commissioner of Police, Rangoon and one*. 1948 B.L.R. (S.C.) 157.

²⁴ 1949 B.L.R. (H.C.) 71.

²⁵ Article 228 of the Constitution says: "All courts existing at the date of the coming into operation of this Constitution shall continue to exercise their jurisdiction until new Courts are established by law in accordance with this Constitution. All cases, civil, criminal and revenue, pending in the said Courts, shall be disposed of as if this Constitution had not come into operation."

²⁶ See *Daw Mya Tin v. The Deputy Commissioner, Shwebo and one*. 1949 B.L.R. (S.C.) 99 at 100.

²⁷ See *Maung Hla Gyaw v. The Commissioner of Police and one*. 1948 B.L.R. 764 at 767.

into the legality or sufficiency of any decision of a judicial or quasi-judicial body.²⁸ Thus Section 9(1) of the Public Order (Preservation) Act, which says that "no order made in exercise of any power conferred by or under this Act shall be called into question in any court" was declared to be void as being contradictory to Article 25 of the Constitution.²⁹ Consequently, in a writ proceeding affecting preventive detention it will be competent for the Supreme Court to consider whether the action taken by the detaining authority is legal or not. In such proceedings the Supreme Court does not exercise appellate jurisdiction. Its function is simply to see whether the authority detaining a person has or has not acted within the limits of its power. For this purpose the Court will examine the competency of the authority and also consider whether the latter had before it such materials as would justify in law its arrival at that conclusion and the Court may for the purpose of satisfying itself require information as to the nature of the materials on which the authority purported to act. The Court can inquire even into the *bona fides* of the authority and genuineness of the order itself.³⁰

IV. TESTS EMPLOYED

Sufficiency of Grounds

In dealing with writ applications arising out of actions taken by the Executive under the Public Order (Preservation) Act, the Supreme Court has laid down certain principles that should guide the authorities concerned. Thus the Court declared that reasonable satisfaction of the necessity to direct detention is the basis of the exercise of powers under Section 5A.³¹ There must be known to the authority such reasonable grounds before he can validly exercise the power.³² When the Commissioner of Police has no other materials before him besides the report of the police officer informing him about the arrest, he is not justified in passing an order of detention for an indefinite period under Section 5A of the Public Order (Preservation) Act.³³ The Commissioner of Police should state what, in his own opinion, the person proposed to be detained has done or was about to do which sufficiently merits his being considered a menace to public peace and tranquility, the Court declared. This

²⁸ *Ibid.*

²⁹ See *Bo San Lin v. The Commissioner of Police and one*. 1949 B.L.R. 372.

³⁰ See *Maung Hla Gyaw's case, op., cit., supra*.

³¹ See *U Zan v. The Deputy Commissioner, Insein and another*. 1951 B.L.R. (S.C.) 188.

³² *Ibid.*

³³ *Ma Ahmar v. The Commissioner of Police, Rangoon and one*. 1949 B.L.R. (S.C.) 39.

information is deemed necessary to enable the Court to consider whether the order of detention was justified in law or not.³⁴

Action under Section 5A cannot be taken on mere suspicion. The officer concerned has to be satisfied that with a view to preventing the person arrested from acting in a manner prejudicial to public safety and maintenance of public order it is necessary to direct the detention of such person. The order of detention which may be justified under Section 5 is not necessarily justified under Section 5A(1)(b).³⁵

The real test is whether the authority concerned could, on the Section 5A of the Public Order (Preservation) Act the Deputy Commissioner said that he had reason to suspect the detainee as likely to cause disturbance of public tranquility and maintenance of law and order and passed an order that he be detained under Section basis of the materials before him, have been satisfied that it was necessary to detain the person concerned to prevent him from acting in a manner prejudicial to the public safety and the maintenance of public order.³⁶ For example where in an order of detention under 5A(1) (b) of the Act, it was held that the order of detention was defective in law and that it was not in accordance with Section 5A(1) (b) of the Act and therefore that the continued detention of the applicant could not be allowed.³⁷ The Court declared: "Officers entrusted with extensive powers to curtail the liberty of a citizen should exercise this serious responsibility with care. The Constitution has guaranteed the personal liberty of a citizen and under Article 16 such personal liberty of a citizen cannot be interfered with except in accordance with law. There must be circumstances justifying the action contemplated and the curtailment of liberty must be in due process of law. It is not enough that circumstances exist as contemplated. The detention must also be in the manner directed by the Act."³⁸

In order that a detention under the Act may be justified, there must be reasonable satisfaction of the necessity to direct such detention. A distinction is, however, being drawn between "reasonable satisfaction" and "apprehension born of vague anticipation". It is, therefore, an abuse of power given under the Act to exercise it on an apprehension born of vague anticipation.³⁹ The personal liberty of a citizen guaranteed to him by the Constitution is not lightly to

³⁴ *Ibid.*

³⁵ See *Pakiya Ammal's case*, *op. cit.*, *supra*.

³⁶ See *Daw Kywe v. The Deputy Commissioner, Pegu and another*. 1952 B.L.R. (S.C.) 92.

³⁷ *Ma Aye Saing v. The Deputy Commissioner, Hanthawaddy and one*. 1949 B.L.R. (S.C.) 43.

³⁸ *Ibid.*

³⁹ See *Tinsa Maw Naing v. The Commissioner of Police, Rangoon and another*. 1950 B.L.R. (S.C.) 17 at 35.

be interfered with and the conditions and circumstances under which the legislature allows such interference must be clearly satisfied and be present.⁴⁰

Illegal Orders of Detention

Thus where the officer did not exercise his own discretion but acted automatically on the instructions of his superior authority, his order is declared to be illegal.⁴¹ In one case⁴² the detainee had been in custody for nearly four years. The authorities directing his detention were unable to state without further inquiry the grounds of detention. The order of detention was therefore quashed.

To justify detention under Section 5A of the Public Order (Preservation) Act a written order is necessary.⁴³ An oral order is invalid and such an order cannot be confirmed later by a written order. Such orders are therefore illegal.⁴⁴ A written order intended to have retrospective effect is also illegal.⁴⁵

Improper Uses of the Act

The Public Order (Preservation) Act is aimed at potential and not actual enemies of the State. The Act is not a punishing statute but a preventive one. However, its provisions cannot be invoked in place of the preventive sections of the Code of Criminal Procedure.⁴⁶ If action can be taken under ordinary Criminal Law, it is improper to invoke the provisions of the Public Order (Preservation) Act. It will, therefore, be an abuse of the Act to employ its summary provisions where action under Chapter 8 of the Code of Criminal Procedure should be taken.⁴⁷ Where the applicant was suspected of being involved in a series of robbery, dacoity (gang-robbery) and murder and detained under the Public Order (Preservation) Act, it was held that the said Act cannot be applied to such cases and the proper action to pursue was under the preventive sections of

⁴⁰ *Id.* at 37.

⁴¹ See *Daw Mya Tin's case*, *op. cit.*, *supra*.

⁴² See *Thet Tun v. The Deputy Commissioner, Shwebo and another*, 1952 B.L.R. (S.C.) 33.

⁴³ See *Daw Aye Nyunt v. The Commissioner of Police, Rangoon and one*, 1949 B.L.R. (S.C.) 5.

⁴⁴ *Ma Aye Kyi v. The Commissioner of Police and one*, 1948 B.L.R. 772.

⁴⁵ See *Daw Aye Nyunt's case*, *op. cit.*, *supra*.

⁴⁶ See *Tinsa Maw Naing's case*, *op. cit.*, *supra* at 54.

⁴⁷ *Ma Kyin Hnin v. The Commissioner of Police and one*, 1948 B.L.R. (S.C.) 777.

the Criminal Procedure Code.⁴⁸ In another case⁴⁹ the allegation against the detainee was that he was a dangerous criminal, a smuggler of military stores and a cattle thief. The Court held that the detainee could not be detained indefinitely under the Public Order (Preservation) Act and that proceedings could be instituted against him under appropriate criminal statute, failing which he could be dealt with under Section 110 of the Code of Criminal Procedure.⁵⁰

Procedural Requirements

In order that a detention may be valid and regular, the authority concerned is required to comply with certain procedures. If the required procedure is not strictly followed, the detainee is entitled to be released even if there may be sufficient grounds to justify detention. For instance, an order for arrest must be in writing and an oral order cannot be validated by subsequent written order.⁵¹ An order intended to have retrospective effect is also invalid.⁵² A single order with respect to several persons arrested at different places and different times or arrested at the same time is considered to be improper because the authority passing such order cannot consider the case of each detainee individually.

The detaining authority must issue the order on his own suspicion or satisfaction that the person to be detained is a danger to public peace and security. If he passed the order under the direction of his superior authority, that order would be illegal.⁵³ Such authority acting under Section 5A of the Public Order (Preservation) Act has to be satisfied of the necessity of detention and he cannot act on mere suspicion.⁵⁴ Thus in the case of *Pakiya Ammal*⁵⁵ it was held that action under Section 5A could not be taken on mere suspicion and that the detaining authority must be satisfied that in order to prevent the person arrested from acting in any manner prejudicial to public safety and maintenance of public order it is necessary to direct the detention of such person.

⁴⁸ See *Maung Thar Shwe v. The Deputy Commissioner, Amherst and one*. 1950 B.L.R. (S.C.) 255.

⁴⁹ See *Ariff Ebrahim Bharoocha v. The Commissioner of Police, Rangoon and one*. 1949 B.L.R. (S.C.) 168.

⁵⁰ *Ibid.*

⁵¹ See *Ah Nywe v. Commissioner of Police, Rangoon and another*. 1948 B.L.R. 737; *Ma Aye Kyi's case*, *op.cit.*, *supra*, note 37.

⁵² See *Daw Aye Nyunt's case*, *op.cit.*, *supra*.

⁵³ See *Daw Mya Tin v. The Deputy Commissioner, Shwebo and one*. 1949 B.L.R. (S.C.) 99 at 100, *Lee Kyin Su (a) U Su v. The Commissioner of Excise and three others*. 1957 B.L.R. (S.C.) 5 at 9.

⁵⁴ See *Ma Aye Saing v. The Deputy Commissioner, Hanthawaddy and one*. 1949 B.L.R. (S.C.) 43 at 44.

⁵⁵ See note 14, *supra*.

The fact that the man is an active member of the Burma Communist Party and Leader of Red Guards and an influential member of the Indian Community, and that he also influenced the strike of the Indian employees of the Burma Oil Company is not sufficient to justify detention under Section 5A(1)(b).⁵⁶ The Court pointed out that to organize labour and to go on strike without illegal means are rights which the Constitution has recognized. Their Lordships also enumerated the different stages that have to be taken in proceedings under Sections 5 and 5A of the Public Order (Preservation) Act. They observed that under Section 5(1) of the Act the police officer could arrest a person whom he suspects of having acted or being about to act in a manner calculated to disturb or contribute to the disturbance of public tranquility. On such suspicion the police officer may keep the person arrested under detention up to fifteen days. This period of fifteen days is permitted, stated the Court, to enable the police officer who acts on reasonable suspicion to investigate the matter further and satisfy himself whether his suspicion is well-founded. The period of detention under this Section can be extended to a period of altogether two months if there is a further order from the President or the officer authorised by the President under Section 7 of the Act.

The next stage is arrived at upon the expiry of the two months or if the inquiry has been concluded earlier, before the expiry of the two months. If the inquiry discloses circumstances justifying action under Section 5A of the Act, then further detention for an indefinite period under this Section can be made by an officer to whom the powers of the President are delegated under Section 7.⁵⁷

In Daw Mya Tin's case⁵⁸ the detainee had been ordered released from custody under directions in the nature of a writ of *habeas corpus* given by the Supreme Court on the ground that his detention was illegal because of a technical defect of law in the proceedings. But the Court held that he could be re-arrested and detained or if he was still in custody, continue to be detained under a fresh order of detention under Section 5A(1)(b) of the Public Order (Preservation) Act.⁵⁹

V. SPECIFIC CASES

Cases of Unjustified Detentions

We shall now examine some of the more important cases in which detentions were held to be unjustified. In Daw Aye Nyunt's

⁵⁶ *Id.* at 38.

⁵⁷ *Id.* at 37.

⁵⁸ See note 19, *supra*.

⁵⁹ *Id.* at 85.

case⁶⁰ the allegations against the detainee were that he fostered dissatisfaction and grievances among the workers inducing them to go on strike and that he acted as a courier during the saw mill strike in 1948 between the strikers' camp and the Burma Communist Party. The court held that the allegations did not disclose any act that would bring the detainee within the purview of Section 5A. Their Lordships observed: "To go on strike or induce others to strike, provided no unlawful means are used, and to carry messages are within the legitimate rights of a citizen of the Union. The detainee did not do anything exceeding his lawful rights or do anything prohibited by law or anything which will be likely to endanger public safety or maintenance of public order."⁶¹

In the case of *Ma Khin Than v. The Commissioner of Police, Rangoon and one*⁶² the applicant's husband was arrested by a police officer on October 7, 1948 under Section 5(1) and later under orders of the Deputy Commissioner of Police, Rangoon to whom authority was delegated under Section 7. The order challenged was that of October 8, 1948 by the Deputy Commissioner of Police, Rangoon. The Supreme Court held that the order of detention was on its face irregular as the detainee could not be detained beyond December 6, 1948 and that the detention until December 7, 1948 was irregular. What has to be justified is the original arrest under Section 5(1). The charges against the detainee of being in contact with the Burma Communist Party and of distributing leaflets and pamphlets issued by said party and possession of such leaflets and some documents were held under the circumstances not to constitute sufficient justification. The Burma Communist Party has not been declared an unlawful association and to be a member thereof is not in itself justification for action being taken.⁶³ The court observed:

"To be a communist and to propagate communism by distributing literature would be acting within the lawful rights assured to a citizen, if he thereby commits no unlawful acts or cause a breach of the peace or public disorder. Possession and retention of documents would not be a sufficient ground in law for action. As from the title of the leaflet the attack was against the A.F.P.F.L. and not against the Government of the Union of Burma, it was within the powers of a citizen to criticize and attack political organisations provided it is legitimate and not prohibited by law."⁶⁴

In the case of *U Zan v. The Deputy Commissioner, Insein and another*⁶⁵ the detainee was arrested and detained by an Inspector

⁶⁰ See note 37, *supra*.

⁶¹ *Id.* at 7.

⁶² 1949 B.L.R. (S.C.) 13.

⁶³ *Id.* at 15.

⁶⁴ *Id.* at 16.

⁶⁵ 1951 B.L.R. (S.C.) 188.

of Police alleging that he was a member and legal adviser of the K.N.D.O. (Karen Insurgents) Administration, and that he had been associated with nine persons most of whom had been released, acquitted or discharged as at the time of filing of the *habeas corpus* application by the detainee. The Deputy Commissioner, Insein, passed an order of detention for an indefinite period based on the report of the Inspector of Police without further examination. After eight months of detention when the detainee applied for an order of release, the successor of the Deputy Commissioner cancelled the earlier order of detention on "reasonable suspicion" and substituted a fresh order on "being satisfied" of the necessity of taking action under the Act.

Detention proceedings showed that the second Deputy Commissioner received a detailed account of unauthenticated information of the illegal activities alleged against the detainee only after about two years of detention and shortly after the court had issued summons to the Deputy Commissioner to justify the detention. The court considered that at the time of passing the order of detention there was no material before either officer on the basis of which they could be "reasonably satisfied" of the necessity of taking action under the Public Order (Preservation) Act and that "the practice of directing detention of a person for an indefinite period first and only later to seek materials in support of the order of detention is one not in accordance with law and could not be too highly deprecated." ⁶⁶

In *U Win Pe v. Secretary, Home Ministry* ⁶⁷ it was alleged that the applicant was engaged in illicit trade in rice and timber with the insurgents and that he acted in a manner prejudicial to public safety and order. It was also alleged that the applicant's rice mill had been used to give alarm signals whenever police and armed patrols went around checking the town. There was, however, no evidence to show that the detainee was at the mill on such occasions or that he knew about such signals. The court held that there was no law against the applicant's dealing in rice and timber and that it could not be considered that he was engaged in illicit trade. It was also held that the detaining authority acted without sufficient supporting material and that just because the closing down of his rice mill coincided with the insurgents' attack of the town on two occasions, it could not be said that the applicant knew about the attack beforehand or that there was any connection between him and the insurgents. ⁶⁸

Perhaps the most significant ruling made by the Supreme Court is that which can be found in the case of *Tinsa Maw Naing*

⁶⁶ *Id.* at 192.

⁶⁷ 1957 B.L.R. (S.C.) 32.

⁶⁸ *Id.* at 35-36.

v. *The Commissioner of Police, Rangoon and another*.⁶⁹ This case is important not because of the facts but because of the observations made by the Supreme Court regarding its legal and constitutional aspects. These observations will be discussed in detail later.⁷⁰ For the present it is sufficient to say that the detention was held to be unjustified on the basis of the facts disclosed. The applicant's husband had been in detention in the Central Jail at Rangoon since July 14, 1948 in pursuance of an order of detention made by the Commissioner of Police, Rangoon under Section 5A(1)(b) of the Public Order (Preservation) Act in exercise of the powers delegated to him under Section 7 of the Act.

An application for directions in the nature of *habeas corpus* was made by the applicant on July 21, 1948, but after the hearing the application was dismissed on August 11, 1948. A second application was therefore presented on December 7, 1949. In considering the application the test adopted by the court was whether it could be said that the Commissioner of Police, on the materials which he had placed before the court, could be "reasonably satisfied" of the necessity of keeping the applicant's husband in further detention. Citing the case of *Liversidge v. Anderson*⁷¹ the court observed that the notion of reasonableness must be presumed in the exercise of such grave powers as interference with the fundamental rights of personal liberty which the Constitution has assured to each citizen. Their Lordships observed further that "the objective test is applicable to determine whether the Commissioner of Police 'is satisfied' or not, of the necessity to act" and that "we must examine the materials to see if they are such as could have satisfied the Commissioner of Police." The court then continues:

"We fully realise that we are not sitting here in appeal from the Commissioner of Police and that we are not entitled to substitute our conclusions on facts for his. But a distinction must be drawn and must be kept ever present before our minds between reasonable satisfaction and apprehension born of vague anticipation. Reasonable satisfaction of the necessity to direct detention is the basis of the exercise of power under Section 5A of the Public Order (Preservation) Act. It is an abuse of that power to exercise it on an apprehension born of vague anticipation."⁷²

The allegations against the detainee in this case were that he was planning the overthrow of the Government by grouping ex-soldiers and that he was present at a political meeting which some criminals also attended. The court held that every citizen had a right to

⁶⁹ 1950 B.L.R. (S.C.) 17.

⁷⁰ See p. 63, *infra*.

⁷¹ 1942 A.C. 206.

⁷² *Id.* at 35.

convene or to be present at a political meeting and the fact that some of those who attended were criminals would not make everyone who attended the meeting liable to detention under the Public Order (Preservation) Act. It was also observed that the allegations about the planned rebellion might be true at the time of detention but that after one year and eight months, as no further information regarding the rebellion was available, the continued detention was not justified.⁷³

Another important case dealing with preventive detention came up very recently to the Supreme Court. This is the case of *Lim Lyan Hwat (a) Lim Sway Gaung and another v. The Secretary, Ministry of Home Affairs and another*.⁷⁴ In this case the applicants were cousins and partners in business. Their names have been entered in the Pink Book, which is a book maintained by the Excise Department with respect to persons who are in the illicit opium trade. The first applicant had to reside in Sandoway from 1954 to 1957 in compliance with an order passed under Section 5A. After three years he was permitted to return to Rangoon on furnishing security for good behaviour for five years. On September 29, 1959, the Ministry of Finance and Revenue, which administered the Excise Department, wrote in to the Ministry of Home Affairs that there was ground for suspicion that he had an interest in some 450 balls of opium seized in May 1959.

In a final action taken the applicant was ordered to be sent to a remote small town in Upper Burma. The other applicant was also ordered to live outside Rangoon some time in 1955. But he later managed to return to Rangoon somehow and like the first applicant he was made to enter into a bond to ensure good behaviour for five years. That bond was executed on May 5, 1959. However, in April 1960 the Home Secretary issued an order sending him to another small town in Upper Burma. The court held that because a person is suspected of being concerned in smuggling opium, it does not follow that his detention or restriction under Section 5A is to be automatic and that the applicants could be prosecuted instead. Their Lordships declared that preventive measures are not meant to be resorted to by way of penalty and that to invoke the Public Order (Preservation) Act as a punishment is a fraud on the statute and an abuse of the powers exercisable under it. Accordingly, the orders passed against the applicants restricting their movements within the Union were quashed and the applicants were ordered to be released immediately.⁷⁵

⁷³ *Id.* at 36.

⁷⁴ Cr. Misc. Applns. No. 20 and 71 of 1960.

⁷⁵ *Ibid.*

Instances of Justified Detentions

The foregoing cases are those in which the Supreme Court has held that the facts and circumstances did not warrant detention under the Act. We shall now briefly turn to cases in which detentions under the Act were found to be justified.

In the case of *Mrs. G. Latt v. The Commissioner of Police and one*⁷⁶ the applicant's husband was alleged to have been distributing arms and ammunition to Karen insurgents. The court was of the view that there was some possibility of the detainee being connected with the rebels on the basis of the materials furnished by the detaining authority. And although the applicant denied the allegations, the detention was nevertheless held to be justified. Their Lordships observed that where a responsible officer entrusted with the duty of guarding and protecting the safety of the State, says on oath that his order is based on information obtained from agents, informers and other reliable sources and that through the detainee arms and ammunition were being supplied to the insurgents, the Court cannot on mere denial of the wife of the detainee brush aside such statement on oath of such responsible officer. Personal liberty of a subject, though precious, will have to be sacrificed to some extent by legal enactments promulgated for the safety of the nation, the court declared.⁷⁷

The case of *Chwa Eik Haung (a) Chwa Tong Taik v. The Commissioner of Police, Rangoon and one*⁷⁸ involves a foreigner. The applicant in that case was arrested and detained by the police in Rangoon under Section 5A of the Public Order (Preservation) Act on the allegation that he was concerned in unauthorized dealings in foreign exchange and that in the course of the investigation it was discovered that his entry into Burma was obtained by a false declaration. It is also said that secret pamphlets dealing with the use of explosives and instructions on signals and codes used by the army were found in a flat occupied by the detainee who admits allegiance to the Kuomintang in Formosa. It was held that under the circumstances the detention could not be said to be unjustified. Their Lordships observed:

"The Court of law is not concerned with a man's political ideology and so long as he respects the laws of the Union he may hold any political

⁷⁶ 1949 B.L.R. (S.C.) 102.

⁷⁷ *Id.* at 104. See also *Saw Benson v. Commissioner of Police, Rangoon and four others*, in which it was held that where the Deputy Commissioner came to conclusions of the fact *bona fide* and reasonable an order will not be interfered with and that the fact that an order of detention is passed during the pendency of *habeas corpus* proceedings before the Supreme Court does not necessarily make it illegal, 1950 B.L.R. (S.C.) 196.

⁷⁸ 1953 B.L.R. (S.C.) 52.

view; but when such a man, motivated by his ideology, pursues a course of action derogatory to the interests of the Union, then his political ideology is a factor which may well be taken into consideration."⁷⁹

In a more recent case ⁸⁰ the Supreme Court held that preventive detention laws and ordinary criminal laws are complementary to one another and that acquittal by a criminal court did not preclude detention under the Public Order (Preservation) Act. Although action under ordinary criminal law may not be successful due to lack of proper evidence, if the authority concerned considers that there are satisfactory reasons, a person may be detained under the Public Order (Preservation) Act in the interest of public order.⁸¹

VI. CONSTITUTIONALITY OF THE STATUTE

The foregoing study of the Supreme Court's decisions has revealed that the power of the Executive to restrict the freedom and liberty of a citizen and to detain him on mere suspicion for an indefinite period is too wide and that there are few safeguards under which that power is to be exercised. It will be seen that the Public Order (Preservation) Act contains no provisions under which the person detained is required to be informed of the charge against him or of the grounds on which action has been taken against him or is given the assistance of a legal adviser. Doubts have, therefore, been expressed as to the constitutionality of the Act itself.⁸²

The first and the most serious attack on the statute in the light of the provisions contained in the Constitution of the Union of Burma was made in the case of *Tinsa Maw Naing v. The Commissioner of Police and one*.⁸³ It was contended by the counsel for the applicant in that case that the Public Order (Preservation) Act of 1947 was unconstitutional and that it was therefore invalid. In support of this contention Article 16 of the Constitution was invoked.⁸⁴ It was also contended that it was not within the competence of the Parliament to enact the Public Order (Preservation) Act and that therefore it did not form part of the body of existing laws

⁷⁹ *Id.* at 53.

⁸⁰ See *Maung Tin Aye v. The Deputy Commissioner, Pakokku and one*. 1957 B.L.R. (S.C.) 17.

⁸¹ *Id.* at 21.

⁸² For a brief review of earlier decisions of the Supreme Court on this question, see Winslow Christian, "Burma's New Constitution and Supreme Court" XXVI *Tulane Law Review* (1951), at p. 47. See also N. A. Subramanian, "Some Aspects of Burmese Constitutional Law" V *Indian Year Book of International Affairs* (1956), at p. 123.

⁸³ 1959 B.L.R. (S.C.) 17. For the facts of the case see p. 60, *supra*.

⁸⁴ Article 16 of the Constitution of the Union of Burma provides: "No citizen shall be deprived of his personal liberty nor his dwelling entered, nor his property confiscated, save in accordance with law."

continuing to be in force in the Union of Burma by reason of Article 226(1) of the Constitution.⁸⁵ It was also urged on behalf of the applicant that the qualifying words "save in accordance with law" require an Act, which authorises interference with the personal liberty of a citizen, to provide that such deprivation of personal liberty shall be made only after an inquiry at which the person proposed to be detained is given a right to attend, to be informed of the charge against him as also of the evidence against him and to be given an opportunity of producing evidence in his own defence. It was claimed that anything short of these requirements would offend the principles of natural justice and the rules of natural law and that when the Constitution in Article 16 speaks of "law" it is not merely positive law that is being contemplated but that the term would extend and embrace in its meaning principles of social and political justice.

In support of these contentions many decisions of the Supreme Court of the United States of America were cited. The Court's replies to these contentions were as follows: To the contention that the Public Order (Preservation) Act does not form part of the "existing laws" as defined in the Constitution⁸⁶ the court said that the term "law" appearing in the phrase "existing law" must be read as meaning a positive enactment of a legislative authority in the Union having power to enact it. The observations made by the Chief Justice who delivered the opinion of the court deserves quotation *in extenso*:

"Customary laws, the Common Law of England and the principles of justice, equity and good conscience were not applied by their inherent force but were made applicable by enactment. It is by people who had been trained under this system that the Constitution of the Union of Burma was drawn up and enacted and it is therefore reasonable to conclude that when the Constitution speaks of "law" it speaks of the will of the legislature enacted in due form, provided that such enactment is within the competence of the legislature.

On principle also it seems to us difficult to accept the suggested

⁸⁵ Article 226 (1) says: "Subject to this Constitution and to the extent to which they are not inconsistent therewith, the existing laws shall continue to be in force until some or any of them shall have been repealed or amended by a competent legislature or other competent authority."

⁸⁶ The term "existing law" is defined in Article 222 (1) of the Constitution as "any law, Ordinance, Order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any legislature, authority or person in any territories included within the Union of Burma being a legislature, authority or person having such power to make such law, Ordinance, Order, bye-law, rule or regulation."

See also the case of *U Hpyu v. The Superintendent, Mandalay Jail and one*; 1953 B.L.R. (S.C.) 41, in which it was held that the Public Order (Preservation) Act, whatever may be its origin and however it came into being, found itself to be "existing law" and continued to maintain its existence.

contrary concept of "law" equating it with principles of absolute justice or the rules of natural justice as they have sometimes been called. With changing social and political conditions notions regarding natural law change; all that remains constant is the appeal to something higher than positive law. Rules of natural law are as the mirage which ever recedes from the traveller seeking to reach it. They are no doubt ideals to which positive law should strive to conform. But to accept natural law as a higher law which invalidates any inconsistent positive law would lead to chaos. There is no certain standard and no measuring rod by which the so-called principles of natural justice can be ascertained or defined. Each judge administering natural justice would be a law unto himself. In seeking to escape from the arbitrary exercise of power by the State the exponents of this principle would but place themselves under the exercise of arbitrary powers by the judges. The burden of judges also would be intolerable. No judge worthy of his office relishes the exercise of arbitrary powers whether by himself or by any other person."⁸⁷

The court was therefore of the view that when Article 16 of the Constitution speaks of "law" it is an enactment by Parliament or other competent legislative body and that it was within the competence of Parliament to enact the Public Order (Preservation) Act. Their Lordships paraphrased Article 16 of the Constitution as follows: "No citizen shall be deprived of his personal liberty except in such circumstances and under such conditions as Parliament or other competent legislature by an enactment made in due form specifies, provided that in so specifying the circumstances and conditions Parliament or other legislature has not acted beyond the limitations which the Constitution has set."⁸⁸

The court arrived at this conclusion by looking into the meaning of the word "law" as it has been understood in Burma for many years before the Constitution was adopted. The Chief Justice refers to Section 13 of the Burma Laws Act of 1898⁸⁹ and observes that customary laws and principles of justice, equity and good conscience were not applied by their inherent forces but that they were made applicable only by an enactment. He pointed out that it was by people who had lived or who had been trained under the British Common law system that the Constitution of the Union of Burma

⁸⁷ See 1950 B.L.R. (S.C.) 17 at 26.

⁸⁸ *Id.* at 26.

⁸⁹ Section 13 of the Burma Laws Act 1898 provides *inter alia*: "Where in any suit or other proceeding in Burma it is necessary for the court to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution — (a) the Buddhist law in cases where the parties are Buddhists; (b) the Muhammadan law where the parties are Muhammadans; and (c) the Hindu law in cases where the parties are Hindus — shall form the rule of decision, except in so far as such law is by enactment altered or abolished or is opposed to any custom having the force of law."

Sub-section 3 provides: "In cases not provided for by sub-section 1, or any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience." See I Burma Code 9 (1954).

was drawn up and enacted and that the word "law" should mean no other than the will of the legislature enacted in due form.⁹⁰

Thus the Supreme Court upheld the constitutionality of the most controversial Act ever passed by the Burmese legislature. The court tactfully avoided answering the larger question that was posed, namely, whether the administration of "preventive justice" falls within the purview of Article 133 or of Article 150 of the Constitution saying that it was not necessary to decide the issue in view of the stand already taken by the court regarding Section 5A of the Public Order (Preservation) Act.

It is significant to note that although the court has rejected natural justice in this case, yet in a number of other cases it has invoked the rules of natural justice to quash the orders passed by certain administrative agencies. For instance, in the case of *U Pit v. Thegone Village Agricultural Committee and three others*⁹¹ the court declared that the Village Agricultural Committee is a statutory body exercising quasi-judicial functions and that such committees cannot act in excess of their powers or contrary to the provisions of the Tenancy Disposal Act⁹² and rules. Their Lordships observed that these Committees must also act according to rules of natural justice which require, *inter alia*, that: (i) a person cannot be the judge of his own acts and cannot judge a matter in which he is interested; (ii) the judges must act in good faith and give an opportunity to parties to be heard and state their case and viewpoint.⁹³

Again in another case⁹⁴ it was held that where the Customs authorities exercised limited functions of a judicial nature as provided in Article 150 of the Constitution, they were bound to act in conformity with judicial principles. Their Lordships said that rules of natural justice require that no man shall be condemned unheard and, therefore, that before an order to the prejudice of any person is made, he must be given an opportunity of making his defence even though there may be no provision in the Code for such hearing.⁹⁵

The two cases mentioned above involved the right of a citizen to private property and it is certainly questionable whether this right is in any way superior to the right of a citizen to freedom and personal liberty.⁹⁶ It was, however, pointed out by the Supreme

⁹⁰ See 1950 B.L.R. (S.C.) 17 at 25.

⁹¹ 1948 B.L.R. (S.C.) 759.

⁹² Act XII of 1948.

⁹³ See 1948 B.L.R. 759 at 761.

⁹⁴ See *Abdul Gaffar v. U Kyaw Nyunt and one*, 1950 B.L.R. (S.C.) 218.

⁹⁵ *Id.* at 225.

⁹⁶ The validity of the stand taken by the Supreme Court in this particular instance has been questioned by other writers as well. See Subramanian, *op. cit.*, *supra*, note 75, at 137. See also Winslow Christian, *op. cit.*, *supra*, note 75, at 56.

Court that the Public Order (Preservation) Act was so badly drafted that it had given rise to much misunderstanding and confusion and that greater caution should be exercised in drafting such an Act.⁹⁷ It was also observed that this Act had been misused by the Executive and the frequency with which such abuses have occurred in the past has led the Supreme Court to declare in a recent ruling⁹⁸ that although Article 16 of the Burmese Constitution ordains that no person shall be deprived of his personal liberty save in accordance with law, "it is unfortunate that even in the thirteenth year of our country's independence there are still pieces of legislation which run counter to the ideas of liberty and freedom enshrined in the Constitution."⁹⁹

The Act has been so freely used by the Executive that the Prime Minister in a recent speech was led to exhort the authorities concerned publicly not to use this law indiscriminately. The Supreme Court took judicial notice of this speech which was delivered on May 27, 1960 and issued as a Ministry of Information publication. Their Lordships welcomed the speech particularly because it deals with the concept of the Rule of Law which, the court pointed out, is very different from "rule by law" promulgated on the belief of necessity of curbing the liberty of the individual.¹⁰⁰

VII. CONCLUSION

The foregoing study has shown that the Public Order (Preservation) Act, which was promulgated at a time when the country was facing a nation-wide insurrection, has been used so indiscriminately by the authorities concerned that it has become the terror of all the politicians and the concern of every one who is dedicated to the establishment of a democratic society based on the Rule of Law. Section 5 of the Act has become so notorious that there is at present hardly a politician in the country who has not heard of it and the term "Section 5" has become known to the public not as an instrument of justice and freedom but as a tool used by the Party in power to suppress freedom of speech, expression and movement of the citizens.

It may be that the present conditions in the country are such that complete repeal of this notorious statute would be premature. However, many improvements can be made in the Act by introducing

⁹⁷ See *Ma Lone v. The Commissioner of Police, Rangoon and one*. 1949 B.L.R. (S.C.) 8.

⁹⁸ See *Lim Lyan Hwat's case*, *op. cit.*, *supra* note 10.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

appropriate amendments. Such amendments, it is submitted, should contain provisions under which a person against whom action is taken under the Act should be informed of the grounds on which action is taken and of the charge and evidence against him. He should also be afforded an opportunity of adducing evidence in his own defence. The provision relating to indefinite detention should be eliminated and a reasonable time limit should be fixed within which a person may be detained. There should be an inquiry before action is taken against a person under the Act and the detainee should be given the right to attend the inquiry and, if necessary, he should be provided with free legal assistance.

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PROTECTION OF PERSONAL LIBERTY IN THE CRIMINAL PROCEDURES OF EASTERN EUROPE

I. The Standards

The socialist legislation examined in this study belongs to the civil law tradition. Its institutions and their function are a provenance of that stage of the continental European public order which is best described by the German concept of the *Rechtsstaat*. A valid evaluation of the standards of Eastern European law is impossible without measuring it against the principles and legal institutions developed in the West of Europe. This law alone, and no other system of law or political philosophy, can provide the pertinent criteria for gauging the proper place of the socialist legal systems in the history of laws of Europe.

In the concept of the *Rechtsstaat*, protection of personal liberty is solely a legal problem. Perhaps no other aspect of relations between the individual and the collective has achieved such a high degree of harmony of interests and of perfection of legal regulation. Courts and no other branch of government have the exclusive right to pass validly on the restriction of personal liberty, and as violation of the law in force is the only reason for deprivation of liberty, criminal procedure treats of all aspects of this question whenever it is necessary to restrict it in the interest of the administration of justice.

Nowhere does this axiom come more clearly to light than in pre-trial proceedings in the prosecution of crimes. At that stage the codes of criminal procedure combine the inquisitorial principle, reflected in the subordination of all authorities engaged in the investigation of crimes to the office of the public prosecutor, with the independence of judicial officers in regard to the appraisal of evidence, and the legal classification of relevant facts for taking various steps in the course of the investigation, in particular as they affect the question of the personal liberty of the suspect. The judge investigator, a typical institution created in the West of Europe, is bound by law to follow the instructions of the public prosecutor, but is independent in the exercise of his judicial powers. He is under the orders of the public prosecutor who is at the same time a party to the proceedings before him.¹

¹ Cf. Articles 13, 49, 224 of the French Code of Criminal Procedure.

In the pre-trial investigation the most important of the detainee's rights is that of defense. It must be safeguarded at all times, even when the prosecuting authorities are acting in an emergency.² In on the spot interrogations a suspect who appears with his counsel must be heard in the latter's presence.³ If the defendant is arrested his counsel has the right to communicate with him freely and this right may be temporarily suspended only in certain specific circumstances. Such limitation of the right of defense or liberty must be declared for a definite period only, and for reasons determined by law.⁴ The counsel of the defendant may participate in the proceedings.⁵

The first step of an authority dealing with a person suspected of having committed a crime is to inform him of his rights and of the nature of the acts with which he is charged.

Pre-trial proceedings are, whenever possible, conducted discreetly and in secrecy, not only in the interest of the prosecution of crimes but also for the protection of the individuals involved in the proceedings.⁶ Pre-trial investigation is not a trial, and its purpose is to avoid moral damage to those who, although involved in a case, are not guilty and therefore deserve the protection of their honor and good name.

Judicial control of the acts of authorities engaged in the prosecution of crimes, whenever the right of liberty is involved, constitutes the central legal problem and the chief method of assuring legality in judicial examinations and appeals to higher judicial authority. In this respect civil and common law are identical in principle, the only difference consisting in procedural arrangements. While in Anglo-Saxon law *habeas corpus* constitutes a separate procedure, in the civil law countries it is automatically integrated into the procedural rules, assuring judicial intervention when the question of the restriction of personal liberty or of any individual right arises.

There are two types of pre-trial proceedings in the criminal procedures of Europe. In simpler cases and in lesser crimes, investigation is conducted by police or administrative authorities. Courts intervene only when individual rights must be subject to restriction, and they alone have the power to do so. In more important cases pre-trial investigation is conducted by special judicial officers. In pre-trial investigations the prosecutor has the rights of a privileged party since he represents the interest of society.

² *Ibid.*, Articles 56—57.

³ *Ibid.*, Articles 70—71.

⁴ *Ibid.*, Article 116.

⁵ *Ibid.*, Articles 120 ff.

⁶ *Ibid.*, Article 58.

II. The Impact of the Soviet Pattern

Criminal procedure of the Soviet type, adopted in the majority of Eastern European countries, has retained only the outer shell of the traditional European system of protection of individual freedom in the process of the prosecution of crimes. With a few notable exceptions, the courts have lost their role of guarantors of individual liberty. All aspects of legal control over pre-trial investigation are concentrated in the hands of the prosecutor (procuratorial system) thus removing the reason for including this aspect of the administration of justice in the codes of criminal procedure, and distinguishing between various types of investigation according to the gravity or types of crime involved. While there is a qualitative difference between judicial pre-trial investigation and police investigation in Western Europe, visible in the legal weight of the evidence gathered in the course of the trial itself, under the Soviet system this distinction disappears, thus profoundly affecting the nature of the entire judicial process.

The codes of criminal procedure in Eastern Europe are of comparatively recent vintage. With the exception of the Polish Code of 1928, they have all been enacted since the reform of their government and social order according to the Soviet pattern. The Polish Code, although still nominally a relic of the past era, has been subject to such drastic revisions that it may safely be regarded as a law of the socialist type.

In spite of the fact that Eastern European codes are the products of the same ideological climate they represent a wide variety of approach. While in the past Eastern European criminal procedures provided for an almost identical mechanism of guarantees against unwarranted deprivation of freedom, a built-in *habeas corpus*, they are no longer identical in their basic principles. Some of the socialist codes still consider it important to assign to the courts the task of controlling legality whenever the freedom of individuals is involved, and others have adopted the procuratorial system, although with important deviations from the Soviet models.

To the first category belongs the Code of the German Democratic Republic of October 2, 1952⁷ and the Code of the Yugoslav Federal Republic of September 10, 1953.⁸ The Albanian (1953),⁹ Bulgarian (1953),¹⁰ Hungarian (1951),¹¹ Polish (1928),¹²

⁷ *Gesetzblatt*, 1952, p. 997.

⁸ Sl. L. 1953 as amended by the Law of December 26, 1959, Sl. L. 1960/No. 5.

⁹ *Gazeta Zyrtare*, March 30, 1953.

¹⁰ *IPNS* (1952), No. 11.

¹¹ Law No. III/1951.

¹² D.U. 1950, 348/364.

Rumanian (1956),¹³ and Czechoslovak (1950),¹⁴ codes belong to the other category which has followed the Soviet pattern where judicial authority has either been excluded or is admitted only marginally, while the main task of enforcing the law in this respect rests on the shoulders of the public prosecutor.

In the six codes of the procuratorial type (i.e., in which the public prosecutor occupies a central position) Hungarian criminal procedure makes the least pretension that protection of legality and, in particular, protection of the rights of the defense, are of any consequence in the course of pre-trial investigations. As a result there is no longer a division between cases which, depending on their gravity, used to be divided into two categories, one requiring great legal expertise, and the other being left in the hands of the police. According to the present code there is only one type of proceeding under which various authorities, according to their jurisdiction, investigate criminal breaches of law. The formal order which opens pre-trial investigation may be issued by any of the following agencies concerned with the preservation of public order according to their fields of responsibility (Article 86): the police, the security police, the Ministry of the Interior, or the prosecutor. The role of the prosecutor in this stage of criminal proceedings is very discreet. To him go appeals against the actions of the investigators, and he either issues or confirms refusals to institute investigation in more important cases. Some other acts and decisions by the investigating authority require the formal approval of the public prosecutor, but even the final procedural act closing the pre-trial investigation act of accusation is formulated by the authority in charge of a given case (Article 137).

All the other codes continue to distinguish between police investigation in less important cases, and formal pre-trial investigation, which is obligatory in more serious crimes. The other type of procedure differs from police investigation by the formal stages which it must follow, the handling of the investigation by trained agents, and the direct supervision of the prosecutor at all stages of the proceedings.

While police investigations are described in the codes in general terms, the duties of authorities conducting formal investigations are frequently defined in detail (Article 114 of the Albanian Code of Criminal Procedure). Some of the codes, in order to assure observance of the law in more difficult cases, give the public prosecutor the right to assume direct responsibility for the conduct of the investigation (Article 113 of the Albanian Code of Criminal Procedure,

¹³ B.O. 1956, No. 11.

¹⁴ Sb.Z. No. 1, 1953.

Sections 101 and 140 of the Bulgarian Code, Article 245 of the Polish Code, and Article 187 of the Rumanian Code).

In this type of preliminary investigation the public prosecutor's powers of control over the conduct of pre-trial investigations are fairly complete and include the right to institute formal pre-trial investigations when they are not obligatory according to the law. The principle of control of pre-trial investigations by the public prosecution is realized in Czechoslovak procedure where the prosecutor is in charge of all formal pre-trial investigations irrespective of the categories of crimes involved (Sections 176 ff. of the Czechoslovak Code).

Thus pre-trial investigations of the procuratorial type fall into three categories. The first, which is closest to the Soviet pattern, limits the intervention of the public prosecutor to certain determined circumstances. This is represented by the Hungarian Code. The second is that in which the public prosecutor supervises both types of investigation. In this category are the provisions of Article 245 (14 and 15) of the Polish Code of Criminal Procedure as amended after October 1956. The third type is represented by the Czechoslovak Code where the public prosecutor has stepped into the shoes of the judge investigator and is in charge of more serious cases, while supervising the proceedings of the police authorities.

The East German Code of Criminal Procedure of October 2, 1952, represents an intermediate type between the purely procuratorial and the judicial form of pre-trial investigations. Like Hungarian criminal procedure, it covers only the formal type, which in its entirety is supervised by the public prosecutor (Sections 95—101 of the Code). At the same time the court is exclusively competent to impose preliminary detention (Sections 140—156).

The Yugoslav Code of Criminal Procedure is of particular interest. The first effort at enacting socialist criminal procedure in Yugoslavia resulted in an imitation of the Soviet Code (1948).¹⁵ After experimenting for five years with the socialist type of law the Yugoslav Code of 1953 vindicated the validity for all social orders of some fundamental principles of law.

Under the Code of 1953, pre-trial proceedings fall into two categories: informal police investigations, generally under the supervision of the public prosecutor, whose role as the guardian of legality has been fundamentally reduced (Articles 136—154), while the courts exercise control over all measures adopted by the investigation authorities as they affect the rights of the individual (Articles 20, Sections 2, and 153); and formal pre-trial investigations which are conducted by the district courts either through a judge investigator (Article 20), or through a special bench, which hears appeals,

¹⁵ Sl. L. 1948/97.

consisting of three or five professional judges, depending upon the gravity of the case. In certain situations the county court may be charged with the conduct of a pre-trial investigation if this would expedite the course of proceedings.

The Code of 1953, as it was originally enacted, was a combination of two approaches. According to the general interests of the administration of justice, distribution of jurisdiction was conceived not to expedite the investigation, but to preserve a certain field of criminal investigation exclusively for the jurisdiction of the public prosecutor and the administrative authorities, especially the investigators of the Ministry of the Interior. In this category of investigation the public prosecutor controlled the informal procedure and could address himself either to the county court, to the investigating judge of the district court, or to the police with requests to investigate a case or certain phases of it (Article 141). The Law of December 26, 1959, abolished this dichotomy by giving the investigating judge of the district court the right to assume, at any time, the conduct of a pre-trial investigation which was transmitted either to the county court or to the investigators of the Ministry of the Interior (New Article 160).

III. Authority for Ordering Preventive Detention or Deprivation of Liberty for Purposes of Public Security or the Administration of Justice

The broad powers of administrative authorities in Eastern Europe to order detention, deportation, and placement in forced labor camps were, after Stalin's death, either completely abolished or greatly restricted. As a rule, administrative authorities have no right to impose deprivation of liberty except in minor violations of administrative regulations, and the power of deprivation of liberty is in the hands of the courts and may, as a rule, be exercised in connection with the prosecution of specific crimes, chargeable to a concrete individual.

The only exception to this general situation appears to be the Bulgarian law of January 10, 1959,¹⁶ which amended the Law on the People's Militia of 1955. It provided as follows:

"In particularly important circumstances, the Minister of Internal Affairs, having obtained written consent from the Attorney General of the People's Republic, may take the following measures against persons who have been sentenced for offences against the People's Republic, or such person who, in view of their anti-democratic manifestations, may represent a danger to the social order, against recidivists who

¹⁶ IPNS No. 25/1959.

have been sentenced for crimes against social or private property, for a disorderly life, for the counterfeiting of documents or of currency, for assault against governmental authorities, for hooliganism, and also against persons who are without a permanent residence, lead a vagrant life or resort to begging and refuse to engage in socially useful work:

- (a) establish for them a place of residence either permanent or for a determined time;
- (b) prohibit them to leave their place of residence for a period up to six months, and for persons who have no permanent place of residence, vagrants, or those who resort to begging, for the period necessary for their permanent settlement."

Although the powers of the Minister of the Interior in Bulgaria seem to be connected with a judicial conviction for a concrete criminal offense, they in no way resemble the system of educational or preventive measures of some of the modern codes of Europe. In the first place, the various measures are not exclusively restricted to persons convicted by the courts. Secondly, they are also conceived as measures of political suppression. Thirdly, their legal nature is greatly in doubt. If they are imposed in connection with circumstances which came to light in the course of the trial, then they are clearly a case of double jeopardy. If these circumstances came to light later, then, if they do not constitute a criminal offense, they do not call for criminal repression or for preventive measures, and if they do, they belong to the normal channels of the administration of justice.

The provisions of the Bulgarian law of 1959 constitute an exception reminiscent of the situation which obtained in Eastern Europe under Stalinist communism. The reform which removed those anomalies has failed to bring about a change in principle as regards the powers of detention of private persons by administrative authorities in the course of criminal proceedings, although greater control over the actions of police agencies has been introduced. In this respect the Soviet pattern continues. As a result, a system that all restriction of personal liberty in connection with the investigation of crimes had to be authorized by the court, and that, except in certain circumstances, police or even private persons could apprehend a suspect solely for the purpose of taking him before the competent judge for a proper decision, has been replaced by a complicated system lacking this central idea.

In the first place, jurisdiction to impose restriction of liberty in order to assure the proper course of justice depends upon the stage of the criminal proceedings. During pre-trial investigation, arrest or temporary detention may be ordered by any of the authorities in charge of the investigation, with various methods for checking the legality of such a decision. However, from the moment

the defendant is placed, with an act of accusation, under the jurisdiction of the court, that power belongs to the court.

Another complication arising from the Soviet approach is the need to provide a special procedure for each situation connected with an arrest or temporary detention.

At the scene of the crime, or in pursuit of the *prima facie* perpetrator, anybody, including a private person, may apprehend a suspect. Deprivation of liberty in such a case may not exceed the time necessary for making it possible for the competent authorities to assume responsibility for the case.¹⁷ The next step, which has to be expressly provided for in the criminal procedures, is what authority is competent to hear the suspect, a judge,¹⁸ a public prosecutor,¹⁹ or any other authority entitled to conduct an investigation.

In some of the codes of criminal procedure an order to arrest, issued by the police or similar agencies, requires confirmation by the public prosecutor. This procuratorial confirmation takes place without a hearing of the suspect, after examination of the file, and consequently has the character of a formal confirmation of legality. The type and duration of temporary detention depends upon:

- (1) The authority which imposes arrest; and
- (2) the type of investigation (formal pre-trial, or police).

As a rule, the police may detain a suspect on its own authority for a brief period only. According to the Albanian Code (Article 108) police detention cannot be for longer than three days. Such detention may be extended in the course of police investigations up to a period of fourteen days from the day of arrest only if authorized by the public prosecutor. In Bulgaria, police authorities, including agents of state security and of the financial and technical control, have the right to detain a suspect in the course of police investigation for 48 hours if they obtain the approval of the public prosecutor. Further detention for two weeks also requires the permission of the public prosecutor, and if the police investigation cannot be completed within this period, the prosecutor may extend preliminary detention for an additional month.

In Hungarian Criminal Procedure, which provides for one type of pre-trial investigation, a suspect must be examined within 24 hours from the time he is turned over to the investigating authorities

¹⁷ Article 153, Section 1 of the Polish Code of Criminal Procedure; Sections 87(3) and 152 of the Hungarian Code; Section 99(2) of the Czechoslovak Code, Article 182 of the Yugoslav Code.

¹⁸ Section 89 of the East German Code of Criminal Procedure.

¹⁹ Czechoslovak Code of Criminal Procedure, Section 100.

[Sections 89 and 92(3) of the Code]. After the hearing the investigating authorities may ask the public prosecutor for an extension of the period of detention for 48 hours [Section 99(1)]. A detention for another 72 hours requires an order from the public prosecutor [Sections 89, 92 (3), and 99 (1 and 2)].

East German Criminal Procedure distinguishes between temporary detention, which is an emergency measure applicable to a suspect apprehended at the scene of the crime or when there are good reasons for immediate action, and regular detention (Sections 141 and 152 of Criminal Procedure). As a rule the arrest may be imposed only by order of the public prosecutor (Section 142). In each case the person detained must be examined within 24 hours from the time he is taken into detention (Section 144).

In Polish Criminal Procedure the public prosecutor stepped into the shoes of the judge investigator, and as a result the situation is comparatively simple. A suspect may be detained only on the instructions of the public prosecutor (Article 151). A suspect apprehended at the scene of the crime or during pursuit must be delivered within 48 hours into the hands of the public prosecutor, who may impose arrest (Articles 153—156). The duration of detention depends upon the type of proceedings which have been ordered. In the course of pre-trial investigations it must not exceed three months, and in the course of formal pre-trial investigations conducted by the public prosecutor or his investigator, for not more than six months. This reservation as to time is not absolute as higher authorities may extend the period.

In Rumania the situation is similar to that in Poland. The police are empowered to hold a person in the course of police investigation for 24 hours and, with the approval of the public prosecutor, for five days (Sections 200—201). With the formal authorization of the public prosecutor such detention may last one month and, in the course of formal pre-trial investigations, two months. The decision to arrest for formal investigations is made by an investigator from the public prosecutor's office. In effect, the public prosecutor has purely supervisory functions and his intervention in the course of proceedings, and also in deciding the question of arrest, represents a check of the legality [Articles 249(1) and 254 of the Rumanian Criminal Procedure].

In the Czechoslovak Code the arrest and detention of a suspect are possible only with the authorization of the court, issued on the request of the prosecutor (Section 97), regardless of whether this

²⁰ Article 102 of the Yugoslav Code, Sections 92(3), 98(1) of the Hungarian Code of Criminal Procedure; Sections 89—91 of the Bulgarian Code of Criminal Procedure, Articles 107—108 of the Albanian Code of Criminal Procedure.

occurs during police investigations or formal pre-trial proceedings which are conducted by agents of the public prosecutor.

There are several exceptions to this rule. The arrest and detention of a suspect apprehended at the scene of the crime, or during pursuit, or in circumstances indicating his involvement in the commission of the offense, particularly if he is found in possession of objects derived from a criminal act (Section 98) does not require the approval of the court. Moreover, the agreement of the court is not necessary when arrest is made in an emergency in order to bring the suspect before the public prosecutor, or if the arrest is made by a private person who apprehended the suspect at the scene of the crime, and it is necessary to establish his identity in order to prevent his escape or to secure evidence (Section 98). In all these cases the suspect must be brought within 48 hours before the public prosecutor, who will decide on his arrest (Sections 99—101). Although the jurisdiction of the public prosecutor is placed in a system of exceptions from the general rule, these exceptions are so general that they cover the most typical circumstances calling for the detention of a suspect and eliminate the need for judicial intervention at that stage.

Yugoslav Criminal Procedure distinguishes between two types of detention according to the authority which decides to restrict the liberty of the suspect. Anybody may apprehend a suspect at the scene of the crime in order to take him to the county court, to the police, or to the investigating judge of the district court. The police or a county judge may detain a person for three days only. Detention may only be prolonged by a decision of the judge of the county court for valid reasons if more time is needed for the investigation. Arrest by the police or the county judge may be extended for an additional 24 hours in order to bring the suspect before the investigating judge of the district court (Articles 182 and 188 of the Code of Criminal Procedure).

In more serious crimes, decision to arrest may be issued only by the investigating judge in the course of a formal pre-trial investigation (Article 190). An investigating judge may arrest a suspect without a formal pre-trial investigation only if he obtains within three days from the public prosecutor a motion to institute formal pre-trial investigation. If the public prosecutor refuses this demand the suspect must be released (Article 184).

Detention in judicial pre-trial investigation may not exceed two months. It can be extended by the district court for one more month. The Supreme Court of the Republic may extend it for three months, and the Federal Supreme Court may again extend that period for three more months (Article 191).

Duration of temporary detention in the course of informal investigation conducted either by the county court or police authorities

may not exceed 21 days, after which the suspect must either be freed or brought before the investigating judge of the district court. This is not necessary if in the meantime a judicial investigation has been instituted and the investigating judge has issued a decision to arrest (Article 188).

The Law of December 26, 1959 has further strengthened the judicial character of pre-trial investigations and provided that at all times the investigating judge may, on his own decision, assume the investigation of any case which is being handled either by the police or by a county judge (Article 160).

A general trend can be definitely established in the criminal procedures in Eastern Europe: they are built on a theory that all public authorities represent the people, and therefore there is no reason for a system of judicial controls. The element of professionalism, represented in the Soviet system of the administration of justice by the office of the public prosecutor who acts as the guardian of authority, reveals a tendency to assert itself in order to give substance to the guarantees of personal rights. This arrangement seems to be adequate at a comparatively low level of government when a public prosecutor is backed in his action by the hierarchy of his superiors. However, it is clearly inadequate if the tendency to violate the law comes from above. In this case the local public prosecutor responsible for the enforcement of the law is clearly unable to resist the pressure. In such a situation an independent judge, subordinate only to the law, is the proper answer. The developments in Yugoslavia, where the complicated federal and at the same time centralized organization, and the multiplication of governmental authorities, create a good opportunity for local abuses, are characteristic. It was found useful there to rely increasingly on professional and independent judges.

IV. Reasons for Arrest

One of the most important reasons for restricting the liberty of a suspect is the gravity of punishment for a prohibited act, or the seriousness of the offense from a more general point of view. The Albanian Code (Section 155) rules that preliminary detention is mandatory in all cases where the minimum penalty is five years of deprivation of liberty. The Bulgarian Code adds to this category all offenses against the political, social and economic principles of the regime [Section 92 (a)]²¹ The Bulgarian legislator strengthened the

²¹ Here belong the crimes listed in the following provisions of the Bulgarian Criminal Code: Articles 70-99 - Crimes against the People's Republic; Articles 275 - Illegal Crossing of the Frontier; Article 276 - Refusal to Return from Abroad; Articles 295-301 - Violation of Government Secrets; Articles 341-346 - Treason Committed by a Member of the Armed Forces.

power of the investigating authorities to restrict the liberty of an individual by providing that preliminary detention may also be imposed for important governmental reasons [Section 93 (a)].

In East Germany the lower limit which makes preliminary detention mandatory has been set at two years of deprivation of liberty (Section 141), which is low enough to cover any more serious offense, and probably explains the simplicity of the formulation, while in Poland the investigator may detain a suspect in all cases in which the minimum penalty is one year, but detention is not mandatory (Article 152). However, at the same time Polish Criminal Procedure contains the general clause that preliminary detention may be applied if the social danger of the offence is considerable owing either to its kind, or to its prevalence (Article 152, Section 2). A somewhat complicated formulation of the reasons for imposing detention on a suspect contained in Rumanian criminal procedure resembles the Polish system. There is no mandatory detention, but the Code gives the investigator the right to arrest a suspect whenever this is indicated in the interest of the public order and general security. [Article 200 (9)].

There is no mandatory detention in Hungarian Criminal Procedure, but the Code states that if a criminal act belongs to the category of crimes against the People's Republic detention may last twice as long as for other crimes (Sections 98 and 99. Section 3).

Czechoslovak and Yugoslav Criminal Procedures provide for mandatory detention only in cases of serious crimes, setting the lower limits rather high. In the Czechoslovak Code a suspect must be detained when the crime is punishable by death, imprisonment for life or imprisonment for at least ten years (Section 96) while the Yugoslav Criminal Code provides mandatory detention only when the crime is punishable by death (Articles 182 and 190).

With few exceptions, therefore, in the majority of Eastern European criminal procedures preliminary detention may be used as a form of criminal repression. According to the traditional pattern detention imposed in connection with the type of the offense was justified by the reasoning that the severity of the eventual punishment might induce the offender either to hide from justice, or to interfere with its course by some other method. The present practice in Eastern Europe blurs this line of thought and makes criminal procedure an instrument of criminal policy.

Criminal procedures of Eastern Europe revert to type in other situations calling for the restriction of liberty in connection with the investigation of crimes. The probability that the suspect will attempt to escape, or that he will tamper with evidence is most typical in this respect. Some of the codes add more specifically that detention is indicated when it is impossible to identify the suspect, or when

he has no permanent residence. According to some codes the fact that the suspect has a foreign nationality or that he is a stateless person is a good reason for arrest, although sometimes the law requires that he be without a permanent residence or that he be likely to seek to escape from justice, when the penalty he faces is of serious nature²² [Article 141 East Germany, Article 152 (b) Poland, and Article 200 (4) Rumania].

Finally, preliminary detention may be applied to suspects dangerous because of their personal characteristics, reflected in their attitude toward pre-trial activities, which ultimately justifies the assumption that their progress may suffer if the suspect remains free. In this category are suspects who are recidivists [Poland, Article 152(a); Rumania, Article 200(6)] and persons who committed crimes in the past and have committed new offences, or are likely to.²³

In the final analysis, provisions of some of the criminal procedures of the socialist countries of Eastern Europe represent an amalgam of two disparate attitudes. Formalistic determination of reasons for arrest and application of preliminary detention, assuring that it will be applied exclusively in the interest of the administration of justice and not as a punitive measure, is combined with general clauses giving the authorities in charge of preliminary investigation an almost arbitrary power to arrest, which frustrates any effort at a strict formulation of reasons for the preliminary detention of a suspect. Some of the Eastern European legislators set the lower limit of the possible penalty so that traditional legalistically formulated reasons apply only to minor crimes.

V. The Right to a Hearing

Preliminary detention as an exceptional measure should not be designed to induce the suspect to cooperate with the investigating authorities. Consequently, Western European procedures require that the suspect's position in his case be stated immediately after his coming into contact with the authorities in charge of the prosecution of crimes, and that the charges against him be made clear as the first step in his examination.

In form, Eastern European procedures adhere to this principle. Albanian Criminal Procedure instructs the investigating authorities to inform the suspect of the essence of the charges against him

²² Article 141 of the East German Code of Criminal Procedure; Article 152(b) of the Polish Code; and Article 200(4) of the Rumanian Code of Criminal Procedure.

²³ Yugoslav Code of Criminal Procedure, Article 182(3); Czechoslovak Code, Section 96(a); Hungarian Code of Criminal Procedure, Section 97(d).

before proceeding with the investigation (Article 133). The Polish Code of Criminal Procedure gives the suspects the right to demand that he be told the charges and the evidence against him (Article 72), and there is a similar provision in the Bulgarian procedure (Section 40).

However, the implementation of this principle in the various stages of police and formal investigations is far from adequate, owing primarily to the removal of judicial elements from the pre-trial stage of criminal proceedings (with the exception of Yugoslavia and East Germany). Under the traditional system the hearing of the accused by a judicial officer was the main method of determining whether he was aware of his rights and of his position. Under the procuratorial system the check of legality by the public prosecutor dispenses with the formal hearing at which a suspect is told of the charges against him, as in most cases the prosecutor is asked to approve the decision to start the investigation or to impose arrest on a suspect, made by police agents without a hearing.

Some solution of these difficulties has been provided by the rules regarding the various stages of formal pre-trial investigations, particularly by providing that *investigating authorities must issue written decisions either regarding the institutions of such investigation, or the placing of a person in the position of a suspect under a formal charge.*²⁴

The East German Code of Criminal Procedure deviates from the other Eastern European codes in that it combines the procuratorial system with the judicial control of legality. The decision to initiate a pre-trial investigation after it has been formally adopted must be communicated to the suspect at his first examination. It must contain a statement of facts and of law defining the offense with which the suspect is charged (Sections 106-109, 112). At the same time the hearing of an arrested suspect by a judicial officer is also mandatory, and the judge has the duty to explain to him the nature of the charges against him (Section 144).

Yugoslav procedure provides for several stages at which the nature of the criminal charges must be communicated to a suspect. The decision to initiate pre-trial investigations must contain a short

²⁴ Articles 117 and 127-128 of the Albanian Code of Criminal Procedure; Section 147 of the Bulgarian Code of Criminal Procedure; Section 91(b)-96 in Hungary; Sections 106-109 in Germany, although the German Code also provides for a judicial hearing but only in the case of arrest; Articles 200, 201, 248(1)-(6), and 264(1) of the Rumanian Procedure; Sections 93, 100-101 of the Czechoslovak Code of Criminal Procedure. The Polish Code of Criminal Procedure also provides for a formal designation of a suspect as charged with the commission of a concrete crime (Article 237), but it also provides that a suspect may be examined even before such a formal decision is issued (Article 153, Section 3).

statement of facts and law, and as a rule it must be delivered into the hands of the suspect during his hearing and examination (Article 158). Furthermore, detailed provisions deal with the examination by the court of a suspect brought before the judge (Articles 183-185). After noting the personal data of a suspect the judge must begin the examination with an explanation of the charges against him (Article 212 of the Yugoslav Code of Criminal Procedure). Finally, the decision to terminate a pre-trial investigation must be communicated to the suspect, and must contain a statement of the charges against him and of the evidence gathered to support them (Article 253).

VI. Appeal in the Course of Criminal Investigation

In the procuratorial system the question of appeal against the decision of the investigating authority is of singular importance as its mechanism is less attuned to the need for the control of police and of administrative authorities conducting criminal investigations by the public prosecutor, who combines in his office both the function of the guardian of legality and that of the guardian of the public interest in the prosecution of crimes. In the procuratorial system appeal must replace the function of the "automatic *habeas corpus*" which, in the traditional system, is exercised by the participation of the investigating judge. But while "automatic *habeas corpus*" operates simply by the fact that under the traditional system reasons for arrest come under judicial review as only a judicial authority has the right to impose preliminary detention, under the procuratorial system appeal must follow the expression of the will of the suspect, who is not always aware of his rights.

The usual form of appeal is from the decisions of police agents (whether members of the people's militia, state security police, or investigating agents attached to the office of the prosecutor) to the immediately competent public prosecutor. From the public prosecutor, directly superior to the investigating agents, appeal lies to his superiors, and the appeal procedure has all the characteristics of administrative proceedings, dispensing with the judicial forms of deliberation, voting and reporting.²⁵

In East Germany two systems of appeal are in force. In all matters except preliminary detention appeal goes to the public prosecutor (Sections 100-101). As preliminary detention in pre-

²⁵ Articles 203-204 in the Albanian Code; Sections 98, 141 and 157 in the Bulgarian Code; Section 136 in the Hungarian Code; Articles 150, 245, 353-356 in the Polish Code; Articles 76 and 264(7) in the Rumanian Code; and Sections 32-36 in the Czechoslovak Code.

trial investigations may be imposed only by the court, appeal goes to a higher court. The weakness of this system is the extremely limited range of judicial control. Under the traditional system the question of detention may be raised at every stage of the proceedings, and a new decision must be passed. In East German Criminal Procedure once the decision for detention has been made the investigating authorities gain full control of the proceedings (Sections 141-148).

In contrast to the other socialist countries in Eastern Europe, Yugoslavia has almost completely abandoned the procuratorial system in pre-trial investigations, particularly since the reform enacted by the law of December 26, 1959. In the first place the Code of Criminal Procedure rules that decisions issued in the course of proceedings and subject to an appeal by the party must be in writing and a copy of it delivered into the hands of the interested party, together with information concerning his rights of appeal (Article 112). Appeal in police investigations (in minor cases) goes to the public prosecutor, and in formal pre-trial investigations, conducted either by the county court or by the judicial investigator of the District Court, it comes under the jurisdiction of the District Court (Articles 154 and 172). In addition, appeals concerning temporary detention are exclusively under the jurisdiction of the courts (Articles 187-191).

VII. Right of Legal Representation in Connection with Preliminary Detention

The right of legal representation in the course of pre-trial investigation is one of the issues most profoundly affected by the conflicting interests involved. It represents little technical difficulty when the suspect remains free. Its exercise is greatly affected, however, when the suspect is deprived of freedom. In spite of the modern trend to permit the participation of the counsel for defense from the inception of criminal proceedings (Belgium), it is still restricted by the fact that the inquisitorial character of pre-trial investigation, and the delicate nature of the search for evidence, bar the free access to all actions of the investigating authorities, without which proper legal representation is impossible. The real function of defense is the protection of the personal liberty of the suspect, while the formulation and support by evidence of the defense must necessarily be delayed.

The criminal procedures of the people's republics fall into two categories: those which mention in general terms only the right of the defendant to legal counsel,²⁶ but fail to implement this right

²⁶ Article 11 of the Albanian Code of Criminal Procedure; Section 8 of the Bulgarian Code of Criminal Procedure.

in the pre-trial stage of criminal proceedings; and those which introduce serious restrictions of this right in the pre-trial stage.

According to Hungarian procedure the extent of the rights of the legal counsel depends upon the stage of the proceedings. In the course of the pre-trial proceedings his rights are narrowly circumscribed, but once the case is before the trial court he has full freedom to act. Section 52 of the Code of Criminal Procedure provides that during the pre-trial investigation the counsel for the defense has the right "to examine the files of the case in the court if this does not delay the progress of the proceedings in the course of the pre-trial investigation." Furthermore, if the suspect is under arrest he has the right to communicate with his counsel without supervision. This right is not absolute and "if there are indications that these communications may delay the speedy termination of the pre-trial proceedings, it is necessary also to examine the defendant's communications with his counsel" (Section 102).

In East Germany the Code of Criminal Procedure states generally that the accused has the right at every stage of the proceedings to employ the services of a counsel (Section 74). But there is little a counsel for the defense can do in the preliminary investigation. He may gain access to the files of the case still in the hands of the prosecution if this does not interfere with the progress of the investigation. He has the right to communicate with the defendant, but only under conditions established by the prosecution (Section 80).

In Polish procedure, prior to the conclusion of the pre-trial proceedings, i.e., the presentation of the results of the investigation to the suspect, a counsel for defense may communicate with the defendant only with the agreement of the public prosecutor. His interviews may be supervised either by the police officer in charge of the case or by the prosecutor himself (Articles 76 and 84). The defendant and his counsel have no absolute right to be present during various investigatory actions undertaken by the police or the prosecutor, and may only attend them with the permission of the officer in charge (Article 242). The only stage at which the participation of the defendant and his counsel is mandatory is the final act of informing the defendant of the results of the investigations (Article 244).

According to Rumanian Criminal Procedure the counsel for the defense has only specific rights in the course of the pre-trial investigation (Article 234). He may communicate freely with the defendant after he has been examined by the officer in charge of the investigations unless the latter decides to hold defendant *incommunicado* for a period of fifteen days, which period may be extended for ten days. In addition the counsel may advise the detainee in connection with the decision imposing preliminary deten-

tion, may represent him during on the spot investigations, and during searches, and has the right to make motions concerning the progress of the investigation (Articles 74 and 76).

In Czechoslovak Criminal Procedure the rights of the defense counsel in the course of the preliminary investigation are greatly restricted. He may communicate directly or in writing with the defendant who is under arrest under conditions established by the officer in charge of the proceedings (Sections 43 and 47).

Yugoslav procedure differentiates between police investigations and judicial pre-trial proceedings. In the course of police investigations a defense counsel is excluded from the examination of the suspect and of the witnesses. In this last case an exception may be made only when there is a possibility that the witnesses will not be able to be present in the course of the trial. A counsel for the defense may, however, be called to be present during a search of the home of the suspect (Article 150). These restrictions do not apply in the course of judicial investigations. The Yugoslav Code of Criminal Procedure contains the following restrictions in regard to the participation of the counsel at this stage. He may be denied access to the minutes of some investigation proceedings until the investigation is completed if there are indications that it would not be in the interest of the investigation (Section 72). In principle the defense counsel has full right to communicate with the accused but this may be controlled, and in special circumstances the officer in charge may deny the counsel the right to communicate with his client during a specific period of time. Otherwise the defense counsel has the right to undertake all the actions in the course of the pre-trial investigations which the defendant has the right to undertake (Articles 69-73, and 74).

VIII. Conclusion

The comparative survey undertaken above reveals that the rights of the suspect in Eastern Europe have been seriously limited also in the area of pre-trial investigations and police proceedings. Consequently, a general conclusion suggests itself that socialist legislation represents a step backward as regards the protection of personal liberty in connection with administration of criminal justice. It has increased the powers of the investigating authorities, has weakened the effectiveness of the legal guarantees of the personal freedom of the suspect, and has opened serious possibilities for exploiting the powers of the investigating authorities as a method of criminal repression and a deterrent to certain types of crimes.

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PREVENTIVE DETENTION IN INDIA

Preventive detention has a long history in India. I will not go beyond the British days because the exercise of power before that was arbitrary. But even after more settled forms of law were established with the advent of British rule there was still a struggle between what I might call the "Executive" (though that is not an exact term because there was no "Executive" in those days in the sense in which the term is used to-day) and the Judiciary. So far as preventive detention is concerned the real crux lay in the fact that, except for very limited areas in the Presidency towns of Calcutta, Bombay and Madras, writs of *habeas corpus* were unknown. Strangely enough, the earliest reference that I have been able to find about this is what I might call "*Habeas Corpus* in Reverse": I refer to the East India Company Act, 1770.

This Act was passed by the British Parliament in England and was made applicable to India because of the following facts. The Supreme Court at Calcutta had directed the imprisonment of certain persons. The Governor-General refused to accept its verdict. That raised a serious issue between the Governor-General and the Court and the Act was passed to indemnify the Governor-General and render him immune from the jurisdiction of the Court in cases of non-British subjects. That, of course, worked in a sense for the freedom of the individual because it gave the Governor-General power to refuse to carry out a decree for imprisonment passed by the Supreme Court; but it was the Executive that did the freeing and not the courts. It also had an opposite effect because it rendered the Supreme Court powerless to interfere when the Governor-General detained non-British subjects by executive fiat.

But the dispute about who should have that last word still remained, so in order to remove all doubts the East India Company Act of 1773 was passed. This gave the Governor-General power to "secure and detain in custody" any person suspected of carrying on correspondence dangerous to the peace and safety of the British settlements or persons in India. But even as early as this the detainee was given certain rights. He had to be given a copy of the charges on which he was detained within 5 days and he was allowed to put in a defence. He was allowed to produce evidence and to cross-examine witnesses, and if the Governor-General refused

to release him, the Governor-General was required either to send him to England for trial there or have him brought to trial in the courts in India.

These Acts deprived the courts of their usual powers and in the *Wahibi* case the courts in Bengal were obliged to hold that the command of the Governor-General must prevail over any writ that the court had power to issue.

Then came the Bengal Regulation of 1812 which gave the Local Government power to "remove emigrants from foreign countries" and in "certain cases to detain such persons in safe custody".

Close on the heels of this followed the Bengal State Prisoners Regulation of 1818. This empowered the Government to place persons "under personal restraint otherwise than in pursuance of some judicial proceedings". The preamble to the Act explains why:

"Whereas reasons of State... occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any legal proceedings, or when such proceedings may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper."

But though such prisoners had no right of *habeas corpus* they were allowed to make "representations".

The Presidencies of Madras and Bombay followed suit by enacting similar Regulations in 1819 and 1827.

These Regulations were substituted by an All India Act of 1850 called the State Prisoners Act XXXIV of 1850.

There was not much change in the law until the outbreak of the First World War in 1914. Very soon after the commencement of hostilities an Ordinance was issued and later converted into the Defence of India Act (Criminal Law Amendment) 1915. This enabled the Governor-General-in-Council to make Rules for the safety and defence of India and for the arrest of any person who contravened the Rules. When arrested the person was not brought to trial before the ordinary courts, but was tried by special "Commissioners" appointed under the Act. With the exception of one point there was little to which real objection could be taken. Every trial under the Act had to be conducted by three Commissioners. Two had to have at least three years experience as judges in criminal trials in the Sessions Courts and the third had to have the qualifications required for appointment as a High Court Judge. Also, the Commissioners had to follow, as far as practicable, the procedure of the ordinary criminal courts. Therefore, except for the fact that he was brought to trial more quickly, the accused was given substantially the same sort of trial that he would have obtained in the criminal courts. The only departure of substance was that there was no right of appeal. The decision of the Commissioners was

made final even when a sentence of death was imposed and all interference by the courts in any form whatever was excluded.

This Act expired shortly after the termination of the war. The country returned to normal and the right to the writ of *habeas corpus* in Calcutta, Madras and Bombay, and an analogous right (contained in Section 491 of the Criminal Procedure Code) for the rest of India, was restored.

Then came the Second World War and swift on its heels the Defence of India Act of 1939 and the Defence of India Rules. Preventive detention in India in its present form stems from that time. India was, however, not alone in this. Every country involved in the war resorted to roughly similar measures and it cannot be gainsaid that when the very existence of a nation is threatened it cannot afford to take risks. As Lord Atkins put it in the British House of Lords in *Liversidge v. Anderson* 1942 A.C. 260, at 271:

"However precious the personal liberty of the subject may be there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in war, or escape from national plunder or enslavement."

Also the technique of war has changed so radically that the old dividing line between civilians and the armed forces has disappeared. It is accordingly as vital to take special preventive measures among the civil population as it is among the fighting forces. The real question is, therefore, not whether there is a right to resort to preventive detention under the Rule of Law but when is it justifiable to do so?; and more important, how are the powers used?

For India the effect of the Defence of India Act and the Rules was drastic. But it is appropriate to explain the meaning of preventive detention before proceeding further. Preventive detention has three special features. The first is that it is *detention* and not imprisonment; the second is that it is detention by the *Executive* without trial or inquiry by a court; and the third is that the object is *preventive* and not punitive. Lord Finlay described it thus in the case just quoted:

"As the object is precautionary the matter has to be left to the discretion of the executive authority which can only act on suspicion and cannot be expected in every case to have proof of any crimes committed which will satisfy a court of law, ... The test is a subjective one based on the cumulative effect of different activities perhaps spread over a considerable period".

Now to return to discussion of the Defence of India Act and the Rules. Both the Central and the Provincial Governments were given the power to arrest and detain any person if satisfied that it was necessary to do so in order to prevent said person from acting "in any manner prejudicial to the defence of British India, the public

safety, the maintenance of public order in the efficient prosecution of the war"; and having been vested with these powers both the Central and State Governments were given the right to delegate their authority to "any officer or subordinate". In practice the power was usually delegated to district magistrates and in some cases to sub-divisional magistrates, but in theory it could have been delegated even to a police constable. No reasons had to be given for the detention. There was no right to make a representation and no one (except the authorities) knew or could be told where the person was detained. No one could see him and he was not allowed to have legal advice.

These provisions were challenged in the courts. The validity of the Act and the powers conferred by the Rules were upheld by the Indian Courts following the English cases about the emergency laws which were similar to the Indian laws. All that the courts could do therefore was to interpret the Rules and see whether they had been violated in any particular case.

But this also raised the more fundamental question whether the courts had authority to do so. The only way in which the courts could become seized of this kind of case was by issuing a writ of *habeas corpus* or its equivalent under Section 491 of the Criminal Procedure Code. The Government contended strongly that, although there was no provision in the Act abolishing these powers, that had been done by "necessary implication".

The Nagpur High Court refused to accept this contention in *P. K. Tare v. Emp.* I.L.R. 1943 Nagpur 154 and said that:

"such fundamental rights safeguarded under the Constitution with elaborate and anxious care and upheld time and again by the highest tribunals of the realm in language of the utmost vigour cannot be swept away by implication or removed by some sweeping generality".

It held therefore that:

"The rights conferred by Section 491 subsist and will continue to subsist until either the section is expressly, or by necessary and express implication, abrogated or the rights are expressly taken away".

In response the Government promulgated an Ordinance in 1944 expressly taking away these rights; but until that was done the other issues raised before the courts still had to be met. The first was whether the courts could enquire into the "satisfaction" of the detaining authority. Here again, the English precedents were followed and it was held that they could not: the satisfaction being a subjective one. But the Nagpur High Court held that although the courts could not look into the grounds upon which the satisfaction was based they had power to determine whether there was satisfaction in fact and also to determine whether the order had been made

in good faith. It also held that the satisfaction had to be special to each individual case. Thus when a general order was made directing the detention of all persons of a particular class, without having any particular person in mind at the time the order was passed, the order was struck down as faulty. Other High Courts in India took the same view and so did the Federal Court in a later case, *Emp. v. Shibnath Banerjee* 1943 FC 75.

Having reached that point another issue arose. In one case a detainee applied to the Nagpur High Court for release and the prison authorities did not forward the application. As soon as this was brought to the notice of this Court the Inspector General of Prisons and the Jail Superintendent were brought before the court for contempt and both were convicted.

When that hurdle was cleared away another arose. The right of a detainee to send a petition to the courts was now established, but the authorities refused either to allow him to come to court to plead his case in person or to have legal advice, and no counsel was allowed to interview him. These points were also criticized in strong terms by the Nagpur and Bombay High Courts. I quote from one of the Nagpur judgments as follows:

"If the right to apply is not taken away, then the executive cannot arbitrarily nullify the exercise of the right by making the proceedings in this court a farce; and that my opinion is what occurs if it be held that the man may neither come in person nor instruct another who is free and is prepared to come, and that he may not even receive proper and adequate legal advice... So long as the jurisdiction of the court is there judges must be alert to see that it is not whittled away or rendered ineffective by such orders as these".

The Nagpur High Court also drew attention to the differences between the English and the Indian emergency legislations. In England there were many safeguards: -

- (1) A Secretary of State had to be personally satisfied in England and not any one of a number of minor officials as in India;
- (2) The Secretary of State was answerable to Parliament for his acts; not so the host of minor officials who could, and did, order the detentions in India;
- (3) In England there were Advisory Committees and a duty was cast on the Chairman to inform the objector of the grounds upon which the detention order had been made and also to furnish him with such particulars as would in the Chairman's opinion be sufficient to enable him to state his case. In India there were no Advisory Boards, the detainee had no right to make a representation, he was not even informed of the grounds of his arrest, still less furnished with particulars;

- (4) the detainee was allowed legal advice in England; not so in India; and
- (5) most important of all, the Nagpur judgment quoted Lord Wright in *Liversidge v. Anderson* 1941. 3 E.R. 338 where he said:

"But if the sense of the country was outraged by the system or practice of making detention orders, or indeed of any particular order, it will make itself sufficiently felt in the Press and in the Parliament to put an end to any abuse and Parliament can always amend the Regulation..."

and the Nagpur judgment said:

"This does not apply here. Indeed I gather that the applicants before us were arrested in the first instance, for their temerity in trying to exercise those very rights of protest that the law Lords in England regarded as the residuary safeguard".

It is necessary to keep this history in mind because it has an important bearing on the safeguards that eventually found their way into the Indian Constitution.

The powers with which the Executive Authority was endowed were used extensively. In 1940 about 25,000 people were taken into custody in connection with the individual civil disobedience movement. Two years later, on August 8, 1942, about 26,000 persons were rounded up in the space of 3 or 4 days including most of the top-ranking Congress Party leaders, among them the present Prime Minister of India and Mahatma Gandhi.

When the war came to an end preventive detention was not abolished and it was still in force when India attained independence. One of the first things that the Constituent Assembly, convened to draft a Constitution for India, had to decide was whether preventive detention should be continued or not. The issue was very hotly debated and it was eventually decided to incorporate certain provisions about the matter in the Chapter on Fundamental Rights.

This has been much criticised but it is evident that no nation can fight a war or survive an extreme emergency without having powers like these in reserve; and once that is conceded then it is better to face the fact and make frank and open provision for such powers, and at the same time place reasonable restraint on the ambit of their exercise. Many of those who framed these provisions had just emerged from jail and the memories of their experiences were still fresh though surprisingly devoid of bitterness. In any event preventive detention was not made a permanent feature and it was left for the people to decide through their elected representatives in Parliament when and for how long any particular Government should be permitted to resort to it. Accordingly the

following provisions were incorporated in Article 22(4), (5) and (6) of the Constitution:

1. No person can be placed in preventive custody unless there is an express law to that effect enacted either by Parliament or one of the State Legislatures;
2. If such a law is passed and he is arrested he must be told the grounds on which the order of arrest is made "as soon as may be"; and
3. he must be given the "earliest opportunity" of making a representation against the order;
4. He cannot be detained for more than 3 months unless an "Advisory Board" reports "*before the expiration of the period*" that there is, in its opinion, sufficient cause for the detention.
5. The Advisory Board has to consist of persons "who are or have been, or are qualified to be, appointed as judges of a High Court".

But Parliament is given the right to 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 without obtaining the opinion of an Advisory Board," and
- (b) "the maximum period for which any person may in any class or classes of cases, be detained".

It will be seen that as soon as the Constitution came into force no person could be kept in preventive custody beyond 24 hours in the absence of either Parliamentary or State Legislation expressly authorising preventive detention; and many that were in custody on that date, January 26, 1950, were released by the courts.

The Government decided that it was necessary to keep preventive detention in being and so introduced a Bill in Parliament in 1950.

The Bill met with very strong opposition but was eventually passed. Sardar Vallabhai Patel defended it in the following words: —

"The majority of detainees are Communists. Our fight is not with Communists or those who believe in the theory of Communism but with those whose avowed object is to create disruption, dislocation and tamper with communications, to suborn loyalty and make it impossible for normal government based on law to function. Obviously we cannot deal with these people in terms of ordinary law... When the law is flouted and offences are committed there is the criminal law which is put in force. But where the very basis of law is sought to be undermined and attempts are made to create a state of affairs in which, to borrow the words of the father of our Prime Minister 'men would not be men and law would not be law', we feel justified in evoking

emergent and extraordinary laws... There are also anti-social elements raising their heads... When you say *civil liberty should not be interfered with* I endorse it. I appreciate what is civil liberty but I hate criminal liberty to commit violence against innocent peoples; to remove rails from the railway tracks and wreck trains and kill those in them; to dislocate communications; to set fire to public property; to attack warders in jail and kill them; to attack the police."

In order to appreciate this one must realise the conditions in the country when India obtained independence. Nearly all her leaders had just emerged from jail where they had been kept, some of them, off and on for the previous ten or twelve years. Not only had they never had the reins of government in their hands or even gained experience as an opposition party, but they were cut off from the flow of current events. When, therefore, they were suddenly asked to take over the government of the country not only were they inexperienced but they were given an India in which chaos could easily have prevailed. The country had just been partitioned, and they were asked to realign the economy of the country which hitherto had been based on India, as it then was, regarded as a single and compact economic unit. The communication system of the country (railways, roads and telegraphs) which had had its centres at strategic spots had to be changed the centres relocated, and the lines running to and from them gathered up and relaid. Refugees flocked into India on a scale that was unparalleled in Europe even in its worst hours, and millions in the country fled from their homes and went to live elsewhere. The aftermath of the war had also driven herds of men – homeless, desperate and reckless – into the country over the borders of Assam and Bengal. And above all, disruptive communist elements, bent on violence and the overthrow of law and order by striking at vital necessities of government like railways, telegraphs, post offices and the police, and by endeavouring to suborn the army began to raise their heads. It was also found that in some isolated areas witnesses were either terrorised or killed so that the normal function of the courts in certain classes of cases could not continue. The newly formed independent government of India decided therefore that it could not afford to take risks and that a period of stability was essential if the country was to settle down. Thus, *with the consent of the people, through their elected representatives in Parliament and the State Legislators*, it brought into being the several preventive detention laws that now obtain, through democratic processes; *and it is within the power of the people themselves to bring these laws to an end at any moment they please by a simple majority vote in Parliament.*

The Preventive Detention Bill was passed on February 25, 1950 and became known thereafter as the Preventive Detention Act, 1951. It incorporates all the safeguards required by Article 22(4) of the Indian Constitution and its life was for a period of two years.

The object of the Act is to prevent any person from:

“acting in any manner prejudicial to

- (1) the defence of India, the relations of India with foreign powers, or the security of India, or
- (2) the security of the State or the maintenance of public order, or
- (3) the maintenance of supplies and services essential to the community”.

The Act prescribes that if either the Central or a State Government is satisfied that a person is likely to endanger any one or more of the objects set out above he may be detained under the Act.

The “Satisfaction” clause has been the subject of judicial scrutiny, and the Supreme Court of India, following the majority decision in *Liversidge v. Anderson*, 1942 A.S. 206, has held that the satisfaction is subjective to the detaining authority and that the reasonableness of the satisfaction cannot be enquired into. Many would have been happier if the view of Lord Atkins in his powerful and lucid dissenting opinion had been accepted.

The validity of the Act was challenged before the Supreme Court but the challenge failed and the Act was upheld in *S. Krishna and others v. State of Madras*, 1951 S.C.R. 621.

The Act had a bad defect in it. Following the pre-independence Defence of India Rules the detainee was not given a right to appear before the Advisory Board either in person or through counsel; but that was set right by an amending Act in the following year.

Article 22(7) (b) of the Constitution provides that Parliament may prescribe the maximum period for which any person may be detained. The Preventive Detention Act does not provide a maximum period. That was attacked in the Supreme Court as a breach of a fundamental right, but the Court held by a majority of four to one that the Article in the Constitution was permissive and so no maximum period need be fixed.

Although the Act was due to expire in 1952, its life was extended for another two years. At the end of that time the Government moved in Parliament for an extension of a further three years up to the end of 1957. This met with strong opposition, and there were some uproarious scenes in the House of the People.

The Home Minister, in defending the attitude of the Government, said that the Act had been very sparingly used and that in many States it had not been used at all. He gave the following figures in support of his contention:

“In 1950, when the Act first came into force, there were 10,962 persons in detention. By September 1953 the number had declined to 154; and in September, 1954 only 131 were in detention. About 260 to 290 had been arrested in the year 1953/1954 but, except for the 131 in detention, the rest had been released. Of them 15 were released on the orders of the courts.”

The Home Minister said that out of those detained 104 were detained "for violent activities". The others were detained "for inciting people to strike etc. and even for espionage".

He said that "expression of political opinion was never a ground for detention".

He admitted, however, that out of the 280 who had been arrested 109 were politicians. But, apparently the ground of their arrest was not their political views but participation in undesirable activities of the kind mentioned above.

There have been allegations that the Act has been used to silence political opponents and allegations of this kind were made in some *habeas corpus* petitions presented to the Supreme Court, but as these persons were released before the matter came on for hearing the allegations were never investigated. Needless to say, if it could be shown that that was the real ground for detention, the man would be released by the courts.

The population of India is in the neighbourhood of 400 million. On a percentage basis the 131 detentions would mean .0003 % of the population. But whatever the reason, the arguments of the Home Minister prevailed and the life of the Act was extended up to the end of 1957.

Just before the Act was again due to expire Government asked for another extension of an additional three years up to the end of 1960. The number in detention at that time was 205. Again there was strong opposition, but Government was able to carry the measure through. On June 30, 1960 the numbers were 94, and that is how the matter stands at the moment.

In the meantime the Act has been under constant criticism in the courts and the scope of preventive detention in India has been laboriously spelled out there. The following matters have been decided.

1. That the detainee must be taken before a Magistrate within 24 hours of his arrest: *Gunapati Keshavran v. Nafisul*, 1954 S.C. 636.
2. That the sufficiency of the particulars furnished to the detainee can be examined by the courts: *Shibban Lal v. State of Uttar Pradesh*, 1954. S.C. 179.
3. That vague grounds will render the detention invalid: *Shibban Lal v. State of Uttar Pradesh*. 1954. S.C. 179
4. That Article 22 of the Constitution must be scrupulously complied with: 1954. S.C. 179 and 636 as above; and also *Dharam Singh v. State of Punjab*.

5. That the subjective satisfaction of the detaining authority cannot be reviewed: *Gopalan v. State of Madras* 1950. S.C.R. 88.
6. But the courts will examine whether a detention contravenes fundamental rights: *Lawrence D'Souza v. State of Bombay* 1956. S.C. 531.

The cases that have come before the courts reveal two things:

1. that governments have a natural and perhaps understandable tendency to try and grasp as much power for themselves as they can and that tendency sometimes leads not only to an overstepping of the limits of their authority but also to an attempt to by-pass what, to them, are irksome restrictions; and
2. that the courts must be equally zealous in keeping a constant and vigilant watch over these tendencies and be strong to put them down when they overstep the limits of the law.

Two cases will be enough to illustrate this point. In *Gopalan's* case 1950 S.C.R. 88 *Gopalan* was released by an order of the court on the ground that the order of detention had failed to specify the duration of the detention.

The order was passed at 11.50 in the morning and within 5 minutes of the passing of the order *Gopalan* was re-arrested as he left the precincts of the court.

This occasioned a second *habeas corpus* petition. The writ succeeded on the ground that the fresh order had been made with a view to nullifying the order of the court and was, therefore, not an honest exercise of power. *Gopalan* was again released and the Supreme Court upheld the release.

The other case was that of *Kumaramangalam*. He was arrested in Bombay on June 24, 1950. On June 27, 1950 he demanded to be given the grounds of his detention but despite his demand they were not handed over.

On July 5, 1950 the Bombay government sent a telegram to the Madras Government saying that Bombay had no sufficient material to warrant his detention in Bombay and suggested that the man be sent to Madras. Madras agreed.

On July 7, 1950 *Kumaramangalam* filed a petition for *habeas corpus* in the Bombay High Court, and on August 7, 1950 his wife informed the police in Bombay that the petition had been filed.

The police gave no reply and on the same day removed the detainee to Madras, in custody.

A *habeas corpus* petition was then made to the Madras High Court and an order for release was given.

He was released from jail, but as soon as he stepped outside the gates of the jail he was re-arrested under a fresh order of detention.

He then applied for a third time for a writ of *habeas corpus* and the Madras High Court again directed his release. After that he was not re-arrested.

It is significant that both these men were top ranking Communists and that the Indian courts did not allow that to weigh against them. The courts administered the law impartially, "without fear or favour, affection or ill-will" and upheld the Constitution and the laws.

The conclusions that are to be drawn regarding preventive detention would appear to be these.

1. That preventive detention as such does not contravene the Rule of Law.
This is based on the view that the Rule of Law is not an utopian conception of what ought to exist in some imaginary state of perfection but on what civilised nations accept as the practical necessities of existence in the present state of the world;
2. That the Rule of Law must be considered when viewing the manner of the exercise of preventive detention and the conditions under which the power is brought into play;
3. That the power should be specifically conferred by Constitutional or other specific legislative provision;
4. That the limits of its exercise should be clearly and specifically prescribed by law;
5. That certain minimum safeguards should be provided;
6. That there should be a right of protest or appeal to some independent authority, not necessarily the courts;
7. That the courts should have the right to see that the limits of the authority conferred have not been overstepped and, as a corollary, the right to order immediate release when they have been;
8. And above all that the power should at all times be subject to the scrutiny and control of the people of the country through their elected representatives in Parliament or whatever body takes its place in any given country.

VIVIAN BOSE *

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THE FORMER JAPANESE SYSTEM OF PREVENTIVE DETENTION

I. Past Proposals for the Legislation on Preventive Detention

It was once much debated in Japan whether preventive detention should be adopted as one of the *Sicherungsmaßnahmen* or "measures of safety" (preventive justice). There were two divergent lines of opinion. One approach is represented by an excellent scholar of criminal law, and his following, who asserted that the indeterminate sentence (prescribing maximum and minimum periods of confinement) was more effective than preventive detention to preserve peace or enlighten habitual criminals. Apparently there were no scholars, at least at that time, who confuted this opinion directly. There were, however, a few attempts to amend the Penal Code or the Peace Preservation Law. The 1927 preparatory draft for revision of the Penal Code for the first time introduced preventive detention, with measures of protection and care, the curing of vicious drinking, and labor detention. Then in 1934, the Government proposed a bill for revision of the Peace Preservation Law, Article 26 of which provided for preventive detention. Strong opposition in the Diet prevented the bill's passage. The draft proposed that a persistent "thought offender" be placed under preventive detention for two years in order to reform himself. A "thought offender", however, was regarded in the opinion of the majority as a "confirmed offender" who could hardly be reformed. Opinion against the draft held that it was nonsense to try to reform such "thought offenders" during a period of only two years, and that a system of indeterminate sentences should be established instead of preventive detention. The draft of 1940 for revision of the Penal Code also provided for the same four kinds of measures, including preventive detention, as did the draft of 1927. Preventive detention as presented in the draft of 1940 was to apply to a person to be released after serving a sentence of imprisonment with forced labor when there was strong apprehension that if released he might commit further arson, homicide or robbery. Attention should be directed to the fact that while preventive detention in western countries ordinarily applies to habitual offenders in general, the proposed preventive detention was to apply only to certain major offences, i.e., arson, homicide or robbery. This draft, too, was never enacted. In the meantime World War II broke out, and it came to be considered very important for the national defence

of Japan that adequate measures be taken against "thought offenders" (Actually in almost all cases, the law was applied against communists.). With this purpose in mind a bill for revision of the Peace Preservation Law was presented to and passed by the Diet in 1941. This Bill contained many detailed provisions concerning "thought offenders" and provided for preventive detention. This is the first and only Japanese preventive detention measure which has ever been enacted into law.

The system of preventive detention provided for in the law lasted for only about four years. This was not because the system was considered inadequate or ineffective, but rather because the legal regulation of thought which was the object of the preventive detention procedure was entirely abolished after World War II. The Memorandum of the General Headquarters of the Allied forces occupying Japan of October 4, 1945 suggested the abrogation of the Peace Preservation Law and it was subsequently abrogated.

II. The System of Preventive Detention under the Peace Preservation Law

I will now undertake briefly to describe the system of preventive detention as it had been established by the Peace Preservation Law. The law consisted of three chapters. Twenty-seven articles in Chapter III provided in detail for preventive detention. Briefly, a court might, according to the law, order a person to be placed under preventive detention when he had completed serving a sentence imposed for commission of any of the crimes provided for in the law, and there was strong apprehension that he might commit the same crime again if released.

Sixteen articles in Chapter I of the law provided in detail for special crimes. The crimes, however, may be categorized as "thought offenses", which actually meant communist activities. It was not necessary that the defendant be a habitual criminal or that he have been repeatedly convicted, as long as he committed one of the designated crimes. It was required that the defendant would, if not confined under preventive detention procedure, be released after execution of the punishment for the crime for which he had first been convicted. Therefore, persons granted suspension of execution of sentence or those paroled after sentence had been initiated, were not subjected to preventive detention. Furthermore it was required that there be sufficient reason to believe that the person might commit the crime again. Discretion was given to the court to determine the reasonableness of such apprehension.

Persons placed under preventive detention were detained in an "Institute of Preventive Detention", newly established and separate

from the prison. One such Institute was located in Tokyo and one in Korea. The detainee was allowed to receive or deliver any sealed letter or any other things, subject to the limitations of law or ordinance. For purpose of reform he was also given practical training, education and work.

The term of preventive detention was to be two years. This was fixed regardless of the kind of "thought offense" involved. If, however, there was special necessity for continuing detention, the term might be renewed by the ruling of a court. There was no limitation to the number of renewals which might be ordered. On the other hand, when it became unnecessary, after the beginning of detention, to detain a person placed under preventive detention, he might, by action of an administrative authority, be released even before the term had expired. The power to release before the expiration of the term was given to the Director of the Institute of Preventive Detention.

Procedural regulations provided that the request for preventive detention should be made by a public procurator of the District Court having jurisdiction over the defendant. The District Court was to act on such a request by rendering a ruling granting or denying the request after hearing the statement of the defendant. For this purpose the Court might order the defendant to appear. If, however, he refused to make a statement, or escaped, the Court might render a ruling without having heard his statement. When the request had been made before execution of punishment was completed, the Court might, even after the completion of execution of punishment, render a ruling placing the defendant under preventive detention. In order to ascertain the facts, the Court might, if necessary, order an informant to appear and state facts or furnish expert evidence and it could ask public agencies for reports on matters related to the case. The persons entitled to participate in the procedure were limited to a public procurator and an "assistant" of the defendant, all of whom were entitled to state their opinions and submit reference data to the Court.

The procedure was not open to the public as it was said that the defendant's thoughts, which were to be discussed in court, would be dangerous to the public. A relative of the defendant could be his "assistant" by permission of the Court. As it was considered that the procedure was simple and that no difficult questions of law should arise, practicing lawyers were excluded from the proceedings. An appeal to a higher court might be filed by a public procurator against a ruling denying the request for preventive detention, and by the defendant and his "assistant" against a ruling granting said request.

A final factor to be noted was the provision for a Committee of Preventive Detention. The Committee consisted of a Chairman

and six committee members who were appointed by the Minister of Justice from members of the judiciary and other fields of learning and experience. The Committee's opinion was required on requests for preventive detention, renewals of terms of detention, and releases or suspensions of execution of orders for preventive detention. Preventive detention was to apply to persons whose criminal liability had terminated. It was therefore natural that concern for basic human rights should cause uneasiness about the administration of the system. It was in order to eliminate this concern and secure fairness of administration that the Committee was established.

It is rather difficult to find detailed materials concerning actual administration of the system. An article, written about a year and a half after promulgation of the law, which I happened to read, indicates that at that time about thirty persons had been placed under preventive detention.

III. Present Attitude Towards Preventive Detention

In the first place, it is appropriate, I think, to mention the discussion which took place at a symposium at the convention of the Japan Criminal Law Society in the Spring of 1947, which had as its principal object of study the system of *Sicherungsmaßnahmen* or "measures of safety" (preventive justice), including preventive detention. About seventy specialists in criminal law participated. Significantly, it was pointed out at the symposium that it would not be proper to assume that preventive detention would in all circumstances be unreasonable, and that there could be much scope for analysis with respect to each kind of crime. Much criticism, however, was directed against the 1940 draft for revision of the Penal Code and the Peace Preservation Law of 1941 above mentioned. The preventive detention provided for in the Peace Preservation Law, for example, was said to be absolutely defective in that it applied to "thought offenders". It was also reported that all those detained under the law complained that the two years term of detention was meaningless as the detention order might be renewed any number of times. The Criminal Code draft of 1940 was criticized because it provided for preventive detention only in terms of crimes likely to be performed, without regard to the kinds of crimes which the prospective detainee had previously committed. In addition to the above criticism, a number of problems were discussed generally, i.e. the nature of preventive detention – safety of the public or reform of prospective offenders; the predictability of the commission of crimes; definition of the subjects of preventive detention; methods of determination of the detention term – fixed or indefinite term; renewal of term; the relation between punishment

and preventive detention (order of execution); the desirability of administrative board participation in procedure of preventive detention. The various points raised during discussion at the symposium are, however, difficult to reconcile, and it seems rather difficult to select a particular type of preventive detention which all the participants can be said to have favored.

A further development in this field, a new preparatory draft for revision of the Penal Code was published in April of 1960. The new draft adopts two kinds of *Sicherungsmaßnahmen* one aimed at curing persons of unsound mind, and the other providing measures of control for narcotic or alcohol addicts. Preventive detention, however, has not been adopted in this draft. The draft also provided for indeterminate sentences for habitual offenders. It may be said that the drafters avoided the questionable system of preventive detention and sought to obtain the same ends in some degree by use of indeterminate sentences. No criticism has thus far been offered on this portion of the draft. Thus I think there is no strong desire, at least at present, for enactment of measures of preventive detention.

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APPENDIX I

THE PEACE PRESERVATION LAW

(As amended 1941. Abrogated, 1945.)

Chapter I. Crimes

- Article 1. A person who, for the purpose of revolutionizing the structure of the State, organizes an association or is engaged in the work of an officer or other leader thereof, shall be punished with death or imprisonment with forced labor for life or for not less than seven years. A person who, having knowledge of its nature, joins such an association or does actions that serve to realize the purpose thereof shall be punished with imprisonment with forced labor for not less than three years.
- Article 2. A person who, for the purpose of supporting an association provided for in the preceding Article, organizes an association or is engaged in the work of an officer or other leader thereof, shall be punished with death or imprisonment with forced labor for life or for not less than five years. A person who, having knowledge of its nature, joins such an association or does actions that serve to realize the purpose thereof shall be punished with imprisonment with forced labor for not less than two years.
- Article 3. A person who, for the purpose of preparing for an association provided for in Article 1, organizes an association or is engaged in the work of an officer or other leader thereof, shall be punished with death or imprisonment with forced labor for life or for not less than five years. A person who, having knowledge of its nature, joins such an association or does actions that serve to realize the purpose thereof shall be punished with imprisonment with forced labor for not less than two years.
- Article 4. A person who, with the purposes defined in the preceding three Articles, forms or leads a group shall be punished with imprisonment with forced labor for not less than three years. A person who, with the purpose defined in the preceding three Articles, joins a group or does actions that serve to realize the purposes defined in the preceding three Articles, shall be punished with imprisonment with forced labor for not less than one year.
- Article 5. A person who, with the purposes defined in Articles 1 to 3, colludes with or instigates others to act to realize the purposes defined in said Articles, propagandize or does other actions that serve to realize such purposes, shall be punished with imprisonment with forced labor for not less than one year and not more than ten years.
- Article 6. A person who, with the purposes defined in Articles 1 to 3, instigates riot, bodily injury or any other crime causing injury to life, person or property, shall be punished with imprisonment with forced labor for not less than two years.
- Article 7. A person who, for the purpose of encouraging actions that tend to abolish the structure of the State or profane the dignity of the Great Shrine of Ise or the Imperial House, organizes an association, or is engaged in the work of an officer or other leader thereof, shall be punished with imprisonment with forced labor for life or for not less than four years. A person who, having knowledge of its nature, joins

such an association or does actions that serve to realize the purpose thereof shall be punished with imprisonment with forced labor for not less than one year.

Article 8. A person who, with the purpose defined in the preceding Article, forms or leads a group shall be punished with imprisonment with forced labor for life or for not less than three years. A person who, with the purpose defined in the preceding Article, joins a group or does actions that serve to realize the purpose defined in the preceding Article, shall be punished with imprisonment with forced labor for not less than one year.

Article 9. A person who, for the purpose of having the crimes referred to in the eight preceding Articles committed, gives, offers or promises to give money, goods or any other economic advantage, shall be punished with imprisonment with forced labor for not less than ten years. The same applies to a person who, having knowledge of the nature of the offer, receives, demands or contracts to receive money, goods or any other economic advantage.

Article 10. A person who, for the purpose of abolishing the system of private property, organizes an association, or who, having knowledge of its nature, joins such an association or does actions that serve to realize its purpose, shall be punished with imprisonment with forced labor or without for not less than ten years.

Article 11. A person who, with the purpose defined in the preceding Article, colludes with or instigates others to act to realize such purpose, shall be punished with imprisonment with forced labor or without for not less than seven years.

Article 12. A person who, with the purpose referred to in Article 10, instigates riot, bodily injury or any other crime causing injury to life, person or property shall be punished with imprisonment with forced labor or without for not less than ten years.

Article 13. A person who, for the purpose of having the crimes defined in the three preceding Articles committed, gives, offers or promises to give money, goods or any other economic advantage, shall be punished with imprisonment with forced labor or without for not less than five years. The same applies to a person who, having knowledge of the nature of the offer, receives, demands or contracts to receive money, goods or any other economic advantage.

Article 14. Attempts at the crimes provided for in Articles 1 to 4, 7, 8 and 10 shall be punished.

Article 15. The punishment of a person who, having committed the crimes provided for in this Chapter, denounces himself, shall be reduced or remitted.

Article 16. The provisions of this Chapter also apply to any person who commits a crime provided for herein outside the place where this Law becomes effective.

Chapter II. Criminal Procedure

[Omitted.]

Chapter III. Preventive Detention

Article 39. When a person, who has committed any crime defined in Chapter I and has been sentenced to punishment, is to be released because of completion of the execution of his sentence, and there is strong apprehension that he may commit any crime provided for in Chapter I if he is released, a Court may, upon request of a public procurator, order that he shall be placed under preventive detention. The same applies when a person, who having committed any crime provided for in Chapter I, has been sentenced to punishment, and has completed serving his sentence, or has been granted the suspension of the execution of his sentence, is placed under protection and surveillance in accordance with The Protection and Surveillance Law for Thought Offenders, and it is difficult to prevent him from committing the crimes provided for in Chapter I, there being strong apprehension that he may commit such crimes again.

Articles 40. The request for preventive detention shall be made by the public procurator of the District Court having jurisdiction over the place where the defendant is present, to said District Court. When the request mentioned in the preceding Paragraph concerns a person placed under protection and surveillance, the request shall be made by the public procurator of the District Court having jurisdiction over the place where the Institute of Protection and Surveillance charged with him is located, to said District Court. The opinion of the Preventive Detention Committee shall be required in advance in order to request preventive detention.
Para. 3. [Omitted.]

Articles 41 to 43. [Omitted.]

Article 44. When a request for preventive detention is made, the Court shall render a ruling after having heard the statement of the defendant; in this case, the Court may order the defendant to appear. When the defendant refuses to make a statement or escapes, the Court may render a ruling without having heard his statement. When the request for preventive detention is made before the execution of punishment has been completed, the Court may, even after the execution of punishment, render a ruling placing the defendant under preventive detention.

Article 45. When necessary for the purpose of finding facts, the Court may order an informant to appear and state facts or furnish expert evidence. The Court may ask public agencies for reports on matters necessary for finding facts.

Article 46. Where a court requires the statement of a defendant, or requires that an informant state facts or furnish expert evidence, a public procurator may attend and state his opinion or submit reference data.

Article 47. [Omitted.]

Article 48. A court may produce the defendant in the following cases:

- (1) If he has no fixed dwelling;
- (2) If he escapes or there is apprehension that he may escape;
- (3) If he fails to comply with the summons provided in Para.1 of Article 44.

Article 49. Where the circumstances defined in number (1) or (2) of the preceding Article exist, the Court may temporarily detain the defendant in an Institute of Preventive Detention. Where unavoidable, however, the Court may temporarily detain him in a prison. When the defendant is already in a prison, the Court may temporarily detain him in the prison even when the circumstances mentioned in the preceding Para. do not exist.
Para. 2 of Article 42 applies with necessary modifications to the case provided for in Para. 1 of this Article.

Article 50. [Omitted.]

Article 51. A public procurator may file an appeal against a ruling denying a request for preventive detention.
The defendant and his assistant may file an appeal against a ruling granting a request for preventive detention.

Article 52. [Omitted.]

Article 53. A person placed under preventive detention shall be detained in an Institute of Preventive Detention. Necessary measures for making him reform shall be taken.

Para. 2. [Omitted.]

Article 54. A person placed under preventive detention, may, within the limits established by law or ordinance, have interviews with any person, and may deliver or receive sealed letters or any other things.
A sealed letter or any other thing which is delivered to or received by a person placed under preventive detention shall be subject to censorship, seizure, sequestration or any other measure necessary for maintenance of public peace or for making him reform. The same applies to a person who is temporarily detained or who is detained by a warrant of production in accordance with this Chapter.

Article 55. The term of preventive detention shall not exceed two years. Where there is special necessity for continuing detention, the Court may, by a ruling, renew the term.

Paras. 2 to 4. [Omitted.]

Articles 56, 57. [Omitted.]

Article 58. When it becomes unnecessary after the beginning of a term of detention to detain a person placed under preventive detention, he shall, by action of an administrative authority, be released before the term of detention has expired.
The provision of Para. 3 of Article 40 applies with necessary modifications to the case provided for in the preceding Para.

Articles 59 to 65. [Omitted.]

APPENDIX II**MEMORANDUM CONCERNING REMOVAL OF RESTRICTIONS ON
POLITICAL, CIVIL AND RELIGIOUS LIBERTIES.**

4 Oct. 1945

(from G. H. Q. of the Allied Forces
to Japanese Government)

1. In order to remove restrictions on political, civil and religious liberties and discrimination on grounds of race, nationality, creed or political opinion, the Imperial Japanese Government will:

a. Abrogate and immediately suspend the operation of all provisions of all laws, decrees, orders, ordinances and regulations which:

- (1) Establish or maintain restrictions on freedom of thought, of religion, of assembly and of speech, including the unrestricted discussion of the Emperor, the Imperial institution and the Imperial Japanese Government.

(2) to (4). [Omitted.]

b. The enactments covered in paragraph (a) above, shall include, but not be limited to, the following:

- (1) The Peace Preservation Law (No. 54 of 1941, promulgated on or about 10 March 1941).
- (2) The Protection and Surveillance Law for Thought Offenses (Shiso Han Hogo Kansatsu Ho, Law No. 29 of 1936, promulgated on or about 29 May 1936).

[The remainder of the memorandum is omitted.]

PREVENTIVE AND ADMINISTRATIVE DETENTION AS IT PERTAINS TO THE PHILIPPINES

INTRODUCTION

It is most noteworthy that in breaking the ground for the establishment of the concept of the Rule of Law, the International Congress of Jurists assembled at New Delhi, India, in January of 1959, adopted a number of Conclusions, among which are those relating to The Criminal Process and the Rule of Law, including that which pertains to preventive detention or the restraint of liberty of persons when required for purposes of public security or the administration of justice. The Congress of Jurists, as part of The Declaration of Delhi, adopted, *inter alia*, the following:

"IV. Detention pending trial

- (1) No person should be deprived of his liberty except in so far as may be required for the purposes of public security or the administration of justice."

It is truly gratifying to find that the basic concept of the Rule of Law established at New Delhi, is embodied in the twin principles of individual liberty and justice upon which rests the solid foundation of the Philippine system of law. There exists after all among free men, irrespective of color, creed and language, a common understanding of law and justice.

Deeply ingrained in the Constitution of the Philippines, in her statutes and jurisprudence, these principles are much in evidence in the criminal procedural law of the country; that which pertains, in particular, to the arrest and detention of accused persons, the right of the accused to be informed of the nature of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining his own witnesses, to have defense counsel of his choosing, to be afforded bail, and to be guaranteed a fair and speedy trial.

Detention With the View to Maintaining the National Security

Detention of a person or restraint of his liberty without cause or trial has no legal sanction in the Philippines. Embodied in our Bill of Rights is the following:

"Section 1. (1) No person shall be deprived of life, *liberty* or property *without due process of law*, nor shall any person be denied the equal protection of the laws." (Philippine Constitution, Article III.) [Italics Supplied.]

If a detained or arrested person is not released, his detention is rendered arbitrary and illegal in which case he may resort to the writ of *habeas corpus*, that "greatest of all muniments of Anglo-American liberty", of which the whole purpose is a prompt judicial inquiry into all cases of physical restraint. This great writ exists as a speedy and effective remedy to relieve persons from unlawful restraint. It will be issued in aid of one illegally deprived of his liberty. An application for a writ of *habeas corpus* rests on the allegation of illegal restraint of liberty – actual and effective, not nominal or moral restraint.

But there does exist legal authority for arbitrarily detaining, or otherwise depriving a person of liberty without showing cause or possibility of trial. This is in time of national emergency, when the great writ of liberty (*habeas corpus*) itself may not be invoked in defense of personal liberty. The Constitution of the Philippines declares in its Bill of Rights:

"Section 1.

"(14) The privilege of the writ of *habeas corpus* shall not be suspended *except in cases of invasion, insurrection, or rebellion*, when the public safety requires it, in any of which events the same may be suspended wherever during such period the necessity for such suspension shall exist." [Italics Supplied.]

Article VII, Section 10, Clause 2, of said Constitution, in addition, provides that in case of "imminent danger" of invasion, insurrection, or rebellion, when the public safety requires it, the President of the Philippines may also suspend the privilege of the writ of *habeas corpus*.

Within the purview of the suspension of the writ are included "all other crimes and offenses committed by them in furtherance of or on the occasion thereof or incident thereto, or in connection therewith" (meaning sedition, insurrection and rebellion).¹

Why is assault against individual liberty sanctioned where public security is involved? In the life of a nation, crisis after crisis may drive her to the wall; invasion may imperil its sovereignty; rebellion may overthrow its legal government; and sedition may eat at her vitals. As in the very apt language of a great American case:

"In every war, there are men of previously good character, wicked enough to counsel their fellow citizens to resist the measure deemed necessary by a good government to sustain its just authority and over-

¹ *Montenegro v. Castaneda*, G.R. No. L-4221, August 30, 1951.

throw its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large."²

Such an all-pervasive national emergency, vividly described above, may well call upon a constitutional government to take a direct and effective hand in the detention of those who shall willingly and deliberately subvert its just authority for their own evil ends, without requiring that government to justify the fundamental *raison d'être* of their detention and incarceration. To meet head on seditious and treasonable forces, the courts, which only proceed upon formal charges filed to determine the guilt or innocence of the accused – hence, they punish and they do not prevent – are truly weak and inadequate in an area of subversion where the just authority of government and its stability are being challenged.

Concomitant with the power of the President to suspend the writ, is his right to exclusively determine whether or not a state of invasion, insurrection or rebellion exists which warrants such suspension. He shall also determine the duration of the emergency, which shall be binding on all agencies of the government.

Detention in the Course of the Administration of Justice

Arbitrary detention is punishable by law. A person, however, *who is accused of a crime or offense* shall be arrested and detained. Arrest is the taking of a person into custody in order that he may come forth to answer for the commissions of an offense. The word "offense" is a general term embracing every species of indictable offense. An offender, however, may be simply summoned when the law or ordinance violated provides for a penalty or imprisonment for not over one month or a fine of not more than two hundred pesos or both, in which case only an ordinary summons should be issued.

The arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest. Such custody or control, the assumption of which is implied in an arrest, imports actual restraint or detention. Accordingly, the mere utterance of words indicative of an arrest, or mere verbal proffer of the warrant or personal service thereof is inadequate, except when followed by submission. An arrest may be made on any day and at any time of the day or night. The employment of unnecessary or unreasonable force or greater restraint is prohibited. Persons authorized to make arrest may, however, employ force or violence to the extent of effectively overcoming active resistance to a lawful arrest. The refusal of the person arrested

² *Ex parte Mulligan*, 4 Wall. 2.

to obey and surrender, or on attempt to escape warrant the employment of force.

For investigation purposes, police practice in the Philippines sanctions the detention of suspects. The Vagrancy Statute and other similar statutes, however, do not grant special powers of arrest or detention.

There are, however, certain persons who are privileged from arrest and detention. By a settled principle of international law, ambassadors and foreign ministers, not being subject to local jurisdiction, are exempt from arrest. Consuls are not exempted. Likewise, members of the Congress of the Philippines are in all cases, except treason, felony, and breach of the peace, privileged from arrest during their attendance at the sessions and in going to and returning from same. Reasons of public policy justify their exemption.

Arrest may be made with or without a judicial warrant. In the case of an arrest with warrant, the officer executing the warrant must without unnecessary delay deliver the person arrested to the judge or person in authority who issued the warrant. The prisoner may seek temporary release by posting a bail bond.

In the case of an arrest without warrant, the person making the arrest should deliver the prisoner to the proper judicial authorities without unnecessary delay, and within the periods of: six hours, for crimes or offenses punishable by light penalties, or their equivalent; nine hours, for crimes or offenses punishable by correctional penalties, or their equivalent; and eighteen hours, for crimes or offenses punishable by afflictive or capital penalties, or their equivalent. The delivery to the "judicial authorities", above-mentioned, means not a physical delivery of the prisoner, but the filing of a complaint or information in court.

By Whom the Order of Detention or Arrest is Issued

In the event of suspension of the writ of *habeas corpus* by the President of the Philippines, there shall be a Presidential Proclamation to that effect. Once the writ is declared suspended, no judicial examination as to the legality of the arrest and detentions of persons can be speedily undertaken. The findings of the President as to the existence of invasion, insurrection, rebellion, or imminent danger thereof, and the requirements of public safety are final and binding upon the courts. As the Supreme Court of the Philippines held in *Montenegro v. Castaneda*, *supra*:

"And we agree with the Solicitor General that in the light of the views of the United States Supreme Court through Marshall, Taney and Story quoted with approval in *Barcelon v. Baker* (5 Phil. 87), the authority to decide whether the exigency has arisen requiring suspension belongs to the President and 'his decision is final and conclusive' upon the courts and upon all other persons.

"Indeed as Justice Johnson said in that decision, whereas the Executive Branch of the Government is enabled through its civil and military branches to obtain information about peace and order from every quarter and corner of the nation, the judicial department, with its very limited machinery cannot be in a better position to ascertain or evaluate the conditions prevailing in the Archipelago."

Detentions or arrests made in the course of the administration of justice fall into three categories, to wit:

- (1) Arrest upon warrant issued by a judge or by some other person in authority;
- (2) Arrest upon order of a judge, oral or written;
- (3) Arrest without warrant.

In the case of an arrest upon warrant, a judge or some other person in authority issues the warrant, which is delivered to an officer who proceeds forthwith to arrest the defendant, and takes him without any unnecessary delay before that judge or person in authority who has issued the order. A warrant of arrest issued by the justice of the peace cannot be served or executed outside his province, unless the judge of the Court of First Instance of the district, or, in his absence, the provincial fiscal, shall certify that in his opinion the interest of justice requires such service. A warrant issued by the judge of the Court of First Instance or of any superior court may be served or executed anywhere within the Philippines.

In the case of an arrest upon order of the judge, this is done by an oral or written order commanding any person immediately to arrest one who commits an offense *in his presence*, and the judge may thereupon proceed as though the offender had been brought before him on a warrant of arrest.

In the case of an arrest without warrant, any peace officer or a private person may arrest a person:

(a) When the person to be arrested has committed, is actually committing, or is about to commit an offense in his presence;

(b) When an offense has in fact been committed, and he has reasonable ground to believe that the person to be arrested has committed it;

(c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment, or has escaped while being transferred from one confinement to another.

An offense is committed in the "presence" of the arresting officer when he sees the offense, although at a distance, or hears

the disturbance created thereby and proceeds at once to the scene thereof; or the offense is continuing, or has not been consummated, at the time the arrest is made. Mere reasonable ground to believe that an offense was committed, when none in fact was committed, is not enough to justify arrest without warrant. An arrest of a suspicious character found in a suspicious place, attendant circumstances being such as to create suspicion in the mind of a reasonable man is, however, justified. Such reasonable belief may stem from the arresting person's own investigation or from information of third persons. A convict escaping from the custody of a policeman or a penal institution may then be arrested without warrant. A person lawfully arrested who escapes or is rescued may be retaken without warrant by the person from whose custody he escaped or was rescued.

Need for Informing a Person of the Ground of His Detention

In the Constitution of the Philippines, the guarantee exists that —

" . . . In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation against him . . . " (Article III, Section 1, Clause 17.)

Likewise,

"In every case, the person detained shall be informed of the cause of his detention . . . " (Article 125, Par. 2, Revised Penal Code.)

Philippine law, therefore, makes it incumbent upon an arresting officer to "inform the person to be arrested of the cause of the arrest." In other words, the arrested person is entitled to this information. Either before or at the moment of the arrest, the officer ought to have informed him "that he is not dealing with a trespasser, but with a minister of justice." Thus, the respective duties of the arrested person and arresting officer are such that the accused is required to submit to the arrest, to yield himself promptly and peaceably into the officer's custody, while the officer is duty bound to inform the accused of the cause of his arrest only after he has taken his prisoner into safe custody. In fine, the officer's explanation follows the taking into custody, and the exhibition of the warrant comes after the officer's authority has been acknowledged.

Specifically, where the arrest is by virtue of a warrant, the officer shall inform the person to be arrested of the cause of the arrest, and of the fact that a warrant has been issued for his arrest. The officer need not have the warrant in his possession at the time of the arrest, but after the arrest, if the person arrested so requires, the warrant shall be shown to him as soon as practicable.

In the case of an arrest without warrant, the officer shall inform the person to be arrested of his authority and the cause of

his arrest, unless the person to be arrested is then engaged in the commission of an offense, or is pursued immediately after its commission or after an escape, or flees or forcibly resists before the officer has the opportunity of informing him, or when the giving of such information will imperil the arrest.

When it is a private person who is making the arrest, he shall inform the person to be arrested of the intention to arrest him and the cause of his arrest, unless the person to be arrested is then engaged in the commission of an offense, or is pursued immediately after its commission or after an escape, or flees or forcibly resists before the person making the arrest has the opportunity of informing him, or when the giving of such information will jeopardize the arrest.

Evidently, the exceptions to the requirement that the person to be arrested be informed of the cause of his arrest are justified since he is presumed to know the cause for which he is being arrested.

Effective Redress in Cases of Abuses in Arrests and Detentions of Persons

As matters of political history, there existed two instances of the suspension of the writ of *habeas corpus* in the Philippines, namely: (1) Executive Order No. 6, suspending the writ on January 31, 1905, and (2) Proclamation No. 210 declaring the writ suspended on October 22, 1950. In the case of the first suspension, the basis thereof was the existence of an open "insurrection", resulting in "a state of insecurity and terrorism among the people" as to render impossible "preliminary investigations before the justices of the peace and other judicial officers". The second suspension was to affect "persons presently detained, as well as all others who may be hereafter similarly detained for the crimes of sedition, insurrection or rebellion, and all other crimes and offenses committed by them in furtherance or on the occasion thereof, or incident thereto, or in connection therewith". Those arrested and detained then constituted the basic nucleus of the Communist movement in the Philippines.

It is true that under the Constitution of the Philippines the President may, in cases of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of *habeas corpus*, whenever during such period the necessity for such suspension shall exist; and that his findings and conclusions as to the existence of invasion, insurrection, rebellion, or imminent danger of any of these events, and of the requirements of public safety cannot be questioned before the courts.

But the effect of and the extent to which the power to suspend the writ reaches, in the absolute negation of personal liberty, can best be appreciated in the light of the fact that such power is lodged in

the very agency that has the authority to order the arrest and detention of persons – the Executive. It is, therefore, possible, for a dictatorial President, in abuse of his authority, simply to suspend the writ of *habeas corpus*, ostensibly in the interest of safeguarding the security of the State, but in reality to attain his arbitrary ends of clapping in jail his enemies without legal cause and trial.

But is the exercise of this power to suspend the privilege of the writ of *habeas corpus* subject to scrutiny, judicially or otherwise? While, as referred to earlier, the President admittedly has the exclusive competence to ascertain whether suspension of the privilege of the writ issues or not, this does not deny the Judiciary its power to determine whether or not the President's proclamation suspending the privilege of the writ of *habeas corpus* conforms to the provision in the Constitution on *habeas corpus*.

Now, even assuming that such Presidential proclamation be declared valid, there remains a judicial question whether or not the order of suspension covers the case of any person who has precisely filed *habeas corpus* proceedings to test the lawfulness of his detention. A case in point is Proclamation No. 210 which had specified that the coverage of its application was to apply only to the specific crimes of *sedition, insurrection or rebellion*. This being so, it remains within the province of the courts to inquire into whether or not the detained person is still entitled to the privilege of *habeas corpus*, as it may be that the accusation against him is not one of those crimes specified in the Proclamation.

And, the *onus* of establishing that he falls within the scope of the suspension is on those authorities who keep the detainee in detention or in their custody.

In cases of arrests and detentions for crimes committed during normal times, or for those crimes committed but not falling within the purview of a Presidential proclamation of suspension of the privilege of the writ of *habeas corpus*, the exercise of discretion, involved in such arrests and detentions lies in the hands of police as well as judicial authorities. To order the arrest or detention of a person involves no little amount of discretion. A warrant of arrest is issued only on probable cause. Thus, the justice of the peace or the officer who is to conduct the preliminary investigation must take under oath, either in the presence or absence of the defendant, the testimony of the complainant and the witnesses to be presented by him or by the fiscal. If the judge is satisfied from the preliminary investigation conducted by him that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant or order for his arrest. *Mandamus* does not compel the justice of the peace to issue a warrant of arrest. Even appeal is out of the question.

Where the arrest is made without warrant and a person is

detained, he is entitled to be released within the period of six, nine or eighteen hours, depending upon the gravity of the offense charged, unless he has been delivered to the judicial authorities, or the corresponding criminal charges have been filed against him within the above-stated periods.

What forms may redress take to rectify an unlawful arrest or arbitrary detention, in cases of alleged violation of the penal law? Arbitrary official action is remediable by: (a) civil action; (b) criminal action; and (c) *habeas corpus* proceeding. By the first remedy, an action for moral damages lies against the respondent officer or person, for illegal or arbitrary detention or unlawful arrest. Criminally, the respondent may be liable and subject to imprisonment.

A private person who detains another without cause may be held liable for illegal detention. However, these are but sanctions against arbitrary or illegal detentions and unlawful arrest.

In the first two remedies, the processes for vindicating the wrong done to the aggrieved party are slow. But the mere fact that the act may be a crime and the respondent can be proceeded against is not exclusive of the remedy of *habeas corpus*.

Detention without legal cause or authority is speedily remedied in *habeas corpus* proceedings, the essential object of which is to inquire into all manner of involuntary restraint and to relieve a person therefrom if such restraint is illegal. The relevant provision on *habeas corpus* is:

"Section 1. To what *habeas corpus* extends. Except as otherwise expressly provided by law, the writ of *habeas corpus* shall extend to all cases of illegal confinement or detention by which any person is deprived of his liberty, or by which the rightful custody of any person is withheld from the person entitled thereto."

(Rule 102, Rules of Court.)

Under our Rules of Court, *habeas corpus* is classified as a special proceeding, distinctly civil and summary in nature. By this proceeding it is to be determined whether or not the petitioner is legally held. Once determined that illegal restraint of petitioner's liberty exists as a fact, the writ of *habeas corpus* issues. The writ may be granted by the Supreme Court, or any member thereof, on any day and at any time, or by the Court of Appeals or any member thereof, and if so granted, it shall be made enforceable anywhere in the Philippines, and may be made returnable before the court or any member thereof. It may also be granted by a Court of First Instance, or a judge thereof, on any day and at any time, and returnable before himself, enforceable only within his judicial district.

The writ of *habeas corpus* is directed to the person detaining the petitioner, commanding him to produce the body of the latter at a designated time and place, to do, submit to, and receive whatso-

ever the court or judge awarding the writ shall consider in that behalf.

When the court or judge has examined the cause of caption and restraint of the prisoner, and is satisfied that he is unlawfully imprisoned or restrained, he shall forthwith order his discharge from confinement. If the officer or person detaining the prisoner does not wish to appeal, the prisoner shall be forthwith released.

Substantive Procedural Rights of a Detained Person in Habeas Corpus Proceedings

The sole but effective and expeditious remedy in each and every case of detention without legal cause or authority, is that of *habeas corpus*, a right or remedy – “the most important single writ in the common law and in American constitutional development” – which essentially enables a person under arrest, imprisonment or otherwise detained to secure an order upon application to a court, requiring the person detaining him to produce him in person before the court and to justify his detention. It is summary in nature.

The detained person or his family or friends may engage the services of counsel who then files a petition, signed and verified by the party for whose relief it is intended, or by some person on his behalf, setting forth:

- (1) That petitioner is imprisoned or restrained of his liberty;
- (2) The officer or name of the person by whom he is so imprisoned or restrained; or, if both are unknown or uncertain, such officer or person may be described by an assumed appellation, and the person who is served with the writ shall be deemed the person intended;
- (3) The place where he is so imprisoned or restrained, if known;
- (4) A copy of the commitment or cause of detention of such person, if it can be procured without impairing the efficiency of the remedy; or, if the imprisonment or restraint is without any legal authority, such fact shall appear.

If it appears from the petition that the writ ought to issue, the court or judge authorized to grant the writ, grants the same forthwith. Thereupon, the clerk of court shall issue the writ under the seal of the court. In case of emergency, the judge may issue the writ under his own hand, and may depute any officer or person to serve it. In case of imprisonment or restraint by an officer, the writ shall be directed to him, commanding him to have the body of the person restrained of liberty before the court or judge designated

in the writ. In case of imprisonment or restraint by a person not an officer, the writ shall be directed to an officer, and shall command him to bring and present the body of the person restrained of his liberty before the court or judge designated in the writ, and to summon the person by whom he is restrained then and there to appear before said court or judge to show the cause of the imprisonment or restraint.

The officer to whom the writ is directed shall convey the person so imprisoned or restrained before the judge allowing the writ, or before the judge designated in the writ if he is other than the one allowing the same. Technicalities should be disregarded, so that no writ of *habeas corpus* can be disobeyed for defect in form, if it sufficiently appears therefrom in whose custody or under whose restraint the party imprisoned or restrained is held and the court or judge before whom he is to be brought.

On return of the writ, hearing and examination thereof proceeds. If, for good cause shown, the hearing is adjourned, the court or judge shall make such order for the safekeeping of the person imprisoned or restrained as the nature of the case requires. If the person imprisoned or restrained is not produced because of his alleged sickness or infirmity, the court or judge must be satisfied that it is so grave that such person cannot be produced without danger before proceeding to hear and dispose of the matter.

In these proceedings for *habeas corpus*, the petitioner has a right to reply to the respondents' return to the order to show cause, and in case of denial of all or any of the material allegations thereof, respondents are under obligation to offer proof of such allegations. Where it appears, however, from the return of the writ that the petitioner is regularly in custody under warrant, the court will not go behind the return which shall be considered *prima facie* evidence of the cause of restraint.

If the petitioner is unlawfully imprisoned or restrained, he shall forthwith be ordered discharged from confinement. If the officer or person detaining the prisoner does not desire to appeal, the prisoner shall be forthwith released. The respondents' failure to procure the body of a person in obedience to a writ of *habeas corpus*, without legal excuse therefor, constitutes contempt. Once a person is discharged from confinement upon a writ of *habeas corpus*, he shall not be again imprisoned. A final judgment in a *habeas corpus* proceeding is just as binding upon the parties as a final judgment in any other proceeding. No relitigation of such proceeding is allowed.

Like any accused person, the constitutional right to counsel is not denied a detainee. The assistance of counsel from the time he is placed under arrest, detention or restraint by officers of the law is assured the detained person. Under the Rules of Court, a person

in custody has the right to confer with his counsel, in the jail or any other place of custody at any hour of the day or, in urgent cases, of the night. This provision implements more effectively the detained person's constitutional right to counsel. He has also the indispensable aid of counsel even on appeal. An attorney *de oficio* is assigned by the court for a detainee, who is too poor to employ an attorney, and desires to be assisted *de oficio*.

Specific Cases Involving Detention of Persons Challenged in Habeas Corpus Proceedings

To challenge the legality of a person's detention by the authorities, the proper and only remedy is by writ of *habeas corpus*. This great writ, as already stated, is devised with the purpose of safeguarding personal liberty. So important is the nature of the remedy of *habeas corpus* as an instrument of individual freedom, according to former Justice Malcolm of the Philippine Supreme Court, that it has since become a landmark in Philippine constitutional law. It is well settled, then, in this jurisdiction that in each and every case of detention without legal cause or authority, the proper remedy is by writ of *habeas corpus*.

What, then, is the state of jurisprudence in *habeas corpus* proceedings in the Philippines on the basis of decisional law?

Examined below are several specific but representative cases, involving the detention of person in order to safeguard public security.

In the case of *Montenegro v. Castaneda*, G.R. No. L-4221, promulgated on August 30, 1952, a *habeas corpus* proceeding was filed by petitioner Maximino Montenegro to test the validity of Proclamation No. 210 of President Quirino, suspending the privilege of the writ of *habeas corpus*, for "crimes of sedition, insurrection or rebellion, and all other crimes and offenses committed by them in furtherance or on the occasion thereof or incident thereto, or in connection therewith". Petitioner was arrested with others by agents of the Military Intelligence Service of the Armed Forces of the Philippines for complicity with communistic organizations in the commission of acts of rebellion, insurrection or sedition. As far as the record disclosed, he was under arrest in the custody of respondents. On October 22, 1950, President Quirino issued Proclamation No. 210. On October 21, 1950, Maximino's father, the petitioner, applied for a writ of *habeas corpus* seeking the release of his son. In this case, the Supreme Court sustained the power of the President to suspend the writ of *habeas corpus*.

In the cases of *Nava v. Gatmaitan*, G.R. No. L-4855; and *Hernandez v. Montesa*, G.R. No. L-4964, promulgated on October

11, 1951, the Supreme Court declared that the only effect of Proclamation No. 210, issued by the President suspending the privilege of the writ of *habeas corpus*, is that no person detained thereunder has the right to have the cause of his detention examined and determined by a court of justice through a writ of *habeas corpus*.

The Supreme Court, in deciding a petition for a writ of *habeas corpus* in *Saulo v. Cruz*, G.R. No. L-14819, March 19, 1959, held that when a writ of *habeas corpus* is, in conformity with the law, made returnable to a court other than that issuing the writ, the court to which the writ is returned or the judge thereof possesses full authority to examine all issues raised in the case to settle the same. In fine, the court or judge to whom the writ is returned shall have the authority and the duty to inquire into the facts and the law pertinent to the legality or illegality of petitioner's detention, and to order his discharge from confinement, should it appear satisfactorily that he is unlawfully imprisoned or restrained.

Barcelon v. Baker, et al., 5 Phil. Rep. 87, decided in 1905, involved the suspension of the writ of *habeas corpus* in the Philippines, specifically, in the Provinces of Cavite and Batangas, by the then Governor-General Luke E. Wright. The Philippine Supreme Court denied petitioner Barcelon's application for a writ of *habeas corpus*, and, in effect, upheld the authority of the President or the Governor-General to decide whether an exigency exists requiring the suspension of the privilege of *habeas corpus* and stated "his decision is final and conclusive" upon the courts and upon all other persons.

In the case of *Taruc v. Carlos*, G.R. No. L-1028, July 22, 1947, petitioner Taruc was declared entitled to a writ of *habeas corpus*, as he was detained merely on suspicion of participation in a plot against the President of the Philippines, a suspicion that arose because said petitioner was related to a socialist leader.

Now to be considered are some representative cases involving detentions, as a result of alleged infractions of the criminal law, or such restraints of liberty in the course of the administration of justice.

In *Santos v. Cruz*, 44 O.G., 1231, the Supreme Court held that for the remedy of *habeas corpus* to succeed, where a release is sought from detention by police officials or prison officers for a violation of the penal laws, there must be a showing of deprivation of fundamental rights, lack of jurisdiction of the court to impose the sentence, or excessive penalty.

In the two cases of *Lino v. Fugoso*, 43 O.G. 1214, and *Sayo v. Chief of Police*, G.R. No. L-2128, May 12, 1948, it was shown that the persons detained had been kept by police officials more than six hours, without delivering them to the proper judicial authorities, contrary to Article 125 of the Revised Penal Code. It was held that the writ of *habeas corpus* may still lie, even if the accused has

been properly charged and awaiting trial.³ But as one sentence had already been imposed, the allegation that the accused was denied the right to speedy trial as a basis for the granting of a writ of *habeas corpus* would not suffice.⁴

In *Macario Gunabe v. Director of Prisons*, G.R. No. L-1231, January 30, 1947, it was held that the failure to deliver any person to the judicial authorities within six hours, while subject to criminal prosecution under section 125 of the Revised Penal Code, does not affect the legality of his confinement under subsisting process issued by a competent court.

It was held that where the basis of petitioner's detention was a preliminary investigation which was invalidly conducted, because it was conducted by a Justice of the Peace in an adjacent municipality beyond its territorial jurisdiction, the writ of *habeas corpus* is a proper remedy.⁵

The writ will lie, according to *Malinao v. Raveles, etc.*, G.R. No. L-16464, July 26, 1960, where the order detaining the petitioner is itself void because the court issuing it had no jurisdiction over the crime charged, or over the person of the accused, citing *Banayo v. President of San Pablo*, 2 Phil. Rep. 413; *Collins v. Wolfe*, 4 Phil. Rep. 534; *Carrington v. Peterson*, 4 Phil. Rep. 134; *David v. Director of Prisons*, 17 Phil. Rep. 168.

In the case of *Laurel v. Misa* 42 O.G. 2847, petitioner sought to be released from detention, contending that the provision in the People's Court Act suspending Article 125 of the Revised Penal Code (which limits detention to not more than six hours) and giving the prosecutors a six-month period within which to file charges against political detainees, is unconstitutional. Petitioner was a political detainee. *Habeas corpus* was not granted.

That the writ of *habeas corpus*, which is concededly "one of the most important bulwarks of liberty," and which in our fundamental law, the Constitution of the Philippines, is the most important human rights provision, is an effective remedy, can readily be shown by the dispatch of *habeas corpus* proceedings inquiring into the valid character of detentions of persons. To cite of few, in the case of *Lino v. Fugoso*, supra, a petition for *habeas corpus* on behalf of striking city laborers was filed on Monday morning, the petition was heard Tuesday morning, and the laborers were freed on the afternoon of the same day. In *Tanada v. Quirino*, 43 O.G. 934, the special prosecutor, who refused to state whether the evidence of guilt of a political detainee was weak or strong, on the ground that his answer would

³ *Conde v. Rivera and Unson*, 45 Phil. 650.

⁴ *Talabon v. Warden*, 44 O.G. 4328.

⁵ *Ragpala v. Justice of the Peace of Tubod, Lanao, et al.*, G.R. No. L 15375, August 31, 1960.

imperil the success of the prosecution, was found guilty of contempt by the respondent judge in the morning; and upon petition filed on his behalf by the Chief of the Office of Special Prosecutors, the special prosecutor was set at liberty that same afternoon.

In another case, *Caunca v. Salazar*, G.R. No. L-2690, the petition for *habeas corpus* was filed on December 31, 1948. The hearing was set for two o'clock in the afternoon of the same day and, upon explanation by the respondent that the maid-servant was in Silang, Cavite, and would not return until the evening, it was continued for nine o'clock in the morning of January 1, 1949, an official holiday. Notwithstanding the fact that another postponement could have been secured because the maid-servant was still in Silang at five o'clock in the afternoon of the same day, said petition was granted that evening.

Of course, mere filing of such a petition does not guarantee a grant of the relief prayed for. Its summary character and peremptory inquiry into the fundamental basis of petitioner's detention do, however, render this remedy truly invaluable in the hands of one fighting for the liberty of his mind and person.

Detentions Involving Aliens

There is one other form of detention or restraint of liberty of persons, involving primarily aliens in entry as well as in deportation proceedings. In entry proceedings, Philippine immigration laws require that for the purpose of determining whether aliens arriving in the Philippines belong to any of the classes excluded by said laws, such aliens shall, by order of the examining immigration officers, be detained on board the vessel bringing them or in such other place as the officers may designate. Such detention shall be for a sufficient length of time to enable the officers to determine whether they belong to the excluded class.

Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination by a board of special inquiry. The board shall have the authority to determine whether an alien seeking to enter or land in the Philippines shall be allowed to enter or land or shall be excluded. For this purpose the board shall conduct a hearing, and thereafter, proceed to deliberate and decide on the merits thereof. If the result of the deliberation shows that at least two members vote for a landing, the alien shall be released from custody, if the other member of the board does not dissent and give notice of his desire to appeal; otherwise, the alien shall remain in detention.

If the dissenting member appeals from the decision of the

other two members, the case shall be taken before the Board of Commissioners for decision. If the board decides to deny the alien entry, the alien may appeal from such decision. Should this right to appeal be denied the alien, relief by the writ of *habeas corpus* can be obtained in court. The court taking cognizance should not, however, order that the alien be discharged from custody but that he be given the right of appeal and his case remanded to the immigration authorities. The decision of the Board of Commissioners on appeal shall be final.

An alien's detention may not be questioned, inasmuch as even during the *habeas corpus* proceedings filed by him to ask for his right to appeal from the decision of the board, he is not entitled to bail pending said proceedings. Nor is he entitled when the lower court decides adversely against him, so that pending his appeal to the Supreme Court he can not be released under bond. In case the *habeas corpus* is sustained, the alien is, however, entitled to bail pending the appeal of the immigration authorities to the higher court.

In deportation proceedings, where immigration officers are credibly informed or have reason to believe that an alien is unlawfully in the Philippines, they shall promptly investigate his case. If the investigation shows that the alien appears to be subject to deportation under the immigration laws, the investigating officer shall report the facts in the case, through official channels, to the Commissioner of Immigration or to the nearest officer authorized by the Commissioner to issue warrants for the arrest of aliens. Such warrant of arrest must be sufficient to give the alien adequate information about the act relied upon.

Once arrested, the alien shall be accorded a hearing to show cause if any there be, why he should not be deported. Hearings in warrant proceedings may be conducted by immigration officers individually or by boards of special inquiry. Pending determination of the case and in the discretion of the immigration officer in charge, the alien shall be taken into custody or permitted to remain at large under such safeguards as may be deemed sufficient to insure his appearance when wanted, including the exaction of a bond. At the hearing the alien shall be allowed to inspect the warrant of arrest and shall be advised that he may be represented by counsel.

Any alien under arrest in a deportation proceeding may be released under bond or under such other conditions as may be imposed by the Commissioner of Immigration. In the event that the Board of Commissioners finds that the alien is subject to deportation, a warrant of deportation is issued and he shall be deported, unless the Commissioner of Immigration in his discretion, grants the alien an opportunity to depart voluntarily within a stated period

and he so departs. If the alien is not subject to deportation, the proceedings shall be dismissed.

An alien awaiting deportation is subject to detention by the immigration authorities, unless he is allowed, within the discretion of these authorities, to be released on bond. His inability to post a bond resulting in his continued confinement will not constitute an illegal restraint of his liberty. The right to deport an alien does not carry with it the right to imprison him indefinitely under the guise that an opportunity for deportation is being awaited. If the immigration authorities for some reason or another cannot carry out the deportation of the alien, he must be discharged from custody. An alien who is deprived of his liberty in deportation proceedings can have his right to liberty tested on *habeas corpus* proceedings.

An alien facing deportation charges and under detention is entitled to be represented by counsel. A denial of this or any act on the part of the immigration authorities amounting to a denial will render the hearing unfair. However, the fact that an alien who is in custody is questioned by the immigration authorities before he procures an attorney does not constitute a violation of due process provided full hearing is given thereafter. In such cases, it suffices that, during the hearing, the alien is advised of his rights and afforded counsel; and no part of the evidence previously taken or used against him is concealed or withheld from his counsel, and he is not thereby deprived of the privilege of bringing forward any explanatory or rebutting evidence. He may waive this right, however, by expressly stating that he waives the right or by refusing to engage a counsel after he is informed of his right. In this event the alien cannot later on complain that he has been deprived of his right to be represented by counsel.

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ADMINISTRATIVE INTERNMENT IN SINGAPORE

The main areas of potential violation of the law's protection of the individual in Singapore against detention without trial and the imposition of other arbitrary restraints are contained in the provisions of two enactments of 1955: the Preservation of Public Security Ordinance and the Criminal Law (Temporary Provisions) Ordinance.

The first is directed against activities which successive governments have regarded as prejudicial to the political stability of the island-State and thereby likely to imperil whatever chance there may exist of future merger of Singapore with the Federation of Malaya.¹ The second is aimed at eliminating organised crime (chiefly that inspired by authentic and pseudo 'Secret societies') which manifests itself in outcrops of kidnappings, inter-faction warfare, protection 'rackets' and extortions and other offences of violence for which the collection of evidence and conviction of the perpetrators is impeded by the public's apathy and fear of reprisals.

At the time of writing (October 1960) there were an estimated ² thirty political detainees confined in prison establishments (some since the widely publicized Hock Lee "Bus Company" riots of 1956), and about six hundred persons suspected of criminal activities, one hundred and seventy of whom are undergoing "rehabilitative training" at the penal colony of Pulau Senang,³ the rest being detained at prisons on Singapore Island. In addition both enactments

¹ Regarded by the present Government as the most likely prospect for severing the internally self-governing State from the British apron-string. See the speeches of the Prime Minister, Mr. Lee Kuan Yew, and the former Minister of National Development, Mr. Ong Eng Guan, delivered in the Legislative Assembly during the debate on the 1959 Amendment Bill to the Preservation of Public Security Ordinance. See Singapore Legislative Assembly Debates, October 14 1959, Vol. 11, No. 11, Col. 672 where Mr. Ong quoted from the People's Action Party's statement on the Ordinance made in October 1958.

"We must recognise that our overriding object is merger and that means that we must acknowledge that until merger the overriding interests of the Federation must prevail over Singapore . . . so long as they (the Emergency laws) are necessary for the maintenance of the security of the Federation, so long will they be necessary for Singapore."

² This estimate in relation to political probably errs on the side of conservatism. See Singapore Legislative Assembly Debates, September 21, 1960, Vol. 13, No. 9, Col. 688—731 which, again, only provides a broad estimate.

³ An island of about 200 acres situated eighteen miles southwest of Singapore.

provide for the surveillance and restraint of political and criminal 'subverts' whom the administration does not deem it necessary to keep in captivity.

Further provision for detention either prior to or without any real likelihood of trial is contained in the Criminal Procedure Code (1955), the Banishment Ordinance (1915) and in the enactments noted.⁴ But these confer upon the executive powers of restraint which are negligible by comparison with those of the two earlier mentioned ordinances.

Sections 375-390 of the Criminal Procedure Code set out the conditions under which application may be made for the writ of *habeas corpus* and these correspond broadly with the present

⁴ Apart from the *Preservation of Public Security Ordinance* 1955 and the *Criminal Law (Temporary Provisions) Ordinance* 1955 the relevant legislation is:

Banishment Ordinance, 1915 as amended by Ordinances Nos. 18 of 1915, 1 of 1928, 52 of 1941, 37 of 1952, 8 of 1955. See Sections 4, 7, 11 and on Section 4 see *In re Lim Peng Koi* (1952) M.L.J. 26 (Order nisi granted on application for *habeas corpus* after affidavits were sworn that applicant was a British subject.)

Women and Girls Protection Ordinance, 1930 as amended by Ordinances Nos. 15 of 1930, 24 of 1932, 27 of 1935, 13 of 1937, 46 of 1939, 20 of 1941, 23 of 1949, 37 of 1952, 1 of 1954, 8 of 1955. See Sections 13, 14, 15, 17, 18, 19, 20 (right of appeal to the Minister), 21, 22, 23.

Quarantine and Prevention of Disease Ordinance, 1940, Sections 66, 81, 82.

Leprosy Ordinance, 1949, as amended by Ordinances Nos. 13 of 1950, 8 of 1955, Sections 7, 9, 11, 16, 20 (release), 23.

Children and Young Persons Ordinance, 1950 as amended by Ordinance no. 18 of 1954, Sections 5, 8, 23, 66, 68-72, 75, 95 (review of detentions of children committed to approved schools).

Deportation (British Subjects) Ordinance, 1952, 5 and 7 in relation to "undesirable" and "destitute" persons) and Section 9 and 12. Detention of "undesirable" and "destitute" persons is prescribed for a maximum period of 28 days. Cause may be shown before a Judge in Chambers why a deportation order should not be made.

Immigration Ordinance 1953, as amended by Ordinance No. 22 of 1959. See Sections 35, 36, 34 (2) (right to Controller), 38. Detention for a maximum period of fourteen days is prescribed and in the case of Section 35 "for such period as may be necessary for the purpose of making arrangements for his removal."

Criminal Procedure Code, 1955 as amended by Ordinance Nos. 10 of 58, 38 of 59.

By Section 35 persons arrested are not to be detained for more than twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

This section is deprived of its practical effect by Section 55 of the Criminal Law (Temporary Provisions) Ordinance, 1955, under which a criminal suspect may be detained (without warrant of arrest) for a maximum period of sixteen days, provided the detention is authorized by a police officer of the prescribed rank.

English law. To date no reported application for the writ by detainees under the Preservation of Public Security or the Criminal Law (Temporary Provisions) Ordinances has met with success, though the ostensible severity of the operation of their respective detention powers has been mitigated by the administrative machinery of appeal which both enactments make available (and also of review in the case of political detainees).

On becoming law in October 1955 (after the repeal of the Emergency Regulations) the duration of the Preservation of Public Security Ordinance was optimistically fixed for a period of three years. However, by two amending ordinances (No. 38 of 1958 and No. 65 of 1959) its life has been prolonged first by two and then by a further four years. Section 3(1) of the 1955 Ordinance gave the Chief Secretary power to make orders for the detention of persons whom the Governor-in-Council was satisfied of the need to detain in order to prevent them "from acting in any manner prejudicial to the security of Malaya or the maintenance of public order therein or the maintenance of essential services."⁵ The maximum period of confinement prescribed by the Ordinance was two years. In lieu of making a detention order under sub-section 1, the Chief Secretary was empowered by sub-section 4 to direct the imposition of all or any one of the following restrictions relating to place of residence, to the number of hours spent "out of doors", to travel outside the island and also the notification to a specified authority of movements.

Provision was made under Section 4 for the suspension, at the Chief Secretary's discretion, of detention subject to all or any conditions as enumerated above in Section 3(4) with one addition: that of permitting released detainees to leave Singapore and to proceed to other countries who evinced a willingness to receive them.

The Chief Secretary could revoke any such direction if satisfied that the person against whom it was made had failed to comply with it "or that it is necessary in the public interest that such direction should be revoked."

Persons subject to orders under sections three or four were entitled to appeal (under Section 5) to Appeal Tribunals staffed by the direction of the Chief Justice. Each of these tribunals was to comprise not less than three persons of whom two had to be High Court Judges and one a District Court Judge. To enable him to prosecute such an appeal the subject of the order was required to

⁵ Set out in the First Schedule to the Ordinance.

Viz. Water Services, Gas Services, Electricity Services, Public Health Services, Fire Services, Prison Services, Postal Services, Telephone Services and Undertakings, Telegraph Services and Undertakings, Port, Dock and Harbour Services and Undertakings, Bulk Distribution of Fuel and Lubricants.

be furnished by the Chief Secretary with a statement of the grounds on which the order had been issued and other information which the Chief Secretary in his opinion might consider reasonably necessary for the presentation of the case. However, the provision of such materials was declared to be subject to "the requirements of public security, the protection of individuals and the safeguarding of sources of information."⁶ The same Peter-and-Paul arrangement applied to thwart the Tribunals' request that the official channels should supply additional information which they deemed necessary for the hearing.

The Governor-in-Council was empowered to make rules to regulate the Appeal Tribunals' procedure [Section 5(4)]. The Tribunals could by Section 7 revoke, amend or confirm orders made under Sections 3 and 4 and, in so doing, were enabled to make recommendations to the Chief Secretary.⁷

Whether or not the detainee availed himself of the opportunity to appeal, there existed, under Section 8, provision for automatic review of his case by an officer (appointed under Section 9 by the Governor-in-Council from persons qualified to be appointed Judges). Such review was to occur "not less often than once in every six months" – the Reviewing Officer to make recommendations in writing to the Governor-in-Council.

Section 10 conferred on Appeal Tribunals and Reviewing Officers coincident powers with those enjoyed by the ordinary courts for summoning and examining witnesses, for administering oaths or affirmations and for compelling discovery of documents. These functionaries were placed on a comparable protective footing with public servants for the requirements of the Penal Code and afforded the same immunity of suit as Judges.

In October 1958, it was deemed necessary to prolong the life of the Preservation of Public Security Ordinance by one Year (Ordinance 38 of 1958), and twelve months later (by Ordinance 65 of 1959) there was enacted a further extension of five years, *i.e.*, until 1964. One other amendment of real significance was affected by the 1958 Ordinance – the investment of the Chief Secretary with power to extend detention or supervision beyond the original maximum period of two years by additional periods not exceeding twelve months each.

⁶ Section 5(2). The highly discretionary nature of this criterion is underlined by Section 11.

⁷ See, e.g., Orders of the Appeal Tribunal re Fu Wu Mun and Lee Say Long, made on November 15, 1957 and reported in the *Straits Times* and *Tiger Standard* newspapers, November 16, 1957. For criticism of the exercise of the powers of the Tribunal under Section 7 see *University of Malaya Law Review*, Vol. 1, pp. 343, 344.

Structural reorganisation of a radical nature was wrought by the 1959 amendment Ordinance, Section 5 of which repealed the original section by replacing the Appeal Tribunals by Advisory Committees. Section 3(1) is redrafted but does not (as is claimed)⁸ confer any substantially enhanced flexibility on the Minister⁹ in his substitution of restraints for detentions than that which had been accorded the Chief Secretary. These restraints are almost identical with those set out in Section 4 as possible conditions attaching to the suspension of detention orders.¹⁰

The small core of Opposition members in the Legislative Assembly debate on the 1959 Amendment Bill expressed their disquiet over the replacement of an appeal tribunal of judges by one comprising at least three persons, only the Chairman of which must be qualified to hold judicial office. Committees composed on the latter model were to be appointed by the Yang di-Pertuan Negara, the Head of State under the new Constitution. Intrinsically the machinery of appeal remains unchanged.

Mr. A. P. Rajah¹¹ stated that, whilst the Opposition unanimously accepted the extension of the life of the Ordinance, they questioned the wisdom of displacing the Appeal Tribunals which had been functioning successfully since their inception. He went on to underline the need for having appellate bodies staffed by officers with "the absolute impartiality of Judges", otherwise "the fundamental rule of law will disappear."¹²

The Prime Minister, Mr. Lee Kuan Yew, had already said¹³ that the amendment was introduced to relieve the judiciary of a duty which they regarded as an embarrassing burden, and he referred to the protestations of two previous Chief Justices¹⁴ and to a letter addressed to the Chief Minister of the previous government by the (then) Acting Chief Justice Tan Ah Tah, who had been requested

⁸ By the Prime Minister, Mr. Lee Kuan Yew, on the occasion of the 1959 debate on the Ordinance. He stated that under the previous law, restrictions could only be imposed after a person had been detained. In view of the wording of the original Section 3 this would not appear to be true. See Singapore Legislative Assembly Debates, October 14 1959, Vol. 11, No. 11, Col. 670.

⁹ Of Home Affairs.

¹⁰ The one exception is that relating to the Minister's power of granting such person permission to return to the country of his origin or any other country willing to receive him. An addition to both the amended Section 3 and to the original Section 4(a) is the extension of "such restrictions as may be specified" beyond the subject's place of residence to "his employment or activities".

¹¹ The Member for Farrer Park.

¹² *Singapore Legislative Assembly Debates* October 14, 1959, Vol. 11, No. 11, Col. 676.

¹³ *Ibid.*, 668.

¹⁴ Sir Charles Murray-Aynsley and Sir John Whyatt.

to grant permission for the continuance of the practice for one further year.

Mr. Lee quoted from that letter:

"My brother judges and I are all of the opinion it is extremely undesirable for members of the judiciary to constitute the Appeal Tribunal under the Preservation of Public Security Ordinance... We think it was a mistake to have caused the judiciary to be associated with the work of the tribunal. However, in view of the reasons for the extension of the life of the Ordinance set out in your letter, and more particularly in view of the assurance that the judiciary will not be called upon to do this work for more than one further year, the judges who constitute the tribunal have agreed with great reluctance to serve as members of the tribunal."¹⁵

The Prime Minister went on to state¹⁶ that the extraordinary powers under the Preservation of Public Security Ordinance had never vested in the judiciary: in the last analysis they did not even vest in the Government. The final arbiter in the matter of detentions had, in fact, become the Internal Security Council¹⁷ which comprised three representatives each of the United Kingdom and Singapore Governments and one representative of the Government of the Federation of Malaya.

Detentions under the Preservation of Public Security Ordinance have not gone unchallenged in the courts.¹⁸ But the latter have interpreted Section 3(1) as establishing a subjective test, thus refusing applications for *habeas corpus* on the Chief Secretary or the Minister "showing cause" with an affidavit that the Governor-in-Council or the Yang di-Pertuan Negara "is satisfied" of the necessity for the detention and that the order was made in consequence of that satisfaction.

In *re Choo Jee Jeng* (1959)¹⁹ a new argument, in addition to another attempt to pierce the Executive's subjective armour, was advanced by counsel. It was contended that Section 3 (1) was *ultra vires* the Singapore Legislature because, when adverting to "the security of Malaya",²⁰ it seeks to achieve an extra-territorial application.

Mr. Justice Ambrose rejected this argument pointing out that

¹⁵ *Ibid.*, Cols. 668, 669.

¹⁶ *Singapore Legislative Assembly Debates*, October 14, 1959, Vol. 11, No. 11, Col. 670.

¹⁷ Set up under the Singapore (Constitution) Order in Council, 1958. Part VII, Sections 64—71.

¹⁸ *Fu Wu Mun* (1957) Unreported. *Lee Say Long* (1957) Unreported. *Re Choo Jee Jeng* (1959) 25 M.L.J. 217.

¹⁹ *Ibid.*

²⁰ "Malaya" is defined by Section 2 of the Interpretation and General Clauses Ordinance as comprising the Colony of Singapore and the Federation of Malaya.

detention orders made under the Ordinance were enforceable in the Federation of Malaya by Regulation 26 of the (Federation) Emergency Regulations 1951, and that, following the opinion of the Privy Council in *Wallace Bros. & Co. Ltd. v. Commissioner of Income Tax, Bombay* (1948) 75 I.A. 86, 98; A.I.R. 1948 P.C. 118; 52 C.W.N. 620, it "dealt with extra-territorial matters."²¹ The learned Judge also dismissed the other ground on which the application was based, holding that the court was precluded from inquiring into the question whether the Governor had reasonable grounds for being satisfied because the Ordinance imposed a test along the lines of that in *Liversidge v. Anderson*.²² He carried the point a stage further by stating *obiter* that even if Section 3(1) had not ordained a subjective test he would have refused the application for *habeas corpus* (which was not a writ of course) because there existed the alternative remedy of appeal [under Section 5(1)] to an appeal tribunal.

A similar interpretation was accorded Section 55(1) of the Criminal Law (Temporary Provisions) Ordinance²³ by the court in *In Re Ong Yew Teck* (1960). This was also an application for *habeas corpus*. The applicant had been arrested and detained²⁵ by the police under Section 55 as a secret society suspect. Ong contended that his arrest was illegal because it was made by a Detective Corporal who, under Section 55 (1), could show no reason to believe that there were grounds justifying detention under Section 47. The second ground of challenge was that the court was entitled to examine whether there were sufficient reasons for the detention,

²¹ For criticism of this decision see *University of Malaya Law Review*, Vol. 1, pp. 361, 362.

²² [1942] A.C. 206.

²³ Ordinance No. 26 of 1955 as amended by Ordinances No. 25 of 1958, No. 36 of 1958, No. 34 of 1959, No. 56 of 1959 and No. 43 of 1960.

²⁴ (1960) 26 M.L.J. 67.

²⁵ The relevant sections of the Ordinance are as follows:

Section 55(1): "Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe there are grounds which would justify the detention of such person under Section 47 of this Ordinance".

Section 47 reads: "Whenever the Minister is satisfied with respect to any person, whether such person be at large or in custody, that such person has been associated with activities of a criminal nature, the Minister may with the consent of the Public Prosecutor - (a) if he is satisfied that it is necessary that such person be detained in the interest of public safety, peace and good order, by order under his hand direct that such person be detained for any period not exceeding one year from the date of such order; . . ."

Section 53: "Nothing in this Ordinance or in any rules made under Section 59 of this Ordinance shall require the Minister or any other public servant to disclose facts which he considers to be against the public interest to disclose."

the applicant claiming that Section 55(1) imposed an objective rather than a subjective test.

Chua J., who discharged the order *nisi*, held that since the Corporal was only acting as the "instrument" of the committing officer (an Acting Deputy Superintendent of Police) and had no discretionary power conferred on him, his actions were to be construed as those of his superior. To the argument, based on the judgment of the Privy Council in *Nakkuda Ali* (1951),²⁶ the learned judge replied that the degree of discretion conferred by the legislature must always be determined in the context of the Statute or regulation which was in question. Therefore, if the court were to decide the question of "reason to believe", it must have before it all the material evidence. Otherwise to ask it to pass judgment would be futile. In *Re Ong Yew Teck* the officer had made a declaration that it would be prejudicial to the public interest.²⁷ As there was nothing before the court to show that the officer had not honestly supposed that he had reason to believe what Section 55(1) required him to believe, the court was not entitled to question his statement.

The Minister is empowered by Section 47(b) to make orders directing the police supervision of criminal suspects "for any period not exceeding three years from the date of such order."²⁸ Section 48(1) provides for the reference within twenty-eight days of their making of orders for detention and supervision to an Advisory Committee consisting of not less than two persons,²⁹ for whom no special qualifications are prescribed. Committees set up under Section 48 are required to make written reports on the making of orders and may submit recommendations to the Yang di-Pertuan Negara who must consider such reports. The Yang di-Pertuan Negara may cancel, confirm or vary the findings of the Committees "as he shall think fit". Section 52 confers upon Advisory Committees the same powers and immunities as are enjoyed by their counterparts under section 10 of the Preservation of Public Security Ordinance.

²⁶ *Nakkuda Ali v. M.F. de S. Jayaratne* (1951) A.C. 66.

²⁷ As a public servant he was entitled to do this (Section 53).

²⁸ These restrictions are enumerated in Section 49. They are imposed at the discretion of the Minister who may cancel, vary or add to them by written notice to the subject of the order. The restrictions relate to residence and hours spent within and out of doors. Persons subject to such supervision may not leave Singapore without authorization and may be obliged to keep the police informed of their places of accommodation. They may also be required to report to the police at specified times. Contravention or non-compliance with an order is an offence under Section 49A(3) punishable with imprisonment from one to three years. See also Sections 49B, 49C and 49D which also prescribe deterrent punishments for contravention of their provisions by supervisees. On Section 49A(1) see *Public Prosecutor v. Chua Siang Kang* Magistrate's Appeal No. 184 of 1960, as yet unreported.

²⁹ Section 51.

Any police officer may without warrant detain persons "in respect of whom he has reason to believe there are grounds which would justify the detention of such person under Section 47" for a maximum period of twenty-four hours. Officers of or above the rank of Assistant Superintendent may authorise detention for a further twenty-four hours, and if an officer of or above the rank of Superintendent of Police is satisfied that the necessary enquiries cannot be made within that period he may authorise further detention for fourteen days (Section 55).

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PREVENTIVE AND ADMINISTRATIVE DETENTION IN THE U.S.S.R.

Protective custody or administrative detention, as distinguished from the serving of a penalty under a court sentence, have varied in different periods of the Soviet regime. Examination in historical perspective through the successive stages of the Soviet regime may facilitate assessment of its present status. Such a study is offered on the following pages.

I. EARLY PERIOD (1917-1923)

Throughout the early period from 1917 to 1923 there were practically no courts in the Soviet Union. By one of the earliest decrees issued on November 24 (December 7, new calendar), 1917, all existing courts were abolished, public prosecutors were dismissed and the organized Bar was destroyed.¹ The newly created lower courts were under constant reorganization and it was not until 1923 that a definite court system emerged. Up to then there was no definite provision for higher courts.

The activities of the Vecheka and of "revolutionary tribunals" overshadowed the court action.

A. Vecheka, Cheka

From almost the very inception of the Soviet regime an administrative body came into being with unlimited power to impose not only confinement but also the death penalty. This was the Cheka, a name derived from the first letters of the Russian word *Chrezvychainaia Kommissiia* meaning Extraordinary Commission, also called the Vecheka, the first letters of *Vserossiiskaia Chrezvychainaia Kommissiia*, Extraordinary Commission of All Russia.

The exact date of its establishment cannot be ascertained nor can the specific decree creating it be located. When the necessity arose to find it in connection with the twentieth anniversary of the institution the only thing that was printed was a short note on the discussion of the matter at the session of the Council of People's Commissars. To quote the relevant passage:

¹ *RSFSR Laws 1917-1918*, Text 50.

The question of the fight against counterrevolution and sabotage was brought up by Lenin at the session of the Council of People's Commissars [Cabinet] on December 6 (December 19 of new Calendar) [1917]. The question was deliberated by the Council the next day, December 7 (December 20 of new Calendar), when a report by F. E. Dzerzhinsky concerning the organization and composition of the Commission on the fighting of sabotage (Vecheka) was heard.

The draft of a decree on speculation and fighting counterrevolution was "afterwards discussed several times at the sessions of the Council of People's Commissars during December 1917 and January 1918, but *because it was not sufficiently worked out it was never promulgated*. It seems that the draft of the decree was written on December 7 (20) or 8 (21) when the question first came up."²

The recent semi-official history of Soviet criminal law expressly stated that "the decree concerning the organization of the Vecheka was not published."³ Moreover, the same source relates that the "Extraordinary Commission of All Russia and the local extraordinary commissions exercised their activities for a year without any 'statute'."⁴

It may be stated that although three statutes appeared later, November 2, 1918, February 17, 1919, and March 18, 1920,⁵ the power of the Vecheka remained broad and unlimited.

... the Vecheka performed not only tasks of intelligence and counter-intelligence but also the task of checking crimes and rendering summary justice to the enemies of the people. *The Vecheka did not have any generally established rules of criminal law at its disposal.*⁶

Krylenko, former Commissar of Justice, characterized the Cheka activities as follows:

² *20 let Vecheka-OGPU-NKVD (Twenty Years of Vecheka-OGPU-NKVD)*, Moscow, 1938, p. 10, note 1. Italics supplied.

³ Gertsenson, A. and others. *Istoriia sovetskogo ugovnogo prava* (History of Soviet Criminal Law), 1948, p. 83.

⁴ *Ibid.*, pp. 98—99. A collection of documents entitled "From the History of the Vecheka" appeared in 1958. It contains, under the title "Excerpt from the Minutes of the Council of People's Commissars No. 21 on the Creation of the Vecheka" a highly informal record dated December 7, 1917. It states that "the report by Dzerzhinsky on the organization and composition of the commission to fight sabotage was heard" and it was resolved "to name the commission the All-Russian Extraordinary Commission attached to the Council of People's Commissars to fight counterrevolution and sabotage, which confirmed its composition." The rest of the record consists of abbreviated words outlining the tasks of the commission and limiting its power to investigation. It looks more like notes taken of the meeting rather than a final formal record. This book also contains an excerpt from *Izvestiia* of December 10, 1917, No. 248, consisting of some four lines stating that the Council of People's Commissars established the Commission, and its address. There is not a word about its powers.

⁵ *RSFSR Laws* 1917/1918, Text 842; *id.*, 1919, Text 130; *id.*, 1920, Text 75.

⁶ *Op. cit.*, note 3, pp. 98—99.

The Cheka established a *de facto* method of deciding cases without judicial procedure... In a number of places the Cheka assumed not only the right of rendering final decisions but also the right of control over the courts. Its activities had the character of tremendously merciless repression and complete secrecy as to what occurred within its walls... Final decisions over life and death with no appeal from them... were passed... with no rules establishing the procedure or jurisdiction.⁷

One of the decrees dealing with the powers of the Cheka stated among other things that the Cheka had the power to confine in a concentration camp for not over 5 years "violators of labor discipline and the revolutionary order, and parasitic elements of the population if *no evidence sufficient for a judicial procedure is disclosed against them by investigation*" (Italics supplied).⁸

Order No. 48 of April 17, 1920, of the Cheka Presidium, printed in a Cheka publication, stated:

The law gave the Cheka power to imprison by an administrative procedure those... *whom any court, even the most severe, would always, or in the majority of cases, acquit.* (Italics supplied).⁹

Latsis (Sudrabs), one of the Cheka leaders, wrote two books giving popular accounts of Cheka activities: *Two Years of Fighting*, published in 1920, and *The Extraordinary Commission for Combatting Counterrevolution*, published in 1921.¹⁰ The activities of this institution are characterized there in terms which leave no doubt that they were not limited by any law, that is, they were extralegal from every point of view. To quote:

Not being a judicial body the Cheka's acts are of an administrative character... It does not judge the enemy but strikes... The most extreme measure is shooting... The second is isolation in concentration camps. The third measure is confiscation of property... The counterrevolutionaries are active in all spheres of life... Consequently, there is no sphere of life in which the Cheka does not work. It looks after military matters, food supplies, education... etc. In its activities the Cheka has endeavored to make such an impression on the people that the mere mention of the name Cheka will destroy the desire to sabotage, to extort, and to plot.¹¹

The same report also contained statistics on the penalties meted out by the Cheka and other security measures taken by it. The figures given there are qualified in the report as being "far from complete and relating only to 20 provinces for 1918 and 15 provinces for

⁷ Krylenko. *Sudoustroistvo RSFSR (The Judiciary of the RSFSR)*, Moskva, 1923. pp. 97, 322—323.

⁸ Decree of March 18, 1920, *RSFSR Laws 1920*, text 75.

⁹ Appendix to Krylenko, *op. cit.*, note 7, p. 371.

¹⁰ The titles in Russian read *Dvo goda Bor'by*, 1919 and *Chrezvychainaia Komissiia po bor'be s kontrrevolutsiei*, 1920.

¹¹ Latsis, *Chrezvychainaia Komissiia*, pp. 8, 15, 23, 24.

1919" out of a total of about 80 controlled by the Soviets. "This picture," says the report, "is incomplete." In 1918 and the first six months of 1919 a total of 14,480 persons were executed by firing squad, 9,498 were sent to prison camps, 34,334 were imprisoned, 15,111 were taken as hostages, and 86,895 were arrested.¹²

B. Revolutionary Tribunals

The so-called Revolutionary Tribunals, the only rival of the Cheka, were courts in name only. According to Krylenko, "in the jurisdiction of the [revolutionary] tribunals complete freedom of repression was advocated while sentencing to death by shooting was a matter of everyday practice."¹³ There were no provisions guaranteeing suspects the right of defense in the tribunals. With reference to the words of Karl Marx that political adversaries may be shot but not tried, Stuchka, the Commissar of Justice of that time, wrote that Revolutionary Tribunals "were not even intended to be courts."¹⁴

It was decreed on June 16, 1918, that "the Revolutionary Tribunals are not bound by any limitations in the selection of measures for combatting counterrevolution, sabotage, etc., with the exception of cases where the laws set the punishment in terms of 'not under' a certain punishment."¹⁵ It was confirmed by later decrees that the tribunals "are not bound by anything in the selection of punishment."¹⁶ The tribunals were instructed to render their judgments, being guided "exclusively by the interests of the revolution,"¹⁷ or "exclusively by the circumstances of the case and the revolutionary conscience."¹⁸

The summoning of witnesses as well as the admittance of a counsel for the defense was left to the discretion of the tribunals.¹⁹ With regard to some special tribunals it was stated that they were "not bound by any form of judicial procedure."²⁰ Otherwise the decrees mentioned the necessity of an open trial in the presence of the prisoner if he was available.²¹

¹² Latsis, *Dva goda bor'by*, p. 75-76.

¹³ Krylenko. *Op. cit.*, note 7, p. 205.

¹⁴ Quoted from Krylenko, *op. cit.*, note 7, p. 52.

¹⁵ *RSFSR Laws 1917/1918*, Text 553.

¹⁶ *Id.* 1919, Text 130, Section 4; Text 132, Section 1; *id.* 1920, Text 115, Section 1.

¹⁷ *Id.* 1919, Text 504, Sections 1, 5; Text 549, Section 53; *id.* 1920, Text 115, Section 24.

¹⁸ *Id.* 1919, Text 132, Section 25; *id.* 1920, Text 115, Section 24, *Re Military Tribunals*, *id.* 1919, Text 151.

¹⁹ *Id.* 1919, text 130, Section 4 (c); text 132, Sections 17, 20; *id.* 1920, text 115, Sections 17, 19.

²⁰ *Id.* 1919, text 504, Sections 1, 3.

²¹ *Id.* 1917/1918, text 170, Sections 4, 6; *id.* 1919, text 130, Section 4 (c); text 132, Section 19; text 549, Section 25; *id.* 1920, text 115, Section 8.

C. Courts under the New Code

A new era seems to have been inaugurated in 1922 under the more liberal policies of the NEP (New Economic Policy). Together with the limited admission of private enterprise into economy came also a recognition, though with reservations, of private rights. More or less definitely established courts made their appearance and were supposed to follow a Criminal Code and a Code of Criminal Procedure enacted in 1922.

A judiciary act of 1923 established a uniform definitive system of courts which has, in the main, survived to the present. The offices of public prosecutors (government attorneys – *prokuratura*) were also restored. The revolutionary tribunals came to an end although some of their particular features were carried on by the new courts. The courts were established as obedient instruments of the policy of the government and the Communist Party. The establishment of courts did not carry with it any separation of the judicial branch from the executive. The doctrine of the separation of powers is repudiated by Soviet ideologists in general and that of the separation of the judicial power from the executive in particular. This attitude was the guiding principle when the courts were established and the same is true of the present time. Thus Krylenko stated in his lectures in 1923:

No court was ever above class interest and if there were such a court we would not care for it . . . We look upon the court as a class institution, as an agency of government power, and we erect it as agency completely under the control of the vanguard of the working class . . . Our court is not an agency independent of governmental power . . . therefore it cannot be organized in any other way than dependent upon and removable by the Soviet power.²²

The same idea was stated by Vyshinsky in 1936:

The court of the Soviet State is an inseparable part of the whole of the government machinery . . . This determines the place of the court in the system of Soviet administration.

The general [Communist] Party line forms the basis of the entire government machinery of proletarian dictatorship, and also forms the basis of the work of the court . . . The court has no specific duties, making it different from other agencies of government power, or constituting its 'particular nature.'²³

This was reiterated in more recent treatises on the judiciary:

The independence of judges from local influences in no way signifies that judges are cut off, separated from other agencies of government administration, that, in their work, they are free from carrying out the general line of the [Communist] Party or from carrying out the general government policy.²⁴

²² Krylenko, *op cit.* note 7, pp. 27, 42, 177, p. 14, 15.

²³ Vyshinsky and Undrevich 308, 1936. *Kurs ugolovnogo protsessa. Tom. 1, Sudoustroistvo* (Course in Criminal Procedure, Vol. 1, The Judiciary). 1936, pp. 7, 8, 23, 24, 28, 29.

²⁴ *40 let sovetskogo prava*, (Forty Years of Soviet Law), Leningrad, 1957, vol. 2, p. 568.

The new codes bore the birthmark of the practices of the early period. According to Stuchka, then Commissar of Justice, the new Criminal Code was a "codification of revolutionary practices consolidated on a theoretic basis."²⁵ Again the Soviet rulers did not intend, in the words of Krylenko,²⁶ "to have their hands bound." Consequently, the Criminal Code left ample room for the arbitrary imposition of punishments. Likewise, Lenin stated that "the courts shall not do away with terrorism; to promise such a thing would mean to deceive ourselves and others."²⁷ Thus, the newly created Soviet courts departed from several principles of the administration of justice of Western and Imperial Russian judicial bodies.

The term of office of judges was very short, one year for the lower court, and it was made easy to remove judges before the end of their term. The new Criminal Code allowed the application of a penalty not only for an act exactly defined by the Code but also for an act merely resembling the statutory definition. The application of a penal provision of the Code by analogy was expressly allowed (Section 12 of the Code of 1922 and Section 16 of the Code of 1926). A striking feature of the Code of Criminal Procedure was that the provincial (later regional) courts could refuse "to admit as a counsel for defense any formally authorized person if the court considers such person not appropriate for appearance in the court in a given case depending upon the substance of the special character of the case."²⁸ Moreover, a provincial court could hear a case in the absence of both the prosecution and the defense. Section 281 of the same Code reads:

Admission of prosecution and defense at a trial in a provincial court shall not be mandatory and shall be decided in each case in an executive session of the court depending upon the complexity of the case, upon the extent to which the crime is proven, and upon the special political or public interest in the case.

The provincial court must admit or appoint the counsel for the defense if a prosecutor is admitted.

The renouncement by the defendant of counsel shall not prevent the admission of the prosecutor.

Thus a flexible and obedient tool of repression was at the disposal of the newly established court. The question of the abolition of the Vecheka was raised. The first decree on the subject, December 30, 1921, officially promised that "the fight against violations of the laws of the Soviet Republic shall be entrusted to the judicial bodies."²⁹

²⁵ Stuchka, *Kurs sovetskogo grazhdanskogo prava tom 1. Vvedenie* (Course in Soviet Civil Law, v. 1. Introduction), 1931, p. 85.

²⁶ Krylenko, "Proekt ugolovnogo kodeksa" (Draft of a Criminal Code) in *Sovetskoe gosudarstvo* No. 1 (1935), p. 86.

²⁷ Lenin, *Sochineniia* (Works), 3d Russian ed., vol. 27, p. 296.

²⁸ RSFSR Code of Criminal Procedure, Section 382.

²⁹ RSFSR Laws 1921, text 92.

The same was restated in the decree of February 6, 1922, which abolished the Vecheka:

In the future all cases involving crimes which are directed against the Soviet regime or violate the laws of the RSFSR shall be subject exclusively to trial in Court.³⁰

The last promise was not carried out and the abolition of the Vecheka was not followed by the courts' monopoly of penal prosecution. Various successors to the abolished Vecheka appeared side by side with the courts, and a dual system of criminal prosecution came into being. Along with the courts there has been an administrative security agency with broad undefined powers the name of which has varied: 1922-1934 it was called the GPU (State Political Administration)³¹ and OGPU (Federal State Political Administration); in 1934-1946 it was the NKVD (People's Commissariat of the Interior);³² from 1946-1954 it was the MVD (Ministry of the Interior)³³ and MGB (Ministry of State Security);³⁴ and since 1954 it is known as the KGB (State Security Committee).³⁵

Regardless of its name, this agency's powers and activities were defined by law only to a very limited extent. The very fact of its existence seems to have given this agency by implication all the powers needed for the accomplishment of its task - the protection of the security of the regime. That there is continuity between the activities and powers of the Vecheka and those of the current security agency has been plainly recognized in a comparatively recent Soviet study of the history of Soviet criminal law.

The first year of its [the Vecheka's] activities served for working out the principles of the chekist work [and] traditions which, for a quarter of a century, have secured the repressive activities of the Vecheka-OGPU-NKVD-MVD-MGB.³⁶

II. OGPU AND THE COURTS

Let us now look at the legal provisions dealing with the security agencies. The immediate successor to the Vecheka was the OGPU. It was established in the individual Soviet republics as a part of their People's Commissariats of the Interior prior to the formation of the Soviet Union in 1923. When the Union was formed no federal Com-

³⁰ *Id.*, 1922, text 160.

³¹ *Gosudarstvennoe politicheskoe upravlenie.*

³² *Narodny Kommissariat Vnutrennikh Del* also *Narkovnu del.*

³³ *Ministerstvo Vnutrennikh Del.*

³⁴ *Ministerstvo Gosudarstvennoi bezopasnosti.*

³⁵ *Komitet Gosudarstvennoi bezopasnosti.*

³⁶ Gertsenson, *op. cit.* note 3, p. 98-99.

missariat for the Interior was established and the GPU became an independent federal agency, the OGPU attached directly to the Cabinet. The pertinent constitutional provisions (1924 Constitution, Sections 61-63) were silent on the powers of the OGPU, its task having been defined in the most general terms such as "uniting the revolutionary efforts of constituent republics in their fight against the political and economic counterrevolution and banditry." The OGPU obviously inherited the powers of the GPU. The pertinent Statute of February 6, 1922,³⁷ provided for certain powers of the GPU agents. All these agents could make an arrest, a house search or seize objects within 48 hours after an act was committed. After 48 hours a written permission from the GPU office was required. The charge had to be presented to the prisoner within two weeks. After the expiration of two months the prisoner had to be turned over to the court or released, or a warrant for further "isolation" had to be requested from the Central Executive Committee and not the court. Again the GPU was expressly required to transfer only cases of "ordinary crimes" to the courts for judgment, which implied that judgment of extraordinary, i.e., more important, crimes remained in the jurisdiction of the GPU.³⁸ Moreover, the Decrees of August 10 and October 16, 1922³⁹ authorized the GPU "to exile and confine at the place of exile in a camp of forced labor" for a period of up to 3 years "active members of anti-Soviet parties" and criminals tried twice for banditry, counterfeiting, smuggling, rape, hooliganism, larceny, robbery, forgery of documents, falsification of commodities, and possession of firearms. It may be noted that the mere fact of former trials was sufficient for confinement in a camp of forced labor, and exile could be applied for a great variety of political activities and non-political crimes. The Decree of October 16, 1922 authorized the agencies of the GPU to shoot to death on the spot bandits and holdup men caught in the act. The Statute in the OGPU of November 15, 1923⁴⁰ was silent on the death penalty with the exception of a reference to the above-mentioned Decree of October 16, 1922. But any doubts in this respect were removed when an *ex post facto* interpretation was issued by the Central Executive Committee on March 14, 1933, confirming the right of the OGPU "to apply all measures of repression depending on the nature of the crime."⁴¹ Two days before this date *Izvestiia* printed an announcement "from the OGPU" stating briefly that in the case of 80 prisoners, 36, whose names were

³⁷ RSFSR Law, 1922, item 160.

³⁸ RSFSR Laws, 1922, text 160.

³⁹ *Ibid.*, texts 646 and 844.

⁴⁰ *Vestnik*, 1923, 6, item 225.

⁴¹ USSR Laws, 1933, text 108.

given, were shot and the rest were given various terms of imprisonment.⁴²

Thus the OGPU appeared as the true successor of the Vecheka. Its investigative activities were also mentioned in the Code of Criminal Procedure designed for courts. The Code expressly mentioned that some cases are investigated not by investigation authorities subordinate to the public prosecutors but by security agencies, i.e., the OGPU, later NKVD, MVD, MGB and KGB (*supra*). The Code reserved to special regulations, which have never been enacted or have remained secret, the determination of "cases in which the investigation of crime" is reserved for security agencies (RSFSR Code of Criminal Procedure, Section 108, para. 2). "The procedure in the confirmation of arrests made by agencies of the GPU" is also reserved to the same regulations (*id.*, Section 104, note). Krylenko stated in 1928 that it was regulated by a secret instruction which "must legally remain unknown to the broad masses of the population."⁴³ It has never been made public (see also *infra* the recent federal law on criminal procedure). In other words, the provisions of the Code of Criminal Procedure on pretrial arrest are not binding upon security agencies. The same is true of the procedure of security agencies in conducting pretrial investigations (*id.* Section 107). Thus even the guarantees for a suspect afforded by the Code do not have to be followed by the security agencies conducting investigations in cases designed to be tried by courts.

During the period of the OGPU one of its activities was especially developed, viz., the forced labor camps, later called camps of correctional labor. Court sentences for periods exceeding three years had to be also served in these camps. They were finally transformed into large scale projects of convict labor which was of the utmost importance to the Soviet economy.⁴⁴ The vastness of such projects may be illustrated by the officially published figures on amnesties and reduced terms after the completion of two such projects. After the construction of the canal between the Baltic Sea and the White Sea 72,000 prisoners were either pardoned or received a reduction of their terms, and after the completion of the Moscow-Volga canal 50,000 prisoners were pardoned.⁴⁵

⁴² For the text of the announcement and more details on the *ex post facto* interpretation see Gsovski, *Administration of Justice. Soviet Union*. Chapter 15, title 8 in Gsovski and Grzybowski, joint ed., *Government, Law and Courts in the Soviet Union and Eastern Europe*. Atlantic books, London and New York, 1959, p. 570 ff.

⁴³ Krylenko *op. cit.*

⁴⁴ For more details see *id.*, p. 572.

⁴⁵ *USSR Laws* 1933, text 294; *id.* 1937, text 187.

III. NKVD - MVD - KGB

A new legal regulation was applied to the powers of the security agency when it was transformed into the People's Commissariat of the Interior in 1934 (NKVD), renamed the Ministry of the Interior (MVD) in 1946. At that time several laws, enacted in the form of resolutions of the Central Executive Committee, extended the jurisdiction of the NKVD beyond that of the OGPU. The new Commissariat was charged, as was the OGPU, with "the security of the revolutionary order and the safety of the State," "protection of public (socialist) property," and the "guarding of the frontiers." It also had additional duties such as the keeping of vital statistics, responsibility for all penal institutions, and taking care of the passport system, with the power to refuse permission to reside in large cities, etc.

For our purpose the most important are two acts, one of June 10, and the other of November 5, 1934.⁴⁶ These acts authorized the NKVD-MVD to apply to persons whom the agency considered "socially dangerous" one of the following: confinement in a camp of correctional labor for up to five years with unlimited possibility of prolongation; exile in a definite locality with or without forced labor; prohibition to reside in certain places for the same period, or banishment from the Union. Such persons did not have to be charged with any particular crime. The law required only that they be considered "socially dangerous" by the NKVD (later MVD). To apply these measures a Special Board was set up in the Ministry consisting of high-ranking employees of the NKVD (MVD) and the General Procurator.

The imposition of the death penalty was not mentioned in any resolution dealing with the NKVD-MVD.

During World War II the NKVD and later the MVD were subdivided interchangeably into two departments and then fused again. One continued to bear the old name and the other was called the Commissariat for (the Ministry of) State Security. The power to exile remained with the Ministry of the Interior. In 1954 a State Security Committee (KGB)⁴⁷ was created with Serov, a high-ranking MVD man, at the head. This Committee is, as was the OGPU in its time, directly attached to the Council of Ministers. The powers and jurisdiction of the Committee have never been defined by law or decree. A university textbook on the judiciary made it plain that all investigation agencies of the MVD were transferred under the State Security Committee.⁴⁸ The Committee also has local offices and there

⁴⁶ *USSR Laws* 1934, texts 283, 284; *id.* 1935, text 84.

⁴⁷ *Vedomosti* 1954, text 212.

⁴⁸ Karev, D. S. *Organizatsiia suda i prokuratury SSSR* (Organization of the Court and Government Attorneys in the USSR). Moscow, 1954. pp. 170-171.

are similar committees in the individual republics.⁴⁹ From all this it may be inferred that all security agencies of the MVD have now become agencies of the Committee and that for all purposes the Committee is a successor to the MVD as it is described in university textbooks.⁵⁰

Thus it may be concluded that up to December 1958 there were broad possibilities for the detention of citizens as a protective or preventive measure. The application of such measures was regulated by law to a very limited extent and remained largely within the discretion of the executive authorities.

IV. AFTER THE REFORM OF 1958

A radical reform of criminal law and procedure took place on December 25, 1958.⁵¹ To assess its significance, a few technical remarks on Soviet federalism are needed.

The Soviet Union is a federation of 15 Soviet states called republics. According to the latest amendment to the federal Constitution in 1957,⁵² the federal authorities enact only "basic principles" of criminal law and procedure. The issuance of codes is reserved to the authorities of individual Soviet republics. The republics may also issue their own penal statutes in addition to codes. Prior to December 1958, the Soviet criminal law was essentially a uniform body of penal provisions contained in "basic principles" enacted in 1924 by the federal authorities and in the uniform codes enacted at various times in the individual Soviet republics. On December 25, 1958, only the federal "basic principles" on criminal law and criminal procedure were enacted, and these are to be followed by new codes to be issued by individual republics.⁵³

The new Principles of Criminal Law and Criminal Procedure enacted on December 25, 1958, bluntly declare the monopoly of courts in the imposition of penalties. They state categorically that "criminal punishment may be imposed only by a court sentence" (Section 3 of the Principles of Criminal Law) and that "no one may be declared guilty of committing a crime and be subjected to punishment except by a court sentence" (Section 7, phrase 2 of the Principles of Criminal Procedure). The Principles show a complete break

⁴⁹ Vlasov, V. A. and S. S. Studenkin. *Sovetskoe administrativnoe pravo* (Soviet Administrative Law). Moscow, 1959. p. 263.

⁵⁰ *Ibidem*.

⁵¹ *Vedomosti* 1959, texts 6, 8, 10, 11, 15.

⁵² This amendment in fact restored the provisions which were in force from 1924 to 1956.

⁵³ Criminal codes have been enacted thus far in the Uzbek and Kirghiz republics but, not being regularly promulgated, were not available to the writer.

with the forty-year-old practice in the Soviet Union of imposing penalties out of court. But the new Principles need implementation in the federal legislation, in the codes of individual republics and in the penal statutes enacted by them.

This is not the first time that Soviet statutes have gone on record promising that the power to impose punishment shall be reserved to the court. It may be recalled that when the Vecheka was abolished in 1922 it was officially promised that, in the future, criminal cases would be handled by the courts (see *supra* p. 10, 11). The same was implied in the legislation on the GPU, the OGPU, and the NKVD, but these promises never materialized, and these agencies continued to impose detention and even to exercise wide penal jurisdiction despite the penal powers of the courts.

It may be noted that the reform laws of 1958 are couched in careful and rather technical language. The imposition of "criminal punishment" alone is reserved to the courts. What does the word "criminal" mean? It suggests that there may be other penalties which do not come under the provisions of the new laws. This is, of course, true of penalties imposed by disciplinary action. But it means more than that. Sufferings and the abridgment of rights to which citizens were subjected by administrative agencies in the past were never technically called punishment but were designated as "repressions," "measures of social defense," or even were given no designation whatever, although for all practical purposes they were punishments. To be conclusive, the declaration of the monopoly of courts for the imposition of punishment should have been followed by the repeal of all the laws which are in conflict with the declared principle, since they allow the MVD to take steps tantamount to punishments. This has not been done. Simultaneously with the reform of December 25, 1958, the USSR Presidium was commissioned "to approve a list of laws and decrees which are no longer in force because of" the reform. Such a list was approved on April 13, 1959, and made public in *Vedomosti*, 1959, item 91. However, one looks in vain in this list for the Acts of 1934 which bestowed upon the NKVD and its successor, the MVD, the broad power to confine "socially dangerous persons" in a corrective labor camp for up to 5 years and other powers (*supra*, p. 144). On several occasions the Soviet high officials stated orally that the Special Board which applied such confinement had been abolished. However, it was never stated that the Ministry of Interior (MVD) had been deprived of such powers. The federal MVD was abolished in January 1960 but its jurisdiction was transferred to the Ministries of the individual republics.⁵⁴ Thus all the laws which provide for such power remain on the statute book although their application may have been shelved.

⁵⁴ *Vedomosti* 1960, text 25.

Finally why have the powers of the State Security Committee not been legally defined thus far? The new Federal Basic Principles of Criminal Procedure expressly reserve the conduct of pre-trial investigation in political cases to the "agencies of state security" (Section 28), by which are meant, evidently, the agencies of the State Security Committee. Whether such investigations are exempt, as they were before the reform, from the codified provisions of law (pp. 14-15 *supra*) it will only be possible to state after the RSFSR Code and the codes of the republics are enacted. It is more than likely that the agencies of the new State Security Committee, like, in their time, those of the OGPU, continue to exercise all the powers needed for the fulfillment of its function of providing for the security of the State.

Thus the situation on the federal level remains ambiguous and is fraught with possibilities of arbitrary arrest. The discussions in the Soviet university textbooks on administrative law concerning the difference between "arrest" technically so called, which is subject to the provisions of the Code of Criminal Procedure and the Constitution, and mere "detention", open to the discretion of the administrative authorities, lead to pessimistic conclusions. Such discussions appeared in a textbook of 1946, were repeated in its 1950 edition, and were restated essentially in the 1959⁵⁵ edition which appeared after the reform. The latter passage reads:

The detention of a person by competent agencies does not have the character of administrative arrest... Administrative agencies are not granted the right to make arrests in administrative action. An exception is made only in areas placed under martial law....

By its essence as well as its form an arrest is sharply distinct from detention. In the first place, arrest is an act which defines in advance, in accordance with the law, the deprivation of liberty of a certain citizen for distinct, definitely established reasons. An arrest may be made only by a court order or with the approval of the public prosecutor. But the usual detention by agencies of the Ministry of the Interior, State Security Committee and other agencies has a preventive character. It may be done for a variety of reasons, but their basis is always of a preventive significance, aiming to preclude the commission of a violation endangering public order and security, the security of the person and property of citizens (resistance to the orders of police agencies, hooliganism, rioting, state of intoxication, etc.) and protecting socialist property.⁵⁶

⁵⁵ Evtikhiev and Vlasov, *Administrativnoe pravo SSSR* (Administrative Law of the USSR), 1946, p. 238; Studenikin, Vlasov and Evtikhiev, *Sovetskoe administrativnoe pravo* (Soviet Administrative Law), 1950, pp. 184-185; Vlasov and Studenikin, *Sovetskoe administrativnoe pravo* (Soviet Administrative Law), 1959, pp. 166-167.

⁵⁶ Vlasov and Studenikin, *op. cit.*, 1959, pp. 166-167.

The treatises indicate also that agencies of the Ministry of the Interior and the State Security Committee, i.e., the regular and security police, may likewise "detain persons accused of definite crimes," i.e., persons whose cases are intended for court action. The treatises emphasize that only for such cases is the length of detention stated in the Code of Criminal Procedure. Consequently, whenever the prosecution of a "socially dangerous person" outside of court is intended, no legal provision establishes the length of time for his preliminary confinement before he may have recourse to a court because the entire proceedings, including sentencing, take place out of court.

A much more pessimistic picture is presented by the penal laws of the individual republics. As late as 1957 and 1958, when the reform was under discussion, laws against "parasites" were enacted in the Uzbek, Latvian, Kazakh, Turcoman, Azerbaijan, Tadjik and Armenian Soviet Republics.⁵⁷ These laws were practically uniform and are directed not only against "adults able to work, citizens who carry on a parasitic way of life [or] maliciously evade socially useful work" but also against "those who live on unearned income" (Section 1). Such persons may be deported for a period of two to five years with the duty to work at the place of deportation. In cities they are sentenced by the "popular judgment" of an assembly of "adult citizens residing in the area of a house management, a street committee, or a precinct committee," and in rural localities, by the "residents of the village." A general meeting of the majority of such residents passes judgment by simple majority in an open ballot, and this judgment is then "submitted for approval to the competent executive committee" of the district (equivalent to a county) or city, i.e., local, purely administrative agencies. The decision of these committees is final and subject to immediate execution. There is no appeal to a court.

By "persons who live on unearned incomes" are meant persons who actually earn their own living, but not in a manner in tune with the current Soviet economic policy. "Some of them," says the preamble to the law, "are working [by employment] but actually are not living on the income from their employment." This law was applied, for example, to members of collective farms who worked hard on their private garden plots but failed to attain the required credit for participation in the collective work of the farm.⁵⁸ In Latvia a person who earned a living by purchasing broken second-hand musi-

⁵⁷ A draft of such law was made previously for all the republics of the Soviet Union, but in the Ukraine and the RSFSR it was criticized in the press and has not been enacted thus far.

⁵⁸ *Pravda Vostoka*, July 13, and 16, 1957.

cal instruments, repairing and reselling them privately, was exiled for two years.⁵⁹

The law makes it clear that such deportation shall apply only in instances where no crime punishable under Soviet criminal law and entailing a more severe penalty is involved (Section 3). The law also provides that true parasites, i.e., "persons engaged in vagrancy or begging" are not subject to deportation by the above-mentioned administrative procedure but only by a judgment of the People's Court (Section 4).

The law does not call the incriminating behavior a "crime" or its older equivalent a "socially dangerous act", nor is exile called a "criminal punishment" but only a "public censure." It is obvious that exile is a punishment, and the laws should have been repealed to bring the legislation of the above-mentioned republics into conformity with the newly enacted Federal Principles of Criminal Law and Criminal Procedure. However, not only were the antiparasitic laws not repealed but a new law of that type was enacted, after the reform, on January 15, 1959, in the Republic of Kirghizia.⁶⁰ Moreover, a slightly different law was enacted in Georgia as late as September 5, 1960,⁶¹ i.e., more than a year and a half after the reform. This law states as follows:

Sec. 1. Able-bodied adult citizens residing in the cities and urban settlements of Georgia, who maliciously evade socially useful work and carry on a parasitic mode of life, may be evicted by a decision of the executive committee of the local soviet concerned on the petition of a general meeting of citizens, public organizations or police agencies for a period of from 6 months to 2 years.

Attention should be drawn to the fact that instead of "exile" the term "eviction" is used, a Russian word hitherto used exclusively for eviction from premises, as the word is used in English. The "evicted" person is sent to rural localities where he must "join the labor activities," i.e., is subject to forced labor. Thus, according to the Georgian law the parasite is exiled directly by the executive committee of the local soviet, a purely administrative body, and there is no appeal to a court or to higher administrative authorities. The same authority may allow an exiled person to return after he has served half of his term if he has reformed, and place him in "mandatory socially useful work" (Section 3). If the exiled person leaves the place of exile without authorization he must serve the remaining term in prison.

Finally, it may be stated that while on the federal level there exist only possibilities of administrative detention based on the

⁵⁹ *Sovetskaia Latvia*, December 15, 1957.

⁶⁰ *Sovetskaia Kirghizia*, January 20, 1959.

⁶¹ *Zaria Vostoka*, September 6, 1960.

absence of legal provisions prohibiting it and on established practices not specifically repudiated, some of the republics have enacted special laws providing for exile with forced labor in administrative procedure.

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BOOK REVIEWS

Index to Foreign Legal periodicals. Published for the American Association of Law Libraries by the Institute of Advanced Legal Studies. [University of London. K. Howard Drake, General Editor. Quarterly, annual subscription \$ 25.00, £ 9.]

Since 1926 the American Association of Law Libraries has published a valuable Index to Legal Periodicals limited primarily to English-language publications. The Increasing need for information on legal writing outside the Common Law area prompted the launching of the new Index which seeks to make available the contents of the main legal periodicals in foreign countries.

The first issues appeared in 1960 and the precise indexing as well as the broad scope of coverage indicate that lawyers interested in both Public and Private International Law, Comparative Law and Municipal Law of practically all countries of the world have been given a most valuable source of information in a field of study where the increasing quantity of material defies even the most conscientious individual efforts at keeping abreast with the subject matter. Each issue of the Index contains a Subject, Geographical and Author Index and reflects the high standards of the Committee and the qualifications of the specialists from a number of learned institutions who have undertaken the indexing. It is hoped that this new venture will become a permanent publication as it represents a major contribution to the spreading of knowledge about foreign legal systems and to the exchange of views among lawyers from all parts of the world.

THE EDITOR

Law in a Changing Society. By W. Friedmann. [London: Stevens & Sons, Ltd., 1959. 503 pp., Statutes, Cases, Bibliography, Index.]

Friends and supporters of the International Commission of Jurists will derive special pleasure from studying this stimulating book which is so closely related to the "dynamic concept of the Rule of Law" proclaimed by the Congress of New Delhi. Divided in six parts (Theory of Legal Change, Social Change and Legal Institutions, Society and the Individual, Public Law, Law Between Nations, Conclusions), it leads the reader through the entire body

of law and projects the interaction of legal and social change in concrete situations illustrated by contemporary legislation and leading cases. The system used by the author serves to emphasize the great topical importance of his theme and its strong and direct impact on the daily work of the legislator, judge and practitioner.

Ever since, to use Prime Minister Nehru's happy phrase, the Rule of Law was challenged to follow the Rule of Life, a discussion has been going on between members of the legal profession about sound limits of the adaptability of the Law to, and of its interpretation under, modern political, economic and social conditions. It has been repeatedly warned that such flexibility may dangerously undermine legal stability and that the security of the policy of *quieta non movere* and the predictability of the rule of precedent would be imperilled by upsetting a comprehensive system of legal thought developed by centuries of legislative action and judicial decision.

The great merit of Professor Friedmann's book is its convincing argument that the law in a changing society should follow an evolutionary pattern based on firm legislative premises and a solid legal philosophy. Such a concept must necessarily have a clear guiding idea; it must also respect self-imposed limitations. The author conveys the first by attributing to the Supreme Court of the United States "a 'preferred freedoms' philosophy, a hierarchy of values, in which basic personal freedoms are more immune from legislative interference than economic freedoms." But just as such possible interference has to be exercised judiciously lest the economy of a free society be frightened into inaction or dragged into chaos, so are the courts advised to take a cautious approach and to follow "the great majority of judges in all countries with a developed legal system, who refuse to use the judicial function for measures of social or economic redistribution." These premises seem to offer adequate safeguards against the twisting of Law according to fleeting political and sociological fashions, and the threat to legal security and human rights which arises from either doctrinarian pedantry or pragmatic inconsistency.

Within such limits, the author views law as "a flexible instrument of social order, dependent on the political values of the society which it purports to regulate." He proceeds from the assumption that "the paramount value of Western society remains the free and responsible individual". The emphasis is not less on responsibility than on freedom, for Friedmann sees the basic guarantees of the Rule of Law under the control of government by the people "in extra-legal elements: only a society whose members are imbued with their personal sense of responsibility can profit from legal safeguards."

Just as absolute freedom would be self-defeating without its corollary, personal responsibility, so does clamour for absolute

equality amount to demagoguery unless qualified by the recognition of unavoidable inequalities rooted in the very nature of human society. But "a democratic ideal of justice demands that inequalities shall be inequalities of function and service but shall not be derived from distinctions based on race, religion or other personal attributes."

"For better or for worse", says Professor Friedmann, "the creative and moulding power of the law has never been greater than in our highly articulate society. And it has never been more important that lawyers as legislators, judges, teachers, or practitioners should be more than highly trained craftsmen." It is indeed incumbent upon the lawyer to prove that freedom of the individual may not only be preserved but substantially broadened in the process of developing modern political and economic institutions.

Growth and prosperity are not ends in themselves; they are above all means of achieving an educational and cultural level at which modern democracy may be solidly secured. It would be certainly wrong to discount the importance of material factors in the life of nations, least of all in the young states. But the lawyers who toil for the recognition of the principles of the Rule of Law are in no way inferior to the politicians who weld formerly dependent territories into new national entities or to technicians who supply the economic foundations of their social structure. To them, and to all who believe in progress through freedom, Professor Friedmann's book offers inspiration and much needed encouragement.

VLADIMIR M. KABES

Apartheid and Discrimination. By K. L. Roskam. [Leyden: A. W. Sythoff, 1960, 179 pp., Annexes, Bibliography.]

Apartheid and Discrimination was submitted to the Free University, Amsterdam, as a dissertation under the more comprehensive title of *Inter-racial Relationships in the Union of South Africa and the International Community*. This book is the result not only of extensive legal research but also of an on-the-spot investigation of the problems raised by the application of apartheid in the Union of South Africa. The author contributes a well balanced work which cannot be attacked upon the grounds of insufficient familiarity with the actual subject matter and the indigenous situation.

Presented first is a description of the historical development of the relationship between the white groups and the Bushmen, Hottentots, Africans and Asians. It should be mentioned that a thorough "Terminology" set forth in Annex B clarifies the often confusing semantic problem which arises in dealing with various ethnic groups. Annex B is certainly worth reading at the outset as a helpful guide

to the entire book. The author covers next and in great detail the legislation by virtue of which discrimination is presented as the underlying principle of South African society. In this connection a valuable chronological resumé of discriminatory provisions in South African legislation from 1910 to 1960 is set forth on pages 55-60. Subsequently the statutes are analysed from the point of view of discrimination with regard to political rights and restriction of movement and residence of both Africans and Indians. This material also includes an analysis of discrimination not covered specifically by legislation and is well supported by statistics.

A chapter is devoted to investigation of the nature and roots of apartheid, and another chapter to the concept of the South African nation. Finally the author touches upon the action of the United Nations General Assembly concerning the relations between whites and Indians. Particular reference is made to Article 2, paragraph 7 of the Charter of the United Nations in connection with the question of United Nations attention to the deprivation of human rights and fundamental freedoms which results from discrimination against non-whites. It is asserted that the Union of South Africa "cannot invoke protection by Art. 2 par. 7, as it blatantly, avowedly and openly flouts and violates one of the Principles of the Charter", (i.e., as set forth in Articles 1(3), 55(c) and 56). In conclusion *Apartheid and Discrimination* poses the vital question whether the whites still have time to appreciate the unacceptability of apartheid and instead to build an undivided South African nation.

That the Commission highly commends the work of this author can be no more explicitly demonstrated than by reference to its own report on South Africa, in connection with which *Apartheid and Discrimination* was an essential source of reference, both in its text and through its extensive bibliography. Dr. Roskam has made an important contribution with a study which is scholarly in nature and at the same time grasps the vital urgency of the situation.

C. D. M. WILDE

Allgemeine Lehren des rechtsstaatlichen Verwaltungsrechtes. Allgemeines Verwaltungsrecht des Rechtsstaates. (General Principles of Administrative Law under the Rule of Law. General Administrative Law in the Constitutional State.) By Zaccaria Giacometti. Zürich: Polygraphischer Verlag, 1960. IX, 591 pp.

It is difficult to conceive of a field in public life that, in the course of the past few decades, has grown to such proportions and come to embrace so many spheres of life as administration. The steadily increasing number of responsibilities transferred to the State has led to the formation of a wide variety of public

authorities the decrees, orders and enactments of which are almost beyond the grasp of man. From the point of view of the Rule of Law this has its dangers. In the wake of increasing administrative activity the relationship between the individual and the State and its executive bodies becomes complex almost automatically, and the incidence of error in administrative acts, and thus also the unwarrantable danger of interference in the individual's sphere of freedom, tend to grow correspondingly. If this is to be countered, a clear statement and demarcation of the citizen's legal position *vis à vis* the State is required and, moreover – and equally important – the lawfulness of administrative action must be consistently stressed and all holders of responsibility kept constantly aware of the fundamental principles of legality. Both these elements are of crucial importance for the maintenance and progress of any order based on the Rule of Law.

It is therefore both a difficult and a satisfying task to give an account of public administration as part of just this order, while at the same time circumscribing the purpose and limitations of administration. It is difficult because the immense ramifications of these administrative functions present a serious problem to the writer of a co-ordinated and systematic account; but also satisfying because the profusion of laws which exists at all stages calls for constant awareness of the fundamental principles of constitutional action, and because the clarification of the concepts is the prerequisite for just this action.

We must be grateful to Zaccaria Giacometti for embarking upon such an enterprise. He is a Professor at Zurich University and has for many years been one of the leading thinkers in Swiss public law. Professor Giacometti is already well known as the author of a number of publications on the basic principles of Swiss Public Law, the constitutional law of the Swiss Cantons and constitutional jurisdiction. He now presents the first volume of his work on the principles and fundamental ideas of administrative law, to be followed by a second volume dealing with the structure and machinery of administration. After reading his first volume it already becomes clear that the book represents more than a self-contained work: by virtue of the mass of extensive and incorporated material and the penetration of the subject it may be considered a standard work, following in the best tradition of Giacometti's previous achievements.

The method of representation not only involves strict concentration on essentials, but also sifting the wealth of material from a particular point of view. Applying a firmly logical and consistent method of deduction, but always basing its values on the fundamental principles of the Rule of Law (*Rechtsstaat*), Professor Giacometti has succeeded in giving his general theoretical work on administrative law the imprint of lucidity and penetration. He achieves

this by retracing the diverse and often intricate organisational structures and legal conditions within public administration to the conceptions which form their bases, where they originated, and to which they must continually be adjusted. For Giacometti it is, indeed, the ethos of the liberal ideal of law from which he intrinsically and formally seeks to derive and support the ideal and structure of a State based on the Rule of Law and which he would like to see implemented down to the lowest reaches of the three branches of government, with special emphasis on administration. The need for this postulate reveals itself in the practical policy of Switzerland, a country attached so very closely to the Rule of Law, yet whose human and political shortcomings are in constant need of improvement.

On the other hand, the complete realisation of this postulate, thus for example Giacometti's demand for a comprehensive administrative jurisdiction – encounters the obstacles presented by the practical realities existing within a community which has come to its present position by a variety of historical, political and material processes. The limitations set to the ideal of the Rule of Law with its supreme goal, the widest possible protection of the individual and his civil liberties, reveal themselves here, in the day by day conduct of affairs of a complex and often unwieldy machinery of government, which in spite of the best intentions cannot turn into the faithful image of a theory, however logically and faultlessly conceived. Here, therefore, we also find the limitations of any theoretical treatise dealing with a general administrative law. Nevertheless, this detracts in no way from the acceptability of the suggested improvements which always appear in a fresh light in such a treatise.

Giacometti understands the „Rechtsstaat“ as the “legal element of the liberal conception of government”. He subordinates the powers of government to a liberal-democratic legal order and control, thus limiting government action to the sphere allocated to it by this order. As far as public administration is concerned this implies a trend towards greater emphasis on the basic human rights and the merits and dignity of man *per se*.

From here, Professor Giacometti proceeds to circumscribe the sources of administrative law based on the principles of the Rule of Law, and in the third as well as the particularly significant fourth part of his book examines the legal position of the individual *vis-à-vis* the administrative powers of the “Rechtsstaat”. In this context he emphasizes the lawfulness of administration and the legal protection accorded the individual in his relations with administration (administrative jurisdiction), and this serves admirably well to illustrate the author's central theme. As pointed out before, Professor Giacometti is a convinced supporter of the further development of administrative jurisdiction in Switzerland, where it still has many shortcomings

(e.g. the absence of a comprehensive administrative jurisdiction; the inadequacy of legal proceedings in administrative matters; the possibility of *reformatio in pejus*), and he advances very convincing arguments in favour of further improving the Rule of Law. The book is not consistently easy to read, and a thorough familiarity with the formalistically logical habit of thought of the author is required of the reader in several passages. Nor will the author's theories remain unchallenged. But his endeavour to achieve a concise and lucid penetration of the nature and responsibilities of an administration based on the Rule of Law is everywhere apparent. Professor Giacometti is invariably successful in such an endeavour, because behind it is the power of conviction of a jurist whose mind is deeply rooted in this form of thought.

CURT GASTEYGER

Comparative Law. Cases-Text-Materials. By Rudolf Schlesinger, Professor of International and Comparative Law, Cornell University. [Second Edition. Brooklyn: The Foundation Press, Inc., 1959. 635 pp., bibliography, indexes.]

It is not the practice of this *Journal* to review casebooks, but an exception will be permitted in view of the nature of this most successful attempt to achieve a double purpose: to acquaint the student of law with the basic essentials of the comparative method and to remind him of the necessity of understanding the procedures of foreign legal systems before passing judgment on their features. "Strangeness is the root of fear and enmity among nations as well as individuals", wrote Professor Schlesinger in the introduction to the first edition of his work and to him goes the credit for having contributed in no small measure to the removal of many mysteries which confront the American student for whom the book is destined. The author has selected his texts and cases with a discrimination that proves his own superior knowledge of various legal systems. In addition to the major countries of the Common Law and Civil Law areas, he offers typical illustrations of legislation and judicature in the countries of socialist legality and is particularly successful in investigating conflict of law problems arising from these various jurisdictions.

Although books on comparative law multiply in direct proportion to the increasing interest in this subject and its importance in a world whose inter-relations grow closer all the ideological differences notwithstanding, Professor Schlesinger scored a couple of remarkable firsts. He has produced teaching material that stimulates the interest of the student while offering many new aspects to the expert and thoroughly enjoyable reading to all who are looking for information on a specific topic in this broad field. To master the

embarras de richesse offered by the subject matter is in itself a major task and the author will feel the need for additions and expansion in preparing each subsequent edition. Yet the book in its present form does not raise a claim of an exhaustive treatise. Within its scope, encompassed by the technical and economic limits of a law school textbook, it could hardly present a more comprehensive survey in a more lively form.

In addition to leading cases and materials from a variety of books and articles, Professor Schlesinger reproduces excerpts from examinations of witnesses taken from court records (to illustrate problems of expert testimony on foreign law) and resorts to a fictional conversation of lawyers (to stress the pitfalls of litigation in foreign jurisdictions). These extras are smoothly connected with more orthodox notes introducing individual sections and case illustrations to check the student's judgement and understanding of the cases and literature. The whole results in an effect of a well-conceived and original presentation held together by a solid general outline: A. The Nature of a Foreign Law Problem – B. Common Law and Civil Law: Comparison of Methods and Sources – C. A Topical Approach to the Civil Law: Some Illustrative Subjects (Agency, Corporations, Conflict of Laws).

Outside this system, the author adds another valuable feature on Special Hazards of Comparative Law. The short but very useful reference to language difficulties and warning of risks in interpretation sound familiar and welcome to all whose practical experience has taught them to beware of those "false friends" which bedevil legal translations to and from the main European languages.

Professor Schlesinger provides a table of cases, indexes of topics and authors and a particularly valuable bibliography of articles on comparative law of general nature as well as on specific subjects. This part alone consists of 100 pages and expands the usefulness of the book far beyond its original purpose.

V. M. K.

Traité des territoires dépendants. By Nicolas Veïcopoulos. Tome I: Le système de tutelle d'après la Charte de San Francisco. [521 pp., Athènes 1960.]

This book of five hundred pages is a most valuable contribution to the study of the legal status of dependent countries, the general theory of trusteeship and its practical application within the framework of the United Nations. The author, a Greek lawyer, introduces it with a short historical outline of the preparatory work for the setting up of the trusteeship system (Part I). There follows a comprehensive analysis of its legal nature, its aims and the territories to

which it is applied (Part II). In a third part, he deals with the practical application of the trusteeship system by the responsible U.N. bodies, namely the General Assembly, the Security Council, the Trusteeship Council, the General Secretariat and the International Court of Justice. In the fourth and main part, Mr. Veicopoulos presents an interesting and thorough study of the duties of the trusteeship bodies and the means of controlling their activities. Three detailed indices (one on authors and periodicals, one on subject-matters and one on the main reference material) as well as a list giving the classification for the relevant U.N. documents complement this first volume, the value of which is all the more important since the general trend of the still dependent territories toward independence cannot be fully appreciated without a solid knowledge of their present legal position.

C. G.

International Transactions and Relations, Cases and Materials. By Milton Katz and Kingman Brewster. [London: Stevens & Sons Ltd. 1960. XI (Preface and table of contents) 863 (text) pp.]

As explained by the authors in their Preface, the title of this work has been carefully selected to indicate that the material presented is intended to be "a departure from the lines established by familiar teaching materials in the international field". The intention of the authors has certainly been achieved, and this achievement represents a concrete contribution to the study of international law which will interest student, professor and practitioner alike.

Indeed, in posing, and in many cases answering, the question whether international legal order does really exist, this book delineates and clarifies this concept by presenting a study of the specific legal problems which arise in relations and transactions across national boundaries involving individuals, business organisations and governments or any combination thereof. Generally viewed are both the municipal laws of certain states and public international law in the light of the limitations of certain municipal legal systems in coping with specific questions which arise in such relations and transactions. In its entirety the work represents an examination of public international law in the context of particular problems of the lawyer and legal systems applicable thereto.

Specifically the material is divided into two broad categories. The first (chapters 1-7) takes up the problems of the person or legal entity abroad and examines rights and opportunities under the laws of foreign countries and under public international law in connection with the following subjects: Entry, Residence, Movement, Communication and Security; Acquisition, Retention and Use of

Property; Economic Activity, including the question of doing business as a branch or a local corporate subsidiary; Transactions with and by Governments; Obtention of Evidence and Judicial Assistance; Recognition and Enforcement of Foreign Civil Money Judgments.

The second part of the book (Chapters 8—12) treats the question of the extent of national legal systems and interaction, conflict and accommodation between them. Under this broad topic the position of the lawyer attempting to reach a solution to conflict or overlapping of national power is examined in connection with the following: Criminal Laws, Regulation (including monetary), Taxation, Nationalisation, Expropriation and Annulment of Contracts and Concessions. With respect to these matters, possible solutions in the form of international agreement or national action are investigated, with appropriate excerpts from the Charter of the United Nations and the Universal Declaration of Human Rights.

The material in both sections of the book is presented in the form of cases, portions of national legislation and legal treatises, as well as international conventions and agreements. In addition, the authors present their own notes and subsequent comments which keep the broad subject matter within bounds and certainly facilitate its use, not only as a textbook but also as an efficient and practical reference source. The great effort evidenced in the compilation of this material will perhaps best be rewarded by the reader's appreciation of it as a positive and valuable text which certainly does represent a constructive departure from already existing works in the international field.

C. D. M. W.

Private International Law. By Shri N. K. Dixit and Shri Neglur Rangath [Karnatak University, Dharwar, 1960, 264 pp.]

This book presents a comprehensive introduction to what the authors term "Private International Law" or "Law of Conflicts". A valuable introductory chapter provides definitions of terms essential to an understanding of this area of the law set forth in the context of the law of India. In this connection and particularly interesting is the use of the words *Dharma* (law) and *Neeti* (Ethics). The authors explain that the "concept of law as *Dharma* gave rise to *Neeti* or Ethics". The authors then state that "law essentially, therefore, is a set of rules of conduct made for the well being of the community and its law abiding members". The meaning and scope of private international law are explained by taking up the question of why it is necessary in certain instances for the courts of one country to apply the laws of a foreign country to the foreign element

at issue in a judicial process. A history of the evolution of the law of conflicts is carefully traced, and presently existing International Conventions are discussed.

The work then touches upon more specific factors of Private International Law among which it includes: Classification, Domicile, Status and the State Obligation, Property, Torts, Jurisdiction and Insolvency. Subsequently the important question of the recognition and enforcement of foreign judgements is examined in detail. Finally, the problem of the application of foreign law is investigated. The authors point out how to ascertain what law is to be applied and state that Penal Laws and Revenue laws are "non-applicable" because they are only territorial in outlook; similarly, non-applicable are the category "of foreign laws which are against morality or against the public policies of the country where they are sought to be applied".

Appendix A catalogues the conventions which have been produced at the Hague on the topics of Divorce and Separation, Guardianship, Validity and Effect of Marriage, Interdiction and Civil Procedure. Appendix B sets forth the recommendations of the Private Law Committee of 1952 (appointed by the Lord Chancellor of the United Kingdom) and the suggested Code of the Law of Domicile and Draft Covenant to Regulate Conflicts between the Law of Nationality and the Law of Domicile. The work is completed with a compilation of relevant Indian (Appendix C) and Foreign Cases (Appendix D). This valuable contribution to the study of international law reflects intensive care, research and preparation on the part of its authors. It represents both a coherent introduction and a valuable source of reference to the subject of private international law.

C. D. M. W.

Jahrbuch für Ostrecht (Yearbook for East European Law).
[Published by the Institute for East European Law, Munich,
Vol. I, first and second half yearly issues, April and October,
1960, 259 and 239 pp. Herrenalb: Verlag für Internationalen
Kulturaustausch 1960.]

The Institute for East European Law, whose studies of legal developments in the communist domains have already been reported in the previous issue of the *Journal* of the Commission, published the first of its six-monthly issues of the "Year Book for East European Law" in the Spring of 1960. The first issue is outstanding in the almost consistently high level of the ten published contributions (including those of Professors Richard Lause and Benvenuto Samson), the diversity of the subjects, and the fact that authors from

communist countries have also contributed articles (Professor Vojislav Spaić, on the rights of management in Yugoslav enterprises, and Dr. Jan Szachulowicz, on Polish private law). The second of the Year Book's six-monthly issues has now been published. It also contains ten contributions and these, together with the full text of the new Constitution of Czechoslovakia and the draft "Principles of Civil Law in the USSR" (introduced by F.-Chr. Schroeder) complete Volume I which is a notable contribution to the study of East European Law.

The impression, especially after reading the second half-yearly issue now before us, is that within the Eastern bloc there is a tendency towards stabilisation and even some degree of liberalisation in the Soviet Union (thus for example, in the field of labour legislation, as Professor Walter Meder shows in his contribution), whilst in the People's Democracies the processes of the radical transformation of the legal order in the direction of the communist conceptions are continuing. This applies in equal measure to the training and selection of judges (as illustrated in Walther Rosenthal's article on the East German practice), and to substantive law (thus Laszlo Mezöfy in his contribution on the control of administrative measures by the ordinary courts in Hungary, where the introduction in 1957 of the new Code of Administration admittedly represents a positive step in the direction of according the citizen a certain amount of legal protection; and Erich Schmied on the legal restrictions to which the churches are subjected in Czechoslovakia). Siegfried Mampel uses the practical example of East German legal theory for his examination of the "people's right to self-determination", a maxim to which the communists make such frequent appeals in the political sphere. Professor Sevold Braga's contribution also deserves special attention. As a result of an illuminating comparative study of European common law (*viz.*, Western continental Europe) and civil proceedings in the socialist States, he concludes that the entire "legal apparatus of European private law is reflected in Soviet civil law". It must be remembered, however, that a change in the subjects has taken place: in the Soviet Union these are predominantly "socialist organisations" rather than private individuals, a distinction which frequently tends to affect the individual to his detriment. In this respect such comparisons are not without danger if the various objectives and levels on which the law is applied are not constantly borne in mind.

Professor Reinhart Maurach's contribution represents a first attempt at arranging Soviet legal history according to periods. This leads him into polemics with the Soviet doctrine which "far too schematically regards legal history as a consequence and concomitant of economic and social development in the sense of a planned and

systematically conducted process", whereas it is just the various politically conditioned changes of course which call for the application of quite different criteria of assessment. Finally, mention should be made of Andreas Bilinsky's essay on the problems of the rights of the individual in the Soviet Union, a question which in a communist State is subject to an entirely different appraisal than in a democratic community based on the Rule of Law.

Bilinsky bases his arguments on the astonishingly candid admission of the Soviet legal scholar Strogovich that the problem of the Soviet citizens' legal rights had never been the subject of proper analysis and treatment. This may be explained by the fact that once the distinction between "public" and "private" law was denied, the distinction between "private" and "public" individual rights also lost its meaning, and it therefore became practically impossible for the nature of such "public" subjective rights *vis-à-vis* the State to be reflected in the system of communist legal thought. But after the XXth Party congress in 1956 the discussion of this subject, too, came into the open and the term "the subjective public rights of the citizens" was used for the first time in a study published in 1958. Although this does not imply that an answer to the question of the meaning of such rights within a communist state has been found, the problem nevertheless remains posed and calls for further clarification.

The objective presentation of Bilinsky and the other authors represented in this volume merits credit as an important contribution to this discussion, which one assumes will continue within the Eastern bloc as well and, it is hoped, will produce useful results.

C. G.

International Communism. Edited by David Footman. [London: Chatto & Windus, 1960, pp. 151.]

The title under which this newest issue in the series of St. Anthony's Papers appeared is somewhat misleading as the book has no more ambition than to present selected essays on the workings of international Communism in a limited number of countries, to wit, Germany, the United States, India. Regrettably, the material pertaining to the first mentioned country deals with the pre-Hitler period and so does a brief survey of "United Front Tactics of the Comintern" which introduces the regional studies. Thus, the only contemporary element related to the title of the book is the concluding chapter on the present phase of international Communism which of course acquires added interest in the light of the recent conclave of Communist leaders in Moscow and its resolution. The several disconnected papers were written by authors who were

associated with the late R. N. Carew Hunt in his Seminar on International Communism at St. Anthony's College and contributed their essays as a tribute to his memory. A sketch of the many-faceted career of Willy Muenzenberg, "described as the patron saint of the 'fellow-traveller'," is indeed Professor Hunt's last writing and by far the most interesting part of the book. Characteristically for the fate of those whose intellectual brilliance rebels against blind orthodoxy, strong evidence indicates that Muenzenberg's violent end in 1940 was plotted by his Communist friends rather than his Nazi arch-enemies. The concluding paragraph which constitutes Professor Hunt's last warning to the free world whom he kept so knowledgeably abreast of developments in the Soviet realm bears reprinting in full:

"But while this was the end of Muenzenberg, it has been by no means the end of the front organisations — the 'Innocents' Clubs' as he used to call them — which he had done so much to bring into existence. Most of those with which he was concerned have long since disappeared, but only to be replaced by others which perform more or less similar functions. So often has their true nature been exposed that people must indeed be simple to go on being taken in by them. But then the world is largely made up of simple people."

Though the other papers presented in the reviewed book are well-documented and obviously a result of careful research, they contain little original material and fall in general short of the standards set by the late Carew Hunt's own work in this field.

V. M. K.

Die Rechtsverletzungen im sozialistischen Staat und ihre Bekämpfung (Infringements of the Law in the Socialist State and their Repression), by Rolf Schüsseler. [Berlin: Deutscher Zentralverlag, 195. 224 pp.]

This book is an attempt to give a summary account of the problems arising from infringements of the Law in the socialist, viz., the communist controlled State.

Such an undertaking deserves attention because, according to communist belief, crime ought to be altogether absent in such a state. The search for satisfactory explanations of the fact that crimes are still committed in the Soviet State even after forty years of its existence, has lately been intensified in the Soviet Union. Protestations that such infringements of the law are chiefly due to the "bourgeois" influences which still persist within society, do not carry overwhelming conviction. Nevertheless, the argument that the causes of law-breaking lie in the failure so far to overcome the

evil influences of capitalism is widely advanced in the people's democracies, and especially in East Germany. This argument is also made in the book by R. Schüsseler.

His investigations of the causes of law-breaking lead him to conclude that the continuing "contradictions between socialist consciousness and the reactionary consciousness" of some sections of the population is one of the remaining causes of law-breaking in a socialist state. An explanation for the occurrence of crimes within the communist state has thus been provided for the foreseeable future, particularly as it is supported by the Marxist principle that environment determines consciousness. The science of penal law and criminology has long established conclusively that this dogma is true only in a limited and qualified sense and therefore fails to offer an adequate explanation of the causes of crime in communist states. From the above theory of the causes of law-breaking it follows, so argues the author, that the assessment of its nature cannot be based on the protection of the individual's legal property, but must rest on the protection of the interests of the state. According to Schüsseler these infringements of the law are "an unlawful act, detrimental to the socialist order and a violation of the moral and political beliefs of the working class" (p. 220). Such an interpretation will always permit political considerations to dominate the assessment of any action, resulting in the individual's guaranteed right to protection being subordinated to the interests of State and Party.

The value of the book lies in its disclosure of the fundamental differences between the communist theory of penal law on the one hand, and all the principles which continue to view the individual as the essential object of protection by penal law on the other.

C. G.

Die ungarischen Strafgesetze. Amtliche Zusammenstellung der gültigen materiellen strafrechtlichen Vorschriften (Hungarian Penal Legislation). Translated into German and prefaced by Dr. Ladislaus Mezöfi. [Berlin: Walter de Gruyter & Co., 1960. X & 141 pp. DM 17,50.]

Dr. Mezöfi's German edition of the sources of the Hungarian substantive penal law is a very useful contribution to the study of penal law in socialist countries in general and in Hungary in particular. The work describes a legal system in which the legislator tries to adapt the principles determining pre-communist legal materials to the new requirements of a system based on Soviet-type regulation. The editor underscores the transitory character of the pertinent legislation which does, however, preserve some elements of a genuinely Hungarian juridical concept.

The compilation includes a general analysis of crime and punishment and specific penal provisions based on the Criminal Code of 1950 and subsequent legislative enactments up to June 1957.

This conscientious and well organized work will remain an important reference material even after the impending publication of a new Hungarian Penal Code. German-speaking jurists will continue to benefit from its valuable projection of the development on which the new legislation rests.

JANOS TOTH.

Grundzüge des mitteldeutschen Wirtschaftsrechts (Principles of Central German Economic Law), by Benvenuto Samson. [Frankfurt and Berlin: Alfred Metzner Verlag, 1960. 146 pp.]

In this work the author, who is a Professor at Frankfurt University, sets out to examine the legal elements and peculiarities of the economic system established by the communist regime in the Eastern part of Germany after World War II. This enterprise is of particular interest because it throws light upon the growing discrepancy between the two legal systems in the Eastern and Western parts of Germany after 1945, when they ceased to exist as a homogenous entity. Whilst in the Federal Republic of Germany the pre-1933 traditions of the Rule of Law have formed the basis for further progress, a process of increasing adjustment of the existing law to suit the Soviet model began in East Germany. In the latter area the law was completely subjected to communist political objectives, and its substance modified accordingly.

This applied to a particularly large degree to economic legislation. The jurists of East Germany attempted to replace the systematic classification which had previously been accepted throughout Germany, and especially the distinction between private and public law, by a different order deriving from Marxism-Leninism and suitable for the period of transition from the capitalist to the socialist system. But – and here Samson establishes an important point – the laws by no means came about as a sequence of social evolution, namely that in accordance with the Marxist-Leninist doctrine on the law they were recognised and employed as part of the superstructure of the economic foundation. On the contrary, the laws preceded this development, with the aim of bringing about this very same social revolution. This explains why the new communist law in many instances failed to meet the requirements of existing economic conditions, and why correspondingly more coercion was necessary to enforce it. It is nevertheless interesting to note that, because of the extent to which they are governed by realities, a

number of legal subjects have changed in form rather than in substance ("Old vintage in new bottles", as Samson puts it), and that is why the communist law of contract, for example, employs terms and classifications resembling those of traditional civil law. It is, however, difficult to ascertain the real extent of this agreement in substance with the previously existing laws. Experience to date has shown that almost no legal sphere has escaped the attention of communist thinking and thus successfully preserved true apolitical standards. With respect to this matter the author's views seem perhaps a bit over-optimistic, but this in no way detracts from the value of his account.

C. G.

Japanese Occupation and Ex Post Facto Legislation in Malaya. By S. K. Das. [Singapore: Malayan Law Journal, 1960; 148 pages, £ 2.5.0, Malayan \$ 20.00 net.]

This well documented monograph deals with some of the problems arising from the imposition of a new legal system upon Malaya under Japanese military occupation. The study first describes the law that was previously in force and then analyses the legal, judicial and administrative changes made by the Japanese. One of the most interesting matters discussed is the question of debtor and creditor relationship in connection with occupation currency. The problems inherent to the debtor and creditor relationship are presented in the light of their subsequent resolution by post-war legislation with retroactive effect, hence the use of the term "*ex post facto*". Analysis of this matter is supported by extensive case material which will be of interest to the legal scholar as it draws upon both Malayan decisions and also cases determined in other jurisdictions, similarly subjected to foreign occupation.

Also worth careful consideration are the occupation period judgments of the Malayan High Court, which in the opinion of the author represent a high tribute to the efficiency and impartiality of the indigenous judges, recruited from experienced Asian members of the local Bar and the subordinate judiciary, as very few of their decisions were challenged upon the British re-occupation of Malaya. It is pointed out, however, that this was not always true of Japanese decrees and civil proceedings which could be set aside or varied by the Courts pursuant to the Japanese Judgments and Civil Proceedings Ordinance of 1946.

Of equal interest are the matters of the Japanese Custodian of Enemy Property, War Damage Claims and a concluding assessment of the post-war legislation. The author indicates that the post-war legislation, although generally remedial, "in some respects adversely

affected both residents in and evacuees from Malaya". In his criticism the author points out that "the scales were heavily weighted against those who in reliance on Japanese legislation acquired in good faith land or any interest therein contrary to pre-existing law". Supporting this scholarly study is a thorough Table of Cases and a thoughtful Foreword by Dato' Sir James Thomson, Chief Justice of the Federation of Malaya.

C. D. M. W.

BOOKS RECEIVED

Mélanges BASDEVANT (*Hommage d'une génération de juristes au Président Basdevant*). Paris. A. Pedone.

Jean CARABIBER *L'Arbitrage en droit international*, Paris.

W. J. GANSHOF VAN DER MEERSCH *Sécurité de l'Etat et liberté individuelle en droit comparé*. Bruxelles, Emile Bruylant.

André MAST *Les pays du Benelux*. Paris, Pichon et Durand-Auzias (Collection "Comment ils sont gouvernés").

Georg SCHWARZENBERG *A Manual of International Law*, 4th edition, 2 volumes, London, Stevens & Sons.

B. A. WORTLEY *Expropriation in Public International Law*.

Rapports généraux au Vème Congrès international de droit comparé (Bruxelles, 4-9 août 1958) 2 volumes, Bruxelles, Emile Bruylant.

Yearbook of the European Convention on Human Rights (1958-1959), The Hague, Martinus Nijhoff.

We regret that lack of space prevents review of these works in this issue of the *Journal*. Reviews thereof will, however, appear in the next issue.

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 Procuracy 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. I (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

Volume II, No. 2 (Winter 1959 – Spring-Summer 1960):

- Democracy and Judicial Administration in Japan, by Kotaro Tanaka
 The Norwegian Parliamentary Commissioner for the Civil Administration,
 by Terje Wold
 The New Constitution of Nigeria and the Protection of Human Rights and
 Fundamental Freedoms, by T. O. Elias
 Law, Bench and Bar in Arab Lands, by Saba Habachy
 Problems of the Judiciary in the "Communauté" in Africa, by G. Mangin
 Legal Aid and the Rule of Law: a Comparative Outline of the Problem,
 by Norman S. Marsh
 The "General Supervision" of the Soviet Procuracy, by Glenn G. Morgan
 Preventive Detention and the Protection of Free Speech in India, by the
 Editors
 The Report of the Kerala Inquiry Committee
 Book Reviews

Bulletin of the International Commission of Jurists, 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 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 the United Nations and the World Refugee Year

Number 11 (December 1960): This number deals with the various aspects of the Rule of Law and recent legal developments with regard to Algeria, Cyprus, Dominican Republic, East Germany, Hungary, United Nations and the United States

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 on 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

Number 9 (September 1960): African Conference on the Rule of Law (editorial), New Members of the Commission, South Africa, Mission to French speaking Africa, Dominican Republic, Portugal and Angola, Tibet, Missions and Tours, Essay Contest, National Sections, The Case of Dr. Walter Linse, Organizational Notes

Number 10 (January 1961): A Welcome to the African Conference on the Rule of Law, New Member of the Commission, National Sections, Missions, Publications

Number 11 (February 1961): Law of Lagos, African Conference: Conclusions, Postscript, Summary of Proceedings, List of Participants. Missions and Tours

The Rule of Law in the United States (1958): A statement prepared in connection with the Delhi Congress by the Committee to Co-operate with the International Commission of Jurists, Section on 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.

Tibet and the Chinese People's Republic (July 1960): Report to the International Commission of Jurists by the Legal Inquiry Committee on Tibet, Introduction, the Evidence Relating to Genocide, Human Rights and Progress, the Statute of Tibet, the Agreement on Measures for the Peaceful Liberation of Tibet, Statements and Official Documents.

South Africa and the Rule of Law (November 1960): Detailed inquiry into the problems of *Apartheid* in the Union of South Africa. Analysis of legislation and practice compared with pertinent provisions of the Universal Declaration of Human Rights. Statement by Commission's Observer F. Elwyn Jones, Q.C. M.P., Legislative Texts, Affidavits.

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, January 1959, which includes: *Act of Athens; Declaration of Delhi; Conclusions* of the Congress; List of Participants; Programme; Proceedings of the Plenary Sessions and the four Committees of the Congress – (1) The Legislative and the Rule of Law, (2) The Executive and the Rule of Law, (3) The Criminal Process and the Rule of Law, 4) The Judiciary and the Legal Profession and the Rule of Law; Questionnaire on the Rule of Law; Working Paper on the Rule of Law in a Free Society; and a statement on the objectives, organization, history and activities of the International Commission of Jurists.

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 printing costs of the Journal by payment of a small subscription fee.

Apart from subscriptions, the International Commission of Jurists is dependent on voluntary contributions, gifts, and bequests for the continuation and expansion throughout the world of its activities to strengthen and promote the Rule of Law and the guarantees of human rights inherent in that concept. All such financial contributions towards the expansion of the work of the Commission are welcome; cheques should be made payable to the Secretary-General, International Commission of Jurists, Geneva, Switzerland.