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PREVENTIVE DETENTION UNDER DIFFERENT LEGAL SYSTEMS

HARRY E. GROVES EMERGENCY POWERS

SEBASTIAN SOLER and DEPRIVATION OF PERSONAL
EDUARDO H. MARQUARDT FREEDOM IN ARGENTINE LAW

BASILEU GARGIA OUTLINE OF PROVISIONAL OR
PROCEDURAL IMPRISONMENT IN
BRAZIL

J. C. MARTIN PREVENTIVE DETENTION IN
CANADA

GERARDO MELGUIZO PREVENTIVE DETENTION IN
COLOMBIA

STAFF STUDY GHANA'S PREVENTIVE DETENTION
ACT

L. W. ATHULATHMUDALI PREVENTIVE DETENTION IN THE
FEDERATION OF MALAYA

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| | | |
|---|---|-----|
| HARRY E. GROVES | EMERGENCY POWERS | 1 |
| SEBASTIAN SOLER and EDUARDO H. MARQUARDT | DEPRIVATION OF PERSONAL FREEDOM IN ARGENTINE LAW | 16 |
| BASILEU GARCIA | OUTLINE OF PROVISIONAL OR PROCEDURAL IMPRISONMENT IN BRAZIL | 39 |
| J. C. MARTIN | PREVENTIVE DETENTION IN CANADA | 52 |
| GERARDO MELGUIZO | PREVENTIVE DETENTION IN COLOMBIA | 59 |
| STAFF STUDY | GHANA'S PREVENTIVE DETENTION ACT | 65 |
| L. W. ATHULATHMUDALI | PREVENTIVE DETENTION IN THE FEDERATION OF MALAYA | 100 |

DOCUMENT

| | |
|--|-----|
| EUROPEAN COURT OF HUMAN RIGHTS IN RE LAWLESS | 112 |
|--|-----|

BOOK REVIEWS

| | | |
|--|---|-----|
| | Hommage d'une génération de juristes au président Basdevant (<i>Philippe Comte</i>) | 120 |
| <i>Grenville Clark and Louis B. Sohn</i> | World Peace through World Law (<i>P.C.</i>) | 124 |
| <i>Georges Burdeau</i> | Les libertés publiques (<i>P.C.</i>) | 127 |
| <i>Antony Allot</i> | Essays in African Law (<i>A. A. de C. Hunter</i>) | 130 |
| <i>F. E. Dowrick</i> | Justice according to the English Common Lawyers (<i>Jean Ziegler</i>) | 131 |
| <i>European Commission and Court of Human Rights</i> | Yearbook of the European Convention on Human Rights (<i>P.C.</i>) | 133 |
| | General Reports to the Fifth International Congress of Comparative Law (<i>P.C.</i>) | 134 |
| <i>W. J. Ganshof van der Meersch</i> | Sécurité de l'Etat et Liberté individuelle en Droit Comparé (<i>P.C.</i>) | 136 |
| <i>Prof. Jean Graven</i> | Le code pénal de l'Empire d'Ethiopie du 23 juillet 1957 (<i>P.C.</i>) | 138 |
| <i>André Mast</i> | Les Pays du Benelux (<i>P.C.</i>) | 140 |

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EMERGENCY POWERS

INTRODUCTION

One category of problems faced by democracies, no less than other governments, is that created by emergencies. A totalitarian government may handle these situations without embarrassment. But the apparent necessities evoked by danger often conflict gravely with the postulates of constitutional democracy. Constitutional theory has moved some distance from the early-stated American view that emergency does not create power. Yet current democratic practice may not be so far removed from the results sanctioned even by the holdings of the United States Supreme Court; for that tribunal has been able to find in the less than specific language of the United States Constitution authorization for the power, in fact, wielded in grave emergencies by the executive and legislative branches, at least when they have acted together.¹

Emergencies are of many types. But three stand out in modern times. Indeed, they have always existed to plague governments.

A. There is, first, the actual conduct of war or the preparations to meet its imminent occurrence. (In this category may be conveniently, and not inappropriately, placed armed internal rebellion, as well as war of an international kind.)

B. Secondly, there is the threat or presence of internal subversion. This may often be, but is not necessarily, related to category A.)

C. Finally, there is the emergency caused by a breakdown, or potential breakdown in the economy.

There are, certainly, other conditions of emergency: riots, great natural catastrophes such as fires and floods, strikes in strategic services and industries.² But these are usually localized, temporary

¹ Article I gives to the Congress the power to declare war, to raise and support military forces and make the rules for their governance. The Congress may call forth the militia. It may make all laws necessary and proper to execute its powers. It also has the power to raise money by taxation, borrowing or coinage. The President, by Article II, possesses the executive power of the nation. He is the Commander in Chief of the armed forces, including the militia of the several States when called into the service of the United States. It is apparent that where the Congress and the President are in harmony in the exercise of their respective war powers, the combination of power is massive with little, if any, scope for judicial action.

² This listing is not intended to be comprehensive. Article 38 of the Constitution of Ireland, for example, contemplates situations in which "the ordinary Courts are inadequate to secure the effective administration of justice and the preservation of public peace and order." See *In re McCurtain*, [1941] I.R. 83 dismissing an appeal from a conviction by a Special Criminal Court.

and may be met by what can be termed the "normal" or customary powers of government, including martial law, and with these this paper will not concern itself. In fact, if they may not be so dealt with, they virtually by definition fall under one of three headings initially stated. For example, a strike, if sufficiently widespread, prolonged or in a vital industry, may threaten or cause a collapse of the economy.

The United States Constitution does not address itself very specifically to any of the three great emergencies. It does grant Congress the power to declare war and to raise and support the forces necessary for that purpose,³ and it contemplates the necessity of suspending the privilege of the writ of *habeas corpus* in certain cases of rebellion or invasion.⁴ To deal with subversion, one can find no language more in point than the power to provide for the common defence;⁵ whereas economic emergencies must be met with such generally phrased power as that of providing for the general welfare, or regulating commerce⁶ or in those powers inherent in government, the so-called police powers. By contrast, no doubt in reaction to the American example, some more recent constitutions have elected to speak in detail of the subject of emergencies. Notable in this respect is the Constitution of India, Part XVIII of which provides for emergencies of the first two types mentioned, while detention without trial, the chief governmental weapon against subversion, receives constitutional sanction in Article 22.⁷

It is not sound to speak of these three emergencies as if their characteristics were essentially similar or the judicial attitude towards them always comparable. To take one example, while the Indian Constitution and others⁸ permit detention without trial during times of peace as well as war, the United States Supreme Court has been vigilant to limit this great power to exercise in times of war only. Admittedly, it may well be argued that the Indian approach gives more recognition to the realities of modern international relations, where the formal declaration of war is increasingly anachronistic in an era when military success may depend almost entirely on surprise and when external conquest may be most effectively pursued by methods of internal subversion. But even Indian judges when faced with Article 22 have approached regretfully the necessity of upholding detention without trial not in time of war.⁹

³ Art. I, sec. 8.

⁴ Art. I, sec. 9.

⁵ Art. I, sec. 8.

⁶ *Ibid.*

⁷ Part XVIII of the Indian Constitution also contemplates the emergency occasioned by a failure of constitutional machinery in the States.

⁸ E.g., the Constitution of the Federation of Malaya, Part XI.

⁹ See, e.g., the opinion of Justice Mahajan in *Gopalan v. State of Madras*, A.I.R. 1950 S.C. 27 at 80.

A. EMERGENCY OF WAR

The United States Supreme Court has said on more than one occasion that the power to wage war is "the power to wage war successfully".¹⁰ Under this power the Court has permitted the imposition of a curfew on American citizens of Japanese ancestry residing in the West Coast States at a time when the possibility of a hostile Japanese landing on the American continent was imminent.¹¹ By American doctrine, the war power when wielded jointly by the President and the Congress is tremendous. "It extends to every matter and activity so related to war as substantially to affect its conduct and progress."¹² Furthermore, the United States Supreme Court has recognized that the courts are scarcely equipped to make decisions which would override those of the Executive and of the Legislature during the actual time of hostilities. Moreover, it concedes that the exigencies of the moment may properly evoke actions which calm hindsight after the end of hostilities will, perhaps, view quite differently. So it permitted classification, on the basis of race, which restricted Japanese-Americans to their homes, but did not restrict German-Americans or Italian-Americans, although the nation was at war with Germany and Italy, as well as with Japan. The Court found, in *Hirabayashi v. United States of America*,¹³ such classification to be reasonable on the basis of the high concentration of the Japanese-Americans on the West Coast, together with certain evidence of their social and political characteristics, which the Court thought relevant. Although the decision of the Court in *Hirabayashi* was unanimous, the concurring opinions, particularly that of Justice Murphy, who described the decision as going "to the very brink of constitutional power",¹⁴ warned of dangers of racial classification, even for these purposes.

Later the military authorities in the United States concluded that mere curfew was not sufficient protection and subsequently ordered the removal of the Japanese-Americans from their West Coast homes and their internment in "Assembly centers". On the basis of the *Hirabayashi* holding, a majority of the Supreme Court also upheld in *Korematsu v. United States of America*¹⁵ this more extreme invasion of the rights of American citizens under the war powers. But three members of the Court were unable to agree that the war powers reached this far.

¹⁰ See, e.g., *Hirabayashi v. United States of America*, 320 U.S. 81 at 93; 87 L.Ed. 1774 at 1782 (1944).

¹¹ *Hirabayashi v. United States of America*, 320 U.S. 81; 87 L. Ed. 1774 (1944).

¹² *Id.* at 93.

¹³ 320 U.S. 81; L. Ed. 1774, (1944).

¹⁴ *Id.* at 111.

¹⁵ 323 U.S. 214; 89 L. Ed. 194 (1944).

Although the United States courts have conceded great power to the executive and legislative branches in time of war, they have not relinquished their right to review actions taken by the Executive alleged to be authorized under the war powers. And while the courts unquestionably interpret the grant of the war powers liberally in order not to frustrate victory, the theory has never been abandoned that the war powers relied upon must be found within the Constitution. Their exercise is not outside nor above the constitutional limitations. This philosophy is clearly stated in *Ex parte Milligan*.¹⁶ In that case a military commander, during the Civil War, in a loyal state not under martial law, undertook the arrest, trial and conviction of a civilian. In holding the petitioner entitled to release under a writ of *habeas corpus*, Justice Davis, speaking for the Court, said, "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence . . ." ¹⁷ That the Court will not hesitate to apply the Constitution's limitations to action taken in time of the emergency of war and sought to be justified under the war powers may be seen from the case of *Youngstown Sheet and Tube Co. v. Sawyer*,¹⁸ in which the Supreme Court voided President Truman's seizure of the steel mills during an industrial strike in the midst of the Korean Conflict. The uninterrupted flow of steel to the munitions makers and others manufacturers of the implements of war was, of course, vital. But a distinguishing feature of this case was the fact that the Court felt the President had invaded the war powers possessed by Congress in his unilateral action. For although the war powers of those two branches of government working together have scarcely any limit, judicial adherence to the basic American philosophy of separation of powers operates to curb unilateral action. However, the increasing mechanization of war with the cataclysmic possibilities with which an executive decision may be implemented in mere moments reduces the reality of the dichotomy of executive and legislative war powers. But the *Youngstown* decision does illustrate that the Su-

¹⁶ 4 Wallace [U.S.] 1 (1866).

¹⁷ *Id.*, at 121.

¹⁸ 343 U.S. 579, 96 L. Ed. 1153 (1952).

preme Court's pronouncement that the United States Constitution applies in war and peace has historical validity.

The Australian High Court in an analysis not unlike that employed by the United States Supreme Court in the *Hirabayashi* and *Korematsu* cases has permitted the war powers of the Australian Constitution to override the specific constitutional limitation of Section 116, forbidding the Commonwealth prohibiting the free exercise of any religion. In *Adelaide Company of Jehovah's Witnesses, Inc. v. Commonwealth*¹⁹ the Australian High Court was faced with a situation in which the petitioner, a religious body, was charged with obstructing the war effort. The Court accepted findings that adherents to this religion advocated that political bodies were organs of Satan and that the adherents refused to take an oath of allegiance to the King or other constituted human authority. The Australian Constitution, like the American, is not detailed in its conferment of the war powers. Parliament has power to make laws "for the peace, order and good government of the Commonwealth with respect to the naval and military defence . . ." ²⁰ The executive power is vested in the Queen and is exercisable by the Governor-General.²¹ Under these powers the *National Security Act* 1939-1940 was enacted, providing, *inter alia*, that the Governor-General could make regulations for securing the public safety and the defence of the Commonwealth. Pursuant to this Act, the *National Security (Subversive Associations) Regulations*, Statutory Rules 1940 No. 190, as amended, were made. By the terms of these Regulations the Government could terminate the existence of bodies or associations which were deemed inimical to safety or defence. It could seize and dispose of the property of such associations. Following the Regulations the Government decreed the dissolution of the petitioner, the occupation of its premises and the forfeiture of its property. While the Court found certain of the Regulations beyond the powers conferred by the Constitution, it essentially upheld the Regulations as not in contravention of the broad protections of Section 116. The Australian High Court cited with approval the English cases of *King v. Halliday*²² and *Liversidge v. Anderson*.²³ Both cases illustrate exceptional powers to detain without trial delegated by the British Parliament to the Executive in the emergency of war. The statutes involved in both *Halliday* and *Liversidge* were carefully drawn to limit their operation to the specific war emergency.

Although Ireland remained neutral during World War II, its

¹⁹ 67 C.L.R. 116 (1943).

²⁰ Constitution, s. 51 (vi).

²¹ *Id.*, s. 61.

²² [1917] A.C. 260.

²³ [1942] A.C. 206.

emergency legislation of that period is properly classified under the heading of Emergency of War for the reason that a constitutional amendment specifically defined that period as one of war as far as Ireland was concerned. Pursuant to its emergency legislation the Irish Supreme Court upheld summary convictions by military tribunals, permitting the introduction of evidence which in the absence of the emergency legislation would have been incompetent.²⁴ But the Irish Supreme Court, reminiscent of its American counterpart of *In re Milligan*,²⁵ insisted that detention under an act purporting to be for the purpose of securing the public safety did not preclude entertaining an application for a writ of *habeas corpus*.²⁶ The importance of this holding should not be overlooked; for untrammelled executive power, especially as exercised by the military, is antithetical to constitutional democracy; and the courts should never relinquish their powers of review of executive actions beyond the unmistakable dictates of the constitution. It is vital that the courts make the distinction between those actions of the judiciary which might interfere with the successful prosecution of the war effort and those actions which retain their appropriateness, regardless of the war. Certainly, also, where the country is actually not at war, as was the case with Ireland, the courts should guard their prerogatives jealously.

Important characteristics of the emergency legislation in *Walsh*, as in *Halliday* and *Liversidge* were its temporary nature and the necessity of laying administrative regulations taken pursuant to the legislation before the Legislature, which thus could exercise constant supervision and review.

World War II was almost certainly the last such conflict in which the countries of all belligerents will not be devastated to a greater or less degree, and perhaps very quickly. In view of this fact it is inconceivable that courts in all constitutional democracies will not withdraw from the possibility of any interference with the war effort. The precedent for temporary judicial abdication is overwhelming. The American statement that the protections of the Constitution are for war as well as peace came, after all, out of the Civil War of the 1860's, a conflict which has been termed the first of the modern wars in the organization of the economy and the involvement of the civilian population, including destruction of their property in the battle zones. Yet the Civil War moved at the pace of the foot soldier and the cavalry; and life away from the front lines, not excluding the life of the courts, could proceed in quite a normal fashion. Even so, the Court emphasized that the war

²⁴ *In re Walsh*, [1942], I.R. 112.

²⁵ 4 Wallace [U.S.] 1 (1866).

²⁶ *In re Walsh*, *op. cit.*, note 24.

powers, properly exercised, are as complete as the war emergency requires, deciding only that the particular case was an instance of an unjustified claim of the application of those powers. It is inevitable that in the emergency of modern war reliance must be placed upon the Legislature and increasingly upon the Executive to submerge the constitutional guarantees as little as possible and for as short a period as need be. That the temporary loss of constitutional protections may be total or nearly total is, of course, most likely. Their revival will depend not solely upon the desire and the will of the Executive and the Legislature but far more upon the physical survival of the population, the degree of devastation of property. These are the imponderables. No constitution-maker can foresee them. No court can ignore their implications. It is scarcely a truism to state that those who would preserve constitutional democracy today can do so by no better means than the prevention of war.

B. EMERGENCY OF SUBVERSION

The threat of elements within a nation sufficiently strong to disrupt the life of the country and jeopardize the existence of the prevailing form of government is a problem of apparently accelerating importance. The activity of such elements may stem from a variety of causes. Perhaps the most common is disloyalty to the existing form of government, often accompanied by the desire to effect change by violent means. Another cause may be strong disaffection with certain government policies. Communal demands for states within a federation on linguistic or religious or racial lines may fall within this category. Or the presence of powerful lawless elements, with perhaps no political motivation, but for various reasons beyond the scope of the ordinary machinery of the law may give rise to these problems. For example both the Federation of Malaya and the State of Singapore have found it difficult to meet with the traditional criminal laws the threat imposed to organized society by gangs which kidnap "towkays", wealthy Chinese business men, partially because fear of gang retaliation has retarded in many instances the cooperation even of the victim and his family.²⁷ The Anglo-American system of criminal law presupposes the co-operation with law enforcement officers, not only of the victims of crime, but of all citizens. The right of the ordinary citizen to make an arrest under certain circumstances is simply one aspect of this system. The citizen who witnesses the commission of a crime or has other knowledge relevant to it has an affirmative duty, not only

²⁷ See *The Straits Times* (Singapore), May 12, 1961, page 16, col. 6, and page 8, col. 3. See, also, *The Sunday Times* (London), May 14, 1961, page 1, col. 1.

to communicate his information, if ferretted out by the police, but to come forward and offer what he knows immediately and willingly. It is expected of him that he will take reasonable steps to frustrate the commission of crime, as well as to assist the authorities in apprehension and conviction. In a community where the citizens deny the police this essential co-operation it follows that the authorities must take other measures or in effect surrender government to the lawless elements. A citizenry which would avoid the harsh and arbitrary methods of arrest and detention without trial can scarcely be heard to complain if it chooses not to align itself with the forces of law and order when those forces would operate in the traditional constitutional way.

A study of the constitutional problems involved in legislation designed to meet the threats of subversion must necessarily include some reference to the historic democratic freedoms of speech and association, as well as to the equal protection of the laws and to due process of law or its cognates; for one, held under legislation specially designed to combat subversion, however anti-democratic the acts and philosophy of such a person, naturally and appropriately claims the full protection of the constitutional safeguards.

In the case of the United States, as indicated above, the courts have found constitutional sanction for meeting the threats of subversion in time of war by the most stringent measures, even including the detention without trial of entire racial groups in certain localities.²⁸ But Government in the United States must revert to the ordinary criminal laws to combat subversion in times of peace. Detention without trial, for example, is unknown there, except during a war. The courts have, however, denied the right to advocate the overthrow of the government of the United States by force and violence, and legislation interdicting such activity has been frequently upheld.²⁹ But arrest and conviction for such an offence must be by the procedure applicable to any other crime. By contrast, the Constitution of India³⁰ simply denies most of the regular constitutional procedural protections to one held in preventive detention, although it does provide for certain substituted procedural safeguards.

The Supreme Court of Ireland found a kind of middle ground between the United States position prohibiting detention without trial except in time of war and the subsequent Indian Constitution permitting it anytime. In the absence of express constitutional prohibition, the Irish Court upheld a preventive detention law when

²⁸ *Korematsu v. United States of America*, 323 U.S. 214, 89 L. Ed. 194 (1944)

²⁹ E.g., *Dennis v. United States*, 341 U.S. 494, 95 L. Ed. 1137 (1951).

³⁰ Art. 22.

that country was itself not at war, although World War II was in progress at the time of the enactment.³¹

Up to the time of the promulgation of the Indian Constitution, no democratic constitution had authorized detention without trial in ordinary times. Perhaps the Indian Constitution simply gives formal recognition to the fact of continuing emergency which has been the most striking characteristic of the present century. But one wishes to believe that there is a universal validity for all places as well as all time, with a minimum of exceptions, to the proposition that the law should be *general*, "law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."³²

Article 22 of the Indian Constitution provides in Clause (1) that arrested persons must be informed "as soon as may be" of the grounds of their arrest, and they are guaranteed the right of counsel. Clause (2) requires that arrested persons be produced before the "nearest magistrate" within twenty-four hours of their arrest and that further detention can only be upon the authority of the magistrate. But Clause (3) excepts from the rights granted by Clauses (1) and (2) both enemy aliens and "any person who is arrested or detained under any law providing for preventive detention". Subsequent clauses provide for the procedure applicable to persons detained under preventive detention, as well as for their substantive rights, which are, of course, far less than for those who can claim the protections of Clauses (1) and (2).

Article 22 came up for interpretation for the first time in 1950, in the case of *Gopalan v. State of Madras*,³³ an application for a writ of *habeas corpus* by one imprisoned in Madras under the Preventive Detention Act of 1950. The most significant sections of the Act were the following: (3) permitting either the Central Government or the State Governments to detain any person if satisfied that he would act in a manner prejudicial to the defence or security of India or of a State or prejudicial to the maintenance of supplies and services essential to the community. This section delegated the power granted to certain magistrates and police officers. (12) permitting detention up to one year for certain classes of cases; and (14) preventing the courts from hearing evidence of the substance of any communication indicating the grounds of detention if the Government elected to have such evidence withheld.

The challenge of this Act presented the Indian Supreme Court with its first case calling for a full analysis of the Constitution's

³¹ *In re Offences against the State (Amendment) Bill*, 1940, [1940] I.R. 470.

³² From the argument of Daniel Webster in *Dartmouth College v. Woodward*, 4 Wheaton (U.S.) 518, 581 (1819).

³³ A.I.R. 1950 S.C. 27.

Chapter on Fundamental Rights. Upon very extensive judicial analysis the Act withstood every attack, except for Section 14, which was held to negate the right accorded a detainee by Clause 5 of Article 22 to be communicated the grounds of the order and to make representations against it. Although Clause 6 permitted the Government to withhold "facts" which it considered against the public interest to disclose, the Court was unwilling to be excluded from a review of the "grounds" which were disclosed to the detainee. However, since the Court found Section 14 to be severable, the Act in its operative essentials was upheld.

Subsequent decisions have approved the subjective test contained in the Preventive Detention Act, holding that the determination of the sufficiency of the grounds for detention is not for the courts to decide, although an allegation of *mala fides* remains justiciable.³⁴ However, the majority in the case of *State of Bombay v. Atma Ram Shridhar Vaidya*³⁵ accepted a distinction which Chief Justice Kania made in reference to the grounds. The opinion holds that while the court may not review the grounds from the point of view of their vagueness as to the satisfaction of the Government in detaining an individual, the court may review those same grounds as communicated to the detainee to determine whether they are too vague to enable him to make a representation against his detention. A minority could not accept this distinction and would have held the question of vagueness not justiciable. The majority also held in *Atma Ram* that the grounds for the detention must be in existence at the time the order of detention is made and that these grounds (which the Court defines as conclusions drawn from the available facts) must be supplied the detainee in a body. No part of such grounds may be held back or added to; so grounds inadequate to justify a detention when ordered cannot be improved upon to make legal that which was initially illegal. Again a minority found an inconsistency in the Court's emphasizing the importance of the "grounds" in view of the Government's right to withhold communication of any or all of the facts upon which it based its conclusions.

Although the Indian Supreme Court in both the *Gopalan* and *Atma Ram* cases greatly limited the scope of judicial review of imprisonment under preventive detention legislation, it has ordered the release of detainees on a finding that the grounds for detention as communicated have been too vague to enable the petitioner to make an effective representation against the order of detention.³⁶ It has released detenus on a finding that the grounds disclosed by the Government were irrelevant to the objectives of the preventive

³⁴ *State of Bombay v. Atma Ram Shridhar Vaidya*, A.I.R. 1951 S.C. 157.

³⁵ *Ibid.*

³⁶ *Dr. Ram Krishan Bhardwaj v. State of Delhi*, A.I.R. 1953 S.C. 318.

detention legislation, viz. the prevention of objects prejudicial to the defence of India or to the security of a State or the maintenance of law and order. So it has found the publication of a pamphlet making a scurrilous attack upon a Chief Justice as irrelevant to the objects of the legislation.³⁷ And the Supreme Court has set at liberty a detainee when the Government, through its Advisory Board, has set aside one alleged ground for detention, but has attempted to confirm the detention on another ground remaining. The Court's interesting rationale was that to sustain the detention order on the ground remaining would be to substitute an objective judicial test for the subjective decision of the executive authority, since none could say to what degree the separate grounds had operated on the mind of the Executive in the issuance of the order.³⁸

It is thus apparent that the Indian Supreme Court does guard that area of review of preventive detention which is left to the courts. And within the rather narrow confines of that review it does not hesitate to upset the Executive's determination.

If there is any justification for laws of detention without trial in a constitutional democracy, it can only be on the theory that for some reason or reasons the regular criminal laws with their historic safeguards designed to produce a fair trial before conviction are inadequate and cannot be made adequate to meet the emergency. The Burmese Supreme Court has been notably vigilant to prevent the Executive from employing detention without trial as an easy substitute for adequate available penal laws.³⁹ The Court has found void a section of the Public Order (Preservation) Act, 1947, in so far as it purported to preclude judicial review of an order of preventive detention not in a time of grave emergency.⁴⁰ Moreover, the Court has held the Executive to strict compliance with the procedure of the Act. So a verbal order by telephone directing detention has been held void in view of the Act's requirement of a written order. Nor will an order subsequently complying with the Act render legal an arrest which was initially illegal.⁴¹ Unlike the Indian Supreme Court, the Burma Supreme Court has not accepted the subjective test of the Executive's satisfaction as to the grounds justifying detention.⁴² Rather the Burma Court itself will review the facts alleged to justify the order of detention.⁴³ In holding the objective test applicable to determine whether the exe-

³⁷ *Sodhi Shamsher Singh v. State of Pepsu*, A.I.R. 1954 S.C. 276.

³⁸ *Shibban Lal Saksena v. State of Uttar Pradesh*, A.I.R. 1954 S.C. 179.

³⁹ *Ma Than Sint v. The Commissioner of Police, Rangoon*, 1949 B.L.R. 1.

⁴⁰ *Bo San Lin v. The Commissioner of Police*, 1948 B.L.R. 372.

⁴¹ *Ibid.*

⁴² *Tinsa Maw Naing v. The Commissioner of Police, Rangoon*, 1950 B.L.R. 17.

⁴³ *Daw Aye Nyunt v. The Commissioner of Police, Rangoon*, 1949 B.L.R. 5.

cutive authority is satisfied of the necessity to act, the Burmese Court has said, "... we must examine the materials to see if they are such as could have satisfied the Commissioner of Police. We fully realize 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".⁴⁴ The Burmese Court has recognized the important principle that a detention initially legal may become illegal by a subsequent change of facts. So the Court has not permitted a previous decision upholding an order of detention to bar an application for a writ of *habeas corpus* which alleged a change of circumstances subsequent to the original decision. The Court does not, however, permit the subsequent hearing on the writ of *habeas corpus* to occasion a review of the issues previously determined.⁴⁵

The important distinctions between the emergency of war and emergency short of war cannot be overlooked. In the former instance, external conditions impose rapid, and frequently total, change upon society and institutions. In the latter case, time is fundamentally on the side of the existing form of government; and that Government, if democratic, should operate within the prevailing democratic framework for the reason, among others, that the sacrifice of the constitutional safeguards is normally too great a price to pay for the assumed security it is supposed to buy. But if the Legislature, in its wisdom, deems laws denying the traditional procedural safeguards essential to the preservation of the nation, it does not follow that the courts need make total retreat from their customary role. It is submitted that the approach of the Burma Supreme Court deserves the most careful study. Is there not force in the arguments that the traditional courts with their training and experience are the most appropriate bodies to review the acts of the Executive in ordering arrest and detention? How valid is the position that the Executive is entitled to the "subjective test" as to satisfaction for grounds of detention? Does not the possibility of the abuse of power outweigh the claim that revelation to the court, even *in camera*, of the facts alleged to justify the detention may jeopardize legitimate security interests?

⁴⁴ *Tinsa Maw Naing v. The Commissioner of Police, Rangoon*, 1950 B.L.R. 17 at 35.

⁴⁵ *Tinsa Maw Naing v. The Commissioner of Police, Rangoon*, 1950 B.L.R. 17.

C. ECONOMIC EMERGENCY

The Constitution of India was original in its detailed provisions for enhanced executive power and the overriding of other constitutional articles in the event of emergencies threatening the financial stability of India or any part of it.⁴⁶

As stated previously, the Constitution of the United States does not address itself specifically to economic emergency ; and during the early years of the greatest financial crisis yet faced in America, judicial decisions indicated that the philosophy of the Constitution as to ownership of private property was so conservative as to frustrate Congressional legislation calculated to lift the nation out of the effects of the Great Depression.⁴⁷ So severe became the conflict between the Supreme Court and the President over the interpretation of the economic philosophy of the Constitution that the President proposed to enlarge the Court to secure a majority of Justices who would agree with his economic views. In spite of the tremendous personal popularity of the then President, Franklin D. Roosevelt, and despite the undoubted fact that the Congress supported his legislative program, his "court-packing" plan ran afoul of one of the most basic American beliefs, that of the integrity of the Supreme Court and the undesirability of tampering with it for any cause. The President's plan to enlarge the Court failed to secure Congressional approval. At the same time, however, the Court, whose economically conservative decisions had been by an often closely divided vote, began to uphold later "recovery" legislation.⁴⁸ Subsequent changes in the personnel of the Court, partially as a result of the retirement of some superannuated members, completed the Court's movement towards a more liberal economic phi-

⁴⁶ Art. 360. Subsequent constitutions have followed, at least in part, the Indian Constitution's specific approach to economic emergency. See, for example, Article 150, Clause 1, of the Constitution of the Federation of Malaya.

⁴⁷ E.g., the first Frazier-Lemke Act, which permitted farmer-mortgagors who were unable to obtain a composition or extension of existing indebtedness to retain possession for five years upon payment of a reasonable rental fixed by the court, with an option to purchase at appraised or reappraised value during that period, was held to violate the Fifth Amendment in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 79 L. Ed. 1593 (1935). Other legislation designed to bring about economic recovery was also held to be unconstitutional. See *United States of America v. Schechter Poultry Corporation* 295 U.S. 495, 79 L. Ed. 1570 (1935). See also *Railroad Retirement Board v. Alton Railroad Company*, 295 U.S. 330, 79 L. Ed. 1468 (1934).

⁴⁸ For example, *Helvering v. Davis*, 301 U.S. 619, 81 L. Ed. 1307 (1937). See, also, *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S., 440 81 L. Ed. 736 (1937).

losophy.⁴⁹ The crisis of the United States Supreme Court of the 1930's with the subsequent swing of its majority decisions from economic conservatism to economic liberalism is frequently cited to show one means by which the American Constitution adjusts to the inevitable changes in the body politic. No constitution can survive if it is so rigid as to thwart the irresistible movement of the forces inherent in all living societies. Formal amendment of the United States Constitution is by a difficult, slow and cumbersome procedure.⁵⁰ But the Court has seldom forgotten the admonition of one of its early great Chief Justices, that it is a Constitution the Court is interpreting, an instrument designed to endure.⁵¹ The endurance of the United States Constitution can be attributed as much to the wisdom of the Justices in evolving a pattern of flexibility of decision within a framework of essential stability, as to any other factor.

Although an economic crisis might again come to the United States or other countries of the magnitude of the Depression of the 1930's, it is not likely that legislation to meet it would run into the constitutional difficulties of the early Roosevelt New Deal; for all democracies have adopted more liberal economic policies reflected in substantive constitutional provisions, in directive principles of constitutions, or in judicial precedent.

SUMMARY

Of the great emergencies faced by constitutional democracies in the last twenty years two are towering of importance, the emergency of war and the emergency of subversion. The former by its very nature, by the direction compelled upon it by outside forces is inconsistent with democracy. Its advent must mean the loss, at least temporarily, of traditional constitutional rights. At perhaps the lowest level is the citizen who surrenders his freedom when he enters voluntarily or compulsorily the military service. In any event, the courts probably should not attempt to interpose the constitution between the Executive or the Legislature and the view of those organs of government as to what is necessary to meet the war threat.

⁴⁹ An earlier decision relevant to the same economic crisis had upheld the power of the States under the 10th Amendment to the Constitution, embracing the "police powers", to enact legislation providing for a mortgage moratorium. See *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 78 L. Ed. 413 (1933).

⁵⁰ Art. V.

⁵¹ *McCulloch v. Maryland*, 4 Wheaton 316, 4 L. Ed. 579 (1819).

In the final analysis the courts retain their position of strength, where they are strong, because the other branches of government acquiesce in their power and lend it support. The courts are inherently the weakest branch in the governmental structure. If in time of the overwhelming crisis of war the courts appeared obstructionist, they would surely be ignored, their prestige perhaps irretrievably lost. Furthermore, it must not be overlooked that the courts are not the sole guardians of the constitution. The other branches of government are also bound to this responsibility. The fact that the courts, following the historic development in the United States, may be generally the branch most wisely entrusted with the final determination of constitutionality, is not a complete argument for all situations and times. War is unquestionably a time when the increased powers and responsibilities of the other branches impose upon those branches increased responsibility for determining the constitutionality of their own acts.

But the second great emergency of modern times, the emergency of subversion, poses different problems. If the threat is massive, the issue is in effect one of civil war, and the exercise of war powers may be reasonable to oppose it. But if the threat is less, the courts should be vigilant to limit the essentially arbitrary powers of arrest without open charge and detention without trial to their narrowest field of operation. At the very least, the courts should abandon their acceptance of the subjective test in satisfaction of the Executive's conclusion to order preventive detention, retaining the right for which the courts are best fitted by training and experience to weigh impartially the facts against the historic tests of the law. To do otherwise is to surrender to the rule of men rather than to observe the Rule of Law; and it is the latter characteristic which, above all others, gives content to the claim of constitutional democracy.

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DEPRIVATION OF PERSONAL FREEDOM IN ARGENTINE LAW *

The object of this study ** is to give an impartial description of the present state of Argentine legislation with regard to deprivation of personal freedom.

Nevertheless, some mention must be made of the defects and limitations of our system in so fundamental a matter. For thus this contribution can be linked to those efforts being continuously made in all parts of the world aimed at achieving and maintaining a complete system of individual guarantees.

* Thanks are expressed to Mr. Leopoldo H. Schriffrin for the considerable assistance he provided in reasearch and collation of texts and verdicts.

** In this survey repeated quotations are made from Argentine laws and verdicts. The most accessible sources are listed below:

a) National Constitution: *Anales de Legislación Argentina, Complement for Years 1852-1880*, Buenos Aires, 1954, p. 9;

b) Provincial Constitutions: Provinces of Buenos Aires, Catamarca, Córdoba, Corrientes, Entre Rios, Jujuy, La Rioja, Mendoza, Salta, San Juan, San Luis, Santa Fe, Santiago del Estero and Tucumán, *Anales de Legislación Argentina, 1956*, Buenos Aires, vol. XVI-B, pp. 1467, 1633, 1697, 1823, 1897, 1961, 2005, 2033, 2087, 2133, 2167, 2197, 2239 and 2265 respectively. Also: *Digesto Constitucional de la Nación Argentina*, 1941. These are the constitutions of the 14 original provinces. The constitutions of the new provinces may be found in *Anales de Legislación Argentina*, 1957, Buenos Aires, vol. XVII-B: Chaco, p. 1611; Chubut, p. 1739; Formosa, p. 1789; Neuquén, p. 2029; Rio Negro, p. 2055 and Santa Cruz, p. 2231;

c) *Código Penal de la Nación*; Lajouane, Buenos Aires, 1960;

d) *Código de Procedimientos en Materia Penal*. This is the official title of the code applying in federal courts, called hereinafter "Federal Code". It may be seen in *Leyes Penales Comentadas de la Republica Argentina*, by Juan Manuel Mediano, Luis Jiménez de Asúa and José Peco, Buenos Aires; Losada, 1956, p. 621, and in *Anales de Legislación Argentina, Complement for 1881-1888*, Buenos Aires, 1955, p. 441; Lajouane, Buenos Aires, 1960;

e) Provincial codes of criminal procedure: only 13 provinces have their own codes, the others following the Federal Code. Of these, the following are quoted in the above-mentioned book by Mediano: Buenos Aires, Córdoba, Corrientes, Entre Rios, Salta, San Juan, San Luis, Santa Fe and Santiago del Estero, pp. 775, 857, 959, 1061, 1481, 1573, 1659, 1821 and 1917 respectively. For the others, refer to: Catamarca: *Boletin Informativo de Legislación Argentina*, Year XX, No. 21-22, p. 23; Jujuy: official publishers, *Código Procesal Penal*, San Salvador de Jujuy, 1951; La Rioja: *Anales de Legislación Argentina*, 1951, Buenos Aires, vol. XI-B, p. 1444, and Mendoza: *Anales de Legislación Argentina*, 1950, Buenos Aires, vol. X-B, p. 2430;

f) Verdicts delivered by the National Supreme Court of Justice are to be found in its collection of verdicts in 246 volumes, from 1864 until the present day - abbreviated below as "Fallos".

Personal freedom must be protected by provisions which establish who is competent to order the suspension of such freedom, the causes justifying such action, the formalities required for arrest and the ways in which persons detained may obtain revision of the steps taken against them.

Apart from the case of a sentence which results in loss of freedom – a matter with which we shall not deal here – deprivation of freedom is generally founded on the existence of indications that a serious crime has been committed, where it is essential to detain the person presumed guilty so that he may not evade the imposition of punishment. In such a case, it is normally the responsibility of a judge to order detention, but there are important exceptions that may be determined by the powers granted in certain circumstances to the police. This first concept will be discussed under the heading of “Arrest in Respect of a Crime”.

However, there are other reasons which may lead to detention of persons without there being any suspicion of the commission of a crime. Such reasons are normally based on considerations of security or of police regulations, or on disciplinary requirements concerning the operation of state organs. In such cases it is generally administrative officials rather than judges who have authority to order detention. This second subject will be discussed under the heading of “Arrest Other than in Respect of a Crime”.

The legal means whereby unjustified arrest of any nature may be reviewed and the rights of persons brought for trial in such cases considered, constitute a third subject which will be discussed under the heading of “Judicial Review of Arrests. Rights of Persons Arrested”.

I. ARREST IN RESPECT OF A CRIME

There are two distinct methods of procedure by which a person may be deprived of his freedom on the grounds of the suspicion that he may have committed a crime.

The first procedure is to detain the suspect in order that he should appear before a judge, and this restriction of freedom may, depending of circumstances be imposed either with a judicial order or without. In Anglo-Saxon law this form of detention is called “arrest” (with or without warrant), and in our law it is called “*detención*”.

The second procedure deals with the situation of the accused once the judge considers that there is sufficiently serious evidence justifying deprivation of his freedom as a precautionary measure in order to facilitate investigation and ensure that he appears for trial. This situation, known in Anglo-Saxon law as “preventive detention”, and in French law as “*détention préventive*”, is known in

Argentine law as "*prision preventiva*", and is ordered through a written and motivated decision with reasons known as "*auto de prision preventiva*" ("commitment" in Anglo-Saxon law, "*mandat d'arrêt*" in French law).

As a preliminary clarification before going into the peculiarities of the Argentine system, it should be pointed out that in our country there is a federal system very much like the United States system. The whole country and the federal states, called "*provincias*", each have their judicial procedure, but with differences that are often considerable. It will therefore be essential to point out these differences below wherever this affects the point at issue.

1) Arrest without Warrant

a) Arrest by private persons and police

Our Constitution stipulates in Article 18 that no person may be deprived of his freedom without a written warrant issued by a competent authority. The same principle is established in similar terms in various provincial constitutions.¹ The others, and many of the codes of criminal procedure, state that arrest may only be carried out pursuant to a warrant signed by a judge.²

Nevertheless, legislation admits the possibility of arrest without warrant in certain cases, and principally when a person is caught *flagrante delicto*. In such circumstances any person may arrest a guilty party.³

This important consequence of *flagrante delicto* means that the concept involved must be carefully defined. Most of our laws attempt to establish clear limits, but no single formula has been evolved, since the notion of *flagrante delicto* varies in extent in different Argentine codes of criminal procedure.

¹ Constitution of Entre Rios art. 24; La Rioja: arts. 28 and 29; Salta: art. 29; Santa Fe: art. 91; Santiago del Estero: art. 20; Chaco: art. 18.

² Constitution of Buenos Aires: art. 13; Catamarca: art. 36; Córdoba: art. 12; Mendoza: art. 17; San Juan: art. 8; San Luis: art. 28; Tucumán: art. 31; Chubut: art. 29; Formosa: art. 12; Neuquén: art. 36; Santa Cruz: art. 26; Federal Code: art. 2; Corrientes: art. 3; Entre Rios: art. 6; Salta: art. 2; San Juan: art. 2; Santa Fe: art. 14; Santiago del Estero: art. 5.

³ Constitutional provisions of provinces quoted in notes 1 and 2 and, in addition, National Penal Code: arts. 239 and 240; Federal Code: arts. 3, 4, 184, para. 4, 368, para. 2 and 369; Buenos Aires: art. 184; Catamarca: arts. 255, 258 and 162 para. 8; Córdoba: arts. 329, 332 and 142, para. 5; Corrientes: arts. 5, 6, 170, para. 4 and 368, para. 2; Entre Rios, para. 4; La Rioja: arts. 321, 323, 324 and 197, para. 5; Mendoza: arts. 289, 293 and 192, para. 7; Salta: arts. 3, 4, 143, para. 4, 326, para. 2 and 327; San Juan: arts. 3, 4, 87, para. 4, 271, para. 2 and 272; San Luis: art. 226, para. 2; Santa Fe: arts. 18, 108, para. 4, 190, para. 2 and 191; Santiago del Estero: arts. 5 and 133, para. 4.

Ever since Roman law it has been traditional to consider that the situation of *flagrante delicto* arises not only when a person is apprehended by another while committing a crime but also in situations considered comparable and equivalent. This concept appears with slight shades of difference in almost all Argentine legal codes. As an example, we may quote art. 330 of the Cordoba Code, which is based in part on art. 41 of the French Code of Criminal Investigation: "A situation of *flagrante delicto* shall be considered to exist when the culprit is apprehended at the time of committing an offence or immediately afterwards, while pursued by the forces of public order, by the injured party or by hue and cry, or while he is in possession of objects or bears signs which lead to pressing suspicion of his having just participated in committing an offence."⁴

On the other hand, the Federal Code and the provincial codes of Buenos Aires and Salta limit the concept of *flagrante delicto* to the situation where the apprehending party was present when the crime was committed.⁵

In some provinces it is also required that the offence should be one subject to a prison sentence and automatically leading to prosecution.⁶

There is a further case in which arrest without warrant is authorized, namely when a person escapes from imprisonment. The older codes, which follow the line of the Federal Code, go into great detail in describing this situation. art. 368 of the Federal Code states that: "... any person may apprehend: ...

3) A person fleeing from a penal establishment in which he is serving a sentence;

4) A person fleeing from a place in which he is awaiting transfer to the penal establishment or place in which he is to serve the sentence imposed by an irrevocable verdict;

⁴ Code of Catamarca: art. 256; Corrientes: art. 4; Entre Rios: art. 9; Jujuy: art. 301; La Rioja: art. 322; Mendoza: art. 290; San Juan: art. 5 (with somewhat more restrictive standards); Santa Fe: art. 19.

⁵ Federal Code: art. 5; Buenos Aires: art. 185; Salta: art. 5.

⁶ It is also provided that arrest for an offence punishable by imprisonment is possible only at the request of the injured party if that person wishes a charge to be preferred (Code of Córdoba: art. 329; Jujuy: art. 300; La Rioja: art. 321; Mendoza: art. 289).

Most of our procedural laws deal separately, but with largely the same effect as for *flagrante delicto*, with cases where a person is apprehended when about to commit a criminal offence, although the two concepts are identical. Malagarriga and Sasso, *Procedimiento Penal Argentino*, Buenos Aires, 1910, vol. I, p. 462. Federal Code: art. 368, para. 1; Corrientes: art. 368, para. 1; Córdoba: art. 331, para. 1; Entre Rios: art. 400, para. 1; Jujuy: art. 302, para. 1; La Rioja: art. 323, para. 1; Mendoza: art. 291, para. 1; Salta: art. 326, para. 1; San Juan: art. 271, para. 1; San Luis: art. 226, para. 1; Santa Fe: art. 190, para. 1.

- 5) A person fleeing during transfer to the establishment or place mentioned in the previous sub-paragraph;
- 6) A person fleeing from detention in respect of a pending charge;
- 7) A person tried and sentenced who is in default."⁷

In actual fact, all of these hypothetical situations may be reduced to two: first that of an arrested person fleeing in order to avoid application of an irrevocable sentence (paragraphs 3, 4 and 5) and secondly that of an arrested person in default (paragraphs 6 and 7). In the first situation, it is a question of carrying out a sentence, for which purpose the authorized method cannot be considered as detention in order to bring a suspect to trial. The second situation, on the other hand, is reminiscent of the mediaeval hue and cry.⁸

A private person apprehending an offending party in the cases enumerated must deliver that person to the authorities immediately.⁹

b) Arrest by police

The most common form of arrest without warrant occurs when a police official performs the arrest in connection with a crime. The law states that in those cases where private persons are empowered to arrest without a warrant the police are required to do so. However, there is a further situation in which the police have to act even without any legal warrant: namely when there are strong indications that a particular person has committed a crime.¹⁰

As a general rule, the police are required to hand over persons

⁷ Similarly: Corrientes: art. 368, paras 3, 4, 5, 6 and 7; Entre Rios: art. 400, paras 3, 4, 5, 6 and 7; Salta: art. 326, paras 3, 4, 5, 6 and 7; San Juan: art. 271, paras 3, 4, 5, 6 and 7; Santa Fe: art. 190, paras 3, 4, 5, 6 and 7; San Luis: art. 226, paras 3, 4, 5, 6 and 7.

⁸ For a description of the way in which anyone hearing hue and cry was obliged to join in pursuit, see *Enciclopedia Universal Ilustrada Europeo-Americana* (Espasa Calpe), Madrid, 1925, vol. XXVII, p. 734, under "haro".

⁹ Constitutional provisions of provinces quoted in notes 1) and 2), except for La Rioja, Chaco, Chubut and Santa Cruz. Federal Code: arts. 3 and 370 (last part); Catamarca: art. 258; Córdoba: art. 332; Corrientes: arts. 5 and 371 (art. 5 states the requirements of immediate delivery, while art. 371 allows a time limit of 24 hours); Entre Rios: arts. 7 and 401; Jujuy: art. 303; La Rioja: art. 324; Mendoza: art. 293; Salta: arts. 3 and 328 last part; San Juan: arts. 3 and 273 last part; San Luis: art. 228 last part; Santa Fe: arts. 18 and 192 last part; Santiago del Estero: art. 5. The Federal Code and several provincial codes state that a private person delivering a person apprehended *flagrante delicto* to the authorities must swear this under oath (Federal Code: art. 3; Corrientes: art. 5; Entre Rios: art. 7 and 401 last part; San Luis: art. 228 last part; Santa Fe: art. 18).

¹⁰ Federal Code: art. 4; Córdoba: art. 331, para. 3; Corrientes: art. 6; Entre Rios: art. 8; Jujuy: art. 302, para. 3; La Rioja: art. 323, para. 3; Mendoza: art. 291, para. 3; Salta: art. 4; San Juan: art. 4.

arrested to the judicial authorities within a very short space of time. Laws use the expressions "immediately" and "in the first hours in which the judge officiates".¹¹

This provision is not normally fulfilled within such strict limits. This is due to the fact that the police, in accordance with the powers granted to them under our laws, may hold a preliminary judicial investigation. After this investigation which may take 2 or 3 days the person detained is generally sent to the judge, together with the evidence obtained.

Nevertheless, during such police investigation the competent judge is normally advised by telephone or telegraph of arrests made and is consulted regarding the procedure to be followed with any persons arrested. In such cases it is not rare at this stage for judges to order such persons to be set free when the method of arrest is patently unlawful.¹²

Mention should be made of the particular function allotted to the police by the Buenos Aires provincial code. This states that police officials shall be empowered to conduct the actual preliminary hearing and not merely the above mentioned investigation as in other provinces, even enjoying the judicial power to order arrest.¹³

Finally, it is important to bear in mind the fact that, when an arrest has to be made in a private house, the police cannot enter that building without a signed warrant in the cases enumerated above.¹⁴ This rule does not apply:

1) when one or more witnesses state they have seen persons enter a dwelling with obvious intent to commit a crime therein ;

¹¹ Federal Code: arts. 4 and 370; Catamarca: art. 257; Córdoba: art. 334; Corrientes: arts. 6 and 371; Entre Ríos: arts. 8 and 401; La Rioja: art. 326; Mendoza: art. 292; Salta: arts. 4 and 328; San Juan: arts. 4 and 273; San Luis: art. 228; Santa Fe: art. 192. Provincial constitutions state that the judge must be advised of an arrest within 24 hours and that the person detained must be held at the judge's disposal (Catamarca: art. 38; Córdoba: art. 15; Entre Ríos: art. 24; Jujuy: art. 25; Salta: art. 30; San Juan: art. 11; San Luis: art. 30; Santa Fe: art. 11; Santiago del Estero: art. 21; Tucumán: art. 32; Chaco: art. 18; Chubut: art. 32; Formosa: art. 12; Neuquén: art. 37; Río Negro: art. 9; Santa Cruz: art. 23).

¹² Barberis, *Código de Procedimientos en lo Penal y Leyes Complementarias*, Buenos Aires, 1956, vol. I, p. 7.

¹³ *Code of Buenos Aires*: arts. 92 and 446.

¹⁴ National Constitution: art. 18; provincial constitutions: Buenos Aires: art. 21; Catamarca: art. 21; Córdoba: art. 19; Corrientes: art. 12; Jujuy: art. 31; La Rioja: art. 32; Mendoza: art. 14; Salta: art. 24; San Luis: art. 24; Santa Fe: art. 18; Santiago del Estero: art. 13; Tucumán: art. 30; Chaco: art. 12; Chubut: art. 25; Formosa: art. 10; Neuquén: art. 33; Río Negro: art. 6; Santa Cruz: art. 26. Federal Code: art. 188; Buenos Aires: art. 446, para. 4; Catamarca: art. 193; Córdoba: art. 228; Corrientes: art. 177; Entre Ríos: art. 323; Jujuy: art. 176; La Rioja: art. 249; Mendoza: art. 228; Salta: art. 147; San Juan: art. 91; Santiago del Estero: art. 169.

2) when a person sought for the purpose of arrest in connection with a serious crime enters a dwelling;

3) when voices are heard from inside the dwelling indicating that a crime is being committed, or calling for help.¹⁵

2) Arrest with warrant¹⁶

a) Simple arrest

In this matter Argentine laws may be divided into two groups of roughly equal number. Those following the old model of the Federal Code establish only the formal requirements for a warrant for arrest, which is given the generic title of "*orden de prisión*". This warrant is required by art. 373 of the Federal Code to contain:

- 1) The name of the judge issuing the warrant ;
- 2) the person or authority required to execute it ;
- 3) the crime in respect of which the warrant is issued ;
- 4) details of the person against whom the warrant is directed ;
- 5) the place to which the person is to be taken ;
- 6) whether the person is to be held incommunicado or not.¹⁷

As already mentioned, the warrant must be written, as required under Art. 18 of the Constitution. The older codes do not require the warrant of arrest to be communicated to the person concerned and they contain no express provisions regarding the requirements as to substance for a warrant of arrest, so that it may be authorized simply because a crime has been committed however slight in the same way as apprehension of a person taken *flagrante delicto* is authorized without distinguishing the nature of the offence.

The more modern provincial codes deal with these matters at length and offer a much more satisfactory prospect. They may be sub-divided since the methods laid down are not precisely identical. On the one hand there are the codes of Buenos Aires and

¹⁵ Federal Code: art. 189; Catamarca: art. 196; Córdoba: art. 231; Corrientes: art. 178; Entre Rios: art. 324; Jujuy: art. 177; La Rioja: art. 253; Mendoza: art. 231; Salta: art. 148; San Juan: art. 92; Santiago del Estero: art. 172.

¹⁶ We refer to procedural codes only, but the provincial constitutions establish certain standards regarding grounds and form of the warrant: some serious indication of guilt is required to be revealed by investigation already begun and an exact statement must be made of the persons against whom a warrant is issued (cf. const. provisions quoted in notes 1) and 2), and Constitution of Buenos Aires: art. 14; Jujuy: art. 25; Mendoza: art. 18; Salta: art. 29; San Juan: art. 7; San Luis: art. 29; Santa Fe: art. 10; Chaco: art. 18).

¹⁷ Similarly: Code of Corrientes: art. 374; Entre Rios: art. 406; Salta: art. 331; San Juan: art. 276; Santa Fe: art. 195.

San Luis ; on the other hand, there are those of Córdoba, Catamarca, Jujuy, La Rioja, Mendoza and Santiago del Estero. Notwithstanding the differences between them, they all have the basic idea that persons should not be deprived of their freedom on charges of minor offences only. Several of these codes also state therefore that arrest without warrant may only be ordered when the crime is punishable by imprisonment.

The laws within the first group generally state two conditions for arrest to be ordered :

- 1) that there should be serious indications (they use the expression of "semi-complete proof") of guilt ;
- 2) that the crime in respect of which arrest is ordered should be punishable by a sentence of an average term exceeding two years' imprisonment.¹⁸

The laws in the second group require as a general condition for arrest :

- 1) that there should be foundation for the judge to interrogate the accused ;
- 2) that the offence should be punishable by a sentence of imprisonment and that no conditional sentence is appropriate (under section 26 of the Penal Code, this may be granted when the sentence imposed on a first offender does not exceed two years' imprisonment or takes the form of a fine).¹⁹

In both groups of codes exceptions to the above rules are met. A warrant for arrest may be issued although the offence justifying this is not punishable by imprisonment, provided that there are good reasons to believe that a mere summons will not be obeyed, or if it is feared that the accused might, if left in freedom, take advantage of the opportunity to impede judicial action by taking flight, by entering into collusion with accomplices, by attempting to induce witnesses to give false evidence or by destroying traces of the offences. The Buenos Aires provincial code also states that if an accused is not domiciled in the territory of that state he shall be detained in any circumstances, the same procedure being followed in the case of earlier offenders, persons whose trial is pending or persons charged with robbery.²⁰

Finally, the codes of Buenos Aires and San Luis state that, when preventive arrest is not a consequence of the penalty attaching

¹⁸ Code of Buenos Aires: art. 172; San Luis: art. 213.

¹⁹ Code of Córdoba: arts. 326 and 327; Catamarca: arts. 253 and 254; Jujuy: art. 297 (however, it does not demand the requirements for an initial statement to be made); La Rioja: arts. 318 and 319; Mendoza: arts. 287 and 288; Santiago del Estero: arts. 253 and 254.

²⁰ Code of Buenos Aires: art. 172.

to the crime, arrest for a period of up to eight days may be ordered in order to obtain the first statement by the accused, fix his legal domicile, investigate evidence given in the preliminary hearing and obtain statements by witnesses in either preliminary or full hearing.²¹

The State codes referred to above also contain express reference to the formal requirements governing issue of a warrant for arrest. The warrant must be written, except in cases of urgency in which the judge provides the order verbally, stating this in the file; it must also contain precise details serving for the identification of the person against whom it is directed, together with an indication of the offence of which that person is accused.²²

With regard to the problem arising in the initial stage from the investigation of an act committed in a place where several persons are present without the identity of the criminal being known immediately, our laws empower both the judge and the police to prevent anyone from leaving and to detain any person present.²³ The Federal Code and those following its method distinguish between arrest motivated by the existence of suspicion against particular persons and arrest that is due to the necessity of interrogating all persons present. In the first case the person arrested may be held for a maximum of 48 hours, whereas in the second case he can only be held for a period which extends to the time necessary for a statement to be made.²⁴ The more modern codes make no distinction and simply apply a maximum of 24 hours for arrest.²⁵

By how much can the period during which a person is held on an order for arrest made by a judge, be extended? Here again the dual nature of our procedural systems appears. Older laws leave a considerable gap in this connection, whereas the new laws cover the matter fully. The Federal Code fixes a deadline of 24 hours for persons held in custody to make a first statement, in other words, allowing sufficient time for him to appear before the

²¹ Code of Buenos Aires: art. 173; San Luis: art. 214. This provision is undoubtedly designed for cases where release of the accused would impede the normal course of proceedings, but, by failing expressly to require that this be the case or that there be strong indications that it would happen, it gives the judge too much latitude.

²² Code of Buenos Aires: art. 186; Catamarca: art. 254; Córdoba: art. 328; Jujuy: art. 299; La Rioja: art. 320; Mendoza: art. 288; San Luis: art. 229; Santiago del Estero: art. 255.

²³ Federal Code: art. 364; paras 1 and 2; Buenos Aires: art. 178, paras 1 and 2; Catamarca: art. 252; Córdoba: art. 333; Corrientes: art. 363, paras 1 and 2; Entre Ríos: art. 395, paras 2 and 3; Jujuy: art. 304; La Rioja: art. 325; San Luis: art. 218; para. 1; Santa Fe, art. 185, paras 1 and 2.

²⁴ Federal Code: art. 365; Corrientes: art. 364; Entre Ríos: art. 397; Salta: art. 323; San Juan: 268; Santa Fe: art. 186.

²⁵ Provisions of the codes of Catamarca, Córdoba, La Rioja and Mendoza quoted in note 23) and code of Jujuy: art. 305.

judge and be interrogated by him,²⁶ but it omits to specify a period within which a decision must be made regarding the person's release after this. It is only logical that the courts, when faced with a case of arrest extended to an inordinate degree, have found it intolerable that a person should be held under indefinite arrest while evidence to justify such arrest is awaited. Once the initial statement has been made, it is essential that preventive detention be ordered if it is called for, arrest becoming unlawful otherwise, so that the order calling for it should be revoked.²⁷

The more modern provincial codes lay down definite limits, but the periods applied vary somewhat. For the codes of Buenos Aires,²⁸ Jujuy²⁹ and San Luis,³⁰ preventive detention must be ordered, or the person held under arrest must be released in the case of the first two within 48 hours; in the case of the third within a period of ten days, following the initial statement, which must be made within 24 hours of arrest – an immutable rule of our procedural law which is generally satisfied.³¹

According to the legal codes of Catamarca,³² Córdoba,³³ Mendoza,³⁴ Santiago del Estero³⁵ and La Rioja,³⁶ a decision to send the accused for trial or to order his release must be made within six days in the case of the first four and within eight days, in the case of the last, beginning from the time of arrest.

b) Preventive Detention

We explained at the outset the concept involved, and in the previous paragraph we stated the period within which a judge must order preventive detention.

What formal and basic requirements exist? The conditions fixed by our laws for such cases are invariably:

- 1) that the existence of a criminal offence must be proved;
- 2) that the initial statement of the accused should have been received or that he should have refused to make one; and
- 3) that there should be reasonable elements to indicate his guilt.

²⁶ See note 31 below.

²⁷ *Fallos de la Excma. Cámara de Apelaciones en lo Criminal y Correccional de la Capital*, vol. 1, p. 307.

²⁸ Art. 181.

²⁹ Art. 307.

³⁰ Art. 222.

³¹ Code of the Capital: art. 237; Buenos Aires: art. 119; Catamarca: art. 259; Córdoba: art. 244; Corrientes: art. 249; Entre Ríos: art. 368; Jujuy: art. 216; La Rioja: art. 264; Mendoza: art. 294; Salta: art. 195; San Juan: art. 141; San Luis: art. 148; Santa Fe: art. 222; Santiago del Estero: art. 193.

³² Art. 270.

³³ Art. 336.

³⁴ Art. 307.

³⁵ Art. 258.

³⁶ Art. 327.

The first and third conditions are expressed in a different way in the new and old types of codes. In the old forms, the wording is broad and vague (semi-complete proof, strong indications, etc.) whereas the more modern forms used terms imposing stricter conditions.³⁷

There is no legislative uniformity with regard to the ordering of preventive detention for offences which are not normally punishable by imprisonment. The old codes do not broach the subject, whereas the newer forms answer in the negative,³⁸ and one of them the Mendoza code, even requires two years' imprisonment in such cases. The gap left by the Federal Code and the systems following it have been filled in by jurisprudence in the manner of the more recent laws.³⁹

However, there is no purpose in stipulating conditions the implementation of which cannot be enforced. The wrongful practice of failing to state the grounds for preventive detention has forced many legal systems to describe in great detail the manner in which such orders must be drawn (a brief description of the offence with a reference to the articles of the law applying are the most typical requirements).⁴⁰

II. ARREST OTHER THAN IN RESPECT OF A CRIME

1) Arrest for purposes of security

a) *During the state of emergency*

Article 23 of the Constitution provides that "in case of internal disturbance or external attack endangering the exercise of this Constitution and of the authorities established by it, a state of emergency shall be declared in the province or territory in which order is disturbed, the constitutional guarantees thereby being suspended".

³⁷ Federal Code: art. 366; Buenos Aires: art. 179; Catamarca: arts. 270 and 271; Córdoba: arts. 336 and 338; Corrientes: art. 366; Entre Ríos: art. 398; Jujuy: art. 307; La Rioja: arts. 327 and 329; Mendoza: arts. 307 and 308; Salta: art. 324; San Juan: art. 269; San Luis: art. 219; Santa Fe: art. 187; Santiago del Estero: arts. 258 and 260.

³⁸ Code of Catamarca: art. 276; Córdoba: art. 339; Jujuy: art. 308; La Rioja: art. 330; Mendoza: art. 312; Santiago del Estero: art. 261.

³⁹ *Fallos de la Excma. Cámara de Apelaciones en lo Criminal y Correccional de la Capital*, vol. 3, p. 377.

⁴⁰ Code of Buenos Aires: art. 180; Catamarca: art. 272; Córdoba: art. 337; Jujuy: art. 307; La Rioja: art. 328; Mendoza: art. 309; Santiago del Estero: art. 259.

The arrangement followed is an institution of French origin which amounts to assimilating the situation of the country in time of war or of disturbance due to internal disorder to the situation under a state of siege, when the principle of "*salus populi suprema lex esto*" applies. Concerning personal freedom, the second part of the same article states :

"However, during such suspension, the President of the Republic may not pass or apply sentence on his own authority, which shall in such cases be limited to the power of arrest or of transferring persons from one point to another within the national territory, unless such persons choose to leave the country."

Thus it appears that individuals may be arrested and transferred from one place to another inside the territory for reasons of security but not be subjected to emergency penal provisions applied by organs of the administration or by the chief executive ; moreover, detention may be avoided if the person concerned elects to leave the country.

A state of emergency is something quite different from suspension of the principle of *habeas corpus* of English and American law. In the latter case, only personal freedom is infringed, whereas in a state of emergency all constitutional safeguards are restricted, although personal freedom is restricted somewhat less than under English or American law, which does not provide an option to leave the country.⁴¹

The power to arrest or transfer persons does not extend to the arrest of members of the supreme governmental organs, since a state of emergency is proclaimed in order to safeguard the authorities established by the Constitution and not to prevent their functioning. Therefore when an outstanding Argentine politician, Senator Leandro N. Alem, was arrested under emergency provisions in 1893, the Supreme Court ordered his release.⁴²

Special mention must be made of the right of choosing to leave the country. Such a request must be made to the Executive⁴³ and not to the courts. The Executive may not make permission to leave the country conditional on taking up residence in any particular country outside Argentina.⁴⁴ A person due for trial can not receive authorization by the Executive to leave the country, since then, his appearance before the court will depend on his own decision.⁴⁵

Regarding the organs empowered to proclaim a state of emergency, a distinction must be made between a case of outside attack

⁴¹ Juan A. González Calderón, *Derecho Constitucional Argentino*, Buenos Aires, 1931, vol. II, p. 287.

⁴² *Fallos*, vol. 54, p. 432.

⁴³ *Fallos*, vol. 115, p. 498.

⁴⁴ *Fallos*, vol. 200, p. 253 and 264.

⁴⁵ *Fallos*, vol. 237, p. 260.

and internal disturbance. In the former case, the President of the Republic decrees a state of emergency with the agreement of the Senate.⁴⁶ In the latter case, it is for Congress to make a proclamation, and if it is not in session the President may do so, with the possibility of the Legislature annulling the state of emergency when it meets.⁴⁷ The prevailing opinion at present is that a state of emergency can only be declared by the Federal Government and that provincial authorities have no such power.⁴⁸

When a declaration of a state of emergency to overcome an internal disturbance is made by the Executive its validity is limited in time, in the same manner as for outside attack.⁴⁹

b) The so-called "state of internal warfare"

A state of warfare is dealt with in Articles 23, 53 and paragraphs 21 and 22 of 67, of the Constitution, and the powers of the President as supreme chief of the armed forces are covered by Article 86, paragraphs 15, 16 and 17.

Martial law consists of decrees, somewhat in the nature of penal ordinances issued and applied by the military authorities concerning the civil population in areas of operations of warfare and in places affected by disturbance brought about by the inability of the civil authorities to maintain public order.⁵⁰ In 1943, martial law was proclaimed from June 4 to 8 for the whole nation by a revolutionary government.⁵¹

We make this reference in order to recall a most peculiar institution which was in existence in our country until the downfall of the Peron dictatorship and which was established by that dictatorship as a "state of internal warfare". On September 28, 1951, a rising occurred as a result of which the nation was declared to be in a "state of internal warfare",⁵² in order to justify the use of war-time powers by the Executive, with the main practical effect of authorizing a discretionary power of arrest and the additional effect of withdrawing the option to leave the country normally incorporated in arrest during a state of emergency. Under these circumstances a

⁴⁶ National Constitution: Arts. 53 and 86, para. 19.

⁴⁷ National Constitution: Arts. 67, paras 26 and 86, para. 19.

⁴⁸ González Calderón, op. et. vol. cit. p. 295.

⁴⁹ National Constitution: Art. 86, para. 19. All declarations of a state of emergency are contained in the official publication *Materiales para la Reforma Constitucional*, Buenos Aires, 1957. "III Estado de sitio", 65 ff.

⁵⁰ Code of Military Justice, arts. 131 off. Official publishers, Buenos Aires, 1951. *Anales de Legislación Argentina*, Buenos Aires, vol. XL-A, p. 195.

⁵¹ Decree 1 of June 4, 1943, repealed by Decree 28 of June 8, 1943, see *Anales de Legislación Argentina*, 1943, Buenos Aires, vol. III, p. 169.

⁵² Act No. 14,062 (in *Materiales para la Reforma Constitucional* vol. cit. p. 120). This was repealed by Decree 140/55 (in *Materiales...*, vol. et. loc. cit.).

state of emergency was not found necessary. It was a considerable time before it was again imposed; this occurred at the time of the revolution of September 1955.⁵³ This state of emergency was lifted on 28 June 1957;⁵⁴ but it was imposed again for the federal capital and the province of Buenos Aires for thirty days, from October 4 to November 4, 1957,⁵⁵ On May 1, 1958, the new constitutional government was installed, and declared a state of emergency on November 11 for thirty days,⁵⁶ and then later on December 11 with no limitation in time.⁵⁷

c) *Mobilization of Civilians*

In order to deal with subversion, other legal instruments have been used, such as the mobilisation of civilians decreed on the basis of article 27 of the war-time National Organization Act⁵⁸ in order to prevent strikes affecting essential public services. More recently, through use of the President's war-time powers, civilians were brought under the jurisdiction of the military courts in the case of offences committed against public security,⁵⁹ at a time when the population was threatened by a very extensive clandestine movement using wide-scale terrorist methods. This measure is now repealed by a new Security Act restoring the competence of the Judiciary⁶⁰ for such cases.

These standards have not provided the Executive with any discretionary power of detention. Their effect lies in extending the competence of military courts, which is exercised in respect of offences committed and subject to the procedure laid down by the Code of Military Justice.

d) *Expulsion of Foreigners*

In our legal system there was a legal provision whereby arrest for reasons of security could be authorized, with regard to the expulsion of foreigners as permitted under Act No. 4144, which

⁵³ Act No. 14,427, Act No. 14,433, *Anales de Legislación Argentina*, 1955, Buenos Aires, vol. XV-A, pp. 13 and 28.

⁵⁴ Legislative Decree 7298/57 - *Anales de Legislación Argentina*, 1957, Buenos Aires, Vol. XVII-A, p. 570.

⁵⁵ Legislative Decree 12,717/57, *Anales de Legislación Argentina*, quoted in note 14, p. 765.

⁵⁶ Decree 9764/58 and Act No. 14,774, *Anales de Legislación Argentina*, 1958, Buenos Aires, Vol. XVIII-B, p. 1223 and Vol. VIII-A, p. 286.

⁵⁷ Act No. 14,785 *Anales de Legislación Argentina*, 1958; Vol. XVIII-A, p. 319.

⁵⁸ Act No. 13,234, *Anales de Legislación Argentina*, 1948, Buenos Aires, Vol. VIII, p. 72.

⁵⁹ Decree 2639/60 - *Boletín Oficial*, March 10, 1960.

⁶⁰ Act No. 15,293, *Boletín Oficial*, August 12, 1960.

was recently repealed.⁶¹ Art. 4 of that Act empowered the Executive to arrest undesirable aliens until such time as they could be deported. Decisions of the courts have laid down that such arrest should not be indefinitely extended until the persons were actually expelled.⁶²

2) Police Arrest

In the last case quoted we already met police provisions such as that underlying art. 9 of the Decree of 31 December 1923,⁶³ empowering the immigration authorities to keep persons under arrest and on board ship, when such persons are forbidden by the legislation to disembark; these persons are confined on board ship upto the time of their return home. Under section 9 of the Venereal Disease Prevention Act, health officials may order the forcible hospitalization of diseased persons refusing treatment.

Similarly, there are provisions concerning the federal police, who are authorized to "detain for the purposes of identification, in circumstances justifying this, and for a period not longer than 24 hours, any person whose background should be examined".⁶⁴

A further case in point arises through the detention of mad persons, which may only be ordered by a judge when it is to be feared that a mentally diseased person left at liberty might arm himself or others (art. 482, Civil Code). In this connection, the Supreme Court, dealing with an application for *habeas corpus*, established the need for judicial authorization for the detention of insane persons, except in cases where it is a matter of urgency.⁶⁵

3) Other cases

We must not fail to mention disciplinary arrests which may be ordered by courts (the federal courts may order up to five days, in accordance with art. 18 of the Organization Act), or by the Chambers of Congress, exercising implicit powers in the same manner as in the United States.⁶⁶

Similarly, in the field of family law, there are powers for a father to deprive a son under age of his freedom (art. 218 of the

⁶¹ Act No. 4144, *Anales de Legislación Argentina*, Complement for years, 1889-1919, Buenos Aires, 1954, p. 560. Act No. 14, 445, *Anales de Legislación Argentina*, 1958, Buenos Aires, Vol. XVIII-A, p. 58.

⁶² *Fallos*: Vol. 180, p. 196.

⁶³ *Anales de Legislación Argentina*, Complement for years 1920-1940, Buenos Aires, 1953, p. 901.

⁶⁴ Art. 5, para. 1, of the Act establishing the Federal Police, Legislative Decree 333/58 - *Anales de Legislación Argentina*, 1958, Buenos Aires, Vol. XVIII-A, p. 465.

⁶⁵ *Fallos*: Vol. 139, p. 154.

⁶⁶ González Calderón, op. et. vol. cit., p. 536.

Civil Code), as acknowledged by the Supreme Court in a *habeas corpus* action brought on behalf of a minor whose father had punished him by shutting him in the house.⁶⁷

III. JUDICIAL REVIEW OF ARRESTS - RIGHTS OF PERSONS ARRESTED

1) Review of Arrest during Trial. Judicial Rights of Persons held under arrest

Persons arrested in connection with a crime may have their case reviewed in the stage preceding trial. It has already been explained that even before the accused appears in person before the judge the order for arrest may be annulled by the judge. Moreover, the judge must give a rapid decision regarding the case of the person arrested, ordering either release or preventive detention. This decision may be revoked at any time if the judge does not consider it justified in view of the course of investigation. Apart from this, appeal may be made against an order for preventive detention, thus offering a further opportunity for review.

The National Constitution guarantees the right of defence in court,⁶⁸ as do also the provincial constitutions.⁶⁹ In the provincial constitutions, as well as in procedural codes, other guarantees of fundamental importance are stated: the presumption of innocence,⁷⁰ the access to evidence,⁷¹ the right of persons held under arrest to be informed of the grounds of arrest.⁷²

One of the typical methods followed by procedural laws in order to mitigate hardship to the accused is to allow release on flexible grounds. It is possible through such procedure for an accused person

⁶⁷ *Fallos*: Vol. 239, p. 6.

⁶⁸ National Constitution: Art. 18.

⁶⁹ Constitution of Catamarca: art. 30; Córdoba: art. 9; La Rioja: art. 26; Salta: art. 26; San Juan: art. 17; San Luis: art. 26; Santa Fe: art. 17; Santiago del Estero: art. 19; Tucumán: art. 27; Chaco: art. 17; Chubut: art. 32; Formosa: art. 13; Neuquén: arts. 32 and 50; Rio Negro: art. 8.

⁷⁰ Constitution of Catamarca: art. 25; Córdoba: art. 17; La Rioja: art. 24; San Juan: art. 14; San Luis: art. 26; Santiago del Estero: art. 19; Chubut: art. 28; Rio Negro: art. 8; Santa Cruz: art. 24. Code of La Rioja: art. 2; Code of Mendoza: art. 1.

⁷¹ Constitution of Catamarca: art. 33; Córdoba: art. 9; Corrientes: art. 31; Entre Ríos: art. 28; La Rioja: art. 26; San Juan: art. 18; San Luis: art. 26; Santa Fe: art. 17; Santiago del Estero: art. 23; Tucumán: art. 27; Chubut: art. 32; Neuquén: art. 50; Santa Cruz: art. 19. The provisions of the codes are quoted below.

⁷² Constitution of Buenos Aires: art. 16; Catamarca: art. 39; Mendoza: art. 19; Salta: art. 30; San Juan: art. 9; San Luis: art. 30; Santiago del Estero: art. 21; Chubut: art. 32; Formosa: art. 12; Neuquén: art. 37; Rio Negro: art. 8; Santa Cruz: art. 23; - The provisions of the codes are quoted below.

to be released from preventive detention during the period of actual trial.

Although the preliminary stage is one during which the situation of a person held under arrest may be altered, the fact that the procedure deals primarily with investigation means that some degree of reserve and caution is essential. This may lead to a conflict between the need for efficient investigation and the equally pressing requirement that the accused should enjoy the constitutional guarantees.

Procedural laws aim at a compromise. Rights of persons under trial are acknowledged, but not to such an extent that they impede the action of the judge, who has wide discretionary powers. Nevertheless, there still remains in the old type of laws a spirit of inquisition swinging the balance towards the alleged need for investigation. This tendency disappears in the codes which have followed the system applied in the Córdoba provincial code.

We shall now consider the preliminary hearing more closely in order to obtain a clear idea of the possibilities of defence open to the person held under arrest.

The more modern codes state that a warrant for arrest must be communicated to the person against whom it is issued at the time of arrest, stating the grounds for arrest.⁷³ On the other hand, the Federal Code and those following it contain no such provisions and state that when the interrogation of an accused is completed he must be informed of the grounds of arrest.⁷⁴ This seems to make the initial statement a form of snare such as existed under the system of inquisition but which is rejected by many principles in the same laws.

Interrogation is a process which will inevitably cause serious disturbance to the person interrogated although it also offers him an opportunity to provide explanations and clarify his situation.⁷⁵ Legislation without any exception provides guarantees for persons

⁷³ Provisions quoted in note 22, except for those of the Buenos Aires and San Luis Codes.

⁷⁴ Federal Code: art. 255; Buenos Aires: art. 128; Corrientes: art. 265; Entre Rios: art. 389; Salta: art. 213; San Juan: art. 159; San Luis: art. 157; Santa Fe: art. 240. In cases of arrest without warrant, our laws establish no requirement that a person arrested be informed of the reasons for his detention. The Constitution of Neuquén states in Article 37 that: "In the case of arrest a document shall be prepared, and signed by the person arrested if he is able to do so, stating the grounds for arrest, the place to which he will be taken and the judge officiating".

⁷⁵ This is expressly stated by laws. For example, the Federal Code states: "... A defendant may make any statement he considers desirable in order to obtain his release or to explain the situation ..." (art. 246, cf. Code of Buenos Aires: art. 122; Catamarca: art. 263; 1st part; Córdoba: art. 248, 2nd part; Corrientes: art. 257; Entre Rios: art. 379; Jujuy: art. 222; La Rioja: art. 268, last part; Mendoza: art. 299; 1st part; Salta: art. 204; San Juan: art. 150; San Luis: art. 151; Santa Fe: art. 230).

under trial: they must not be required to swear any oath,⁷⁶ or be reprimanded, or threatened, or be asked leading or obscure questions;⁷⁷ they may dictate their statements;⁷⁸ they must be allowed time to rest,⁷⁹ they may request particular facilities;⁸⁰ they are not obliged to make any statement and refusal to do so may not be considered as a presumption of guilt.⁸¹ Finally, they may appear in order to make as many statements as they wish.⁸²

Legislation grants accused persons the right to choose their own defending counsel,⁸³ although the latter has very limited powers during the preliminary hearing. Above all, defending counsel is authorized to be present during the initial statement and other statements which may not be reproduced in the complete hearing, such as expert opinions, reconstructions, etc.⁸⁴ The presence of defending counsel must be essentially passive under the terms of the older laws,⁸⁵ whereas the newer laws allow their intervention if the

⁷⁶ Federal Code: art. 240; Catamarca: art. 260, para 2; Córdoba: art. 249; Corrientes: art. 253; Entre Rios: art. 373; Jujuy: art. 220; La Rioja: art. 270; Mendoza: art. 296; Salta: art. 198; San Juan: art. 144; Santa Fe: art. 227; Santiago del Estero: art. 198.

⁷⁷ Federal Code: art. 242; Catamarca: art. 260; Córdoba: art. 250; Corrientes: art. 254; Entre Rios: art. 375; Jujuy: art. 221; La Rioja: art. 269; Mendoza: art. 296; Salta: art. 200; San Juan: art. 146; Santa Fe: art. 227; Santiago del Estero: art. 199.

⁷⁸ Federal Code: art. 247; Buenos Aires: art. 123; Catamarca: art. 263; Córdoba: art. 250; Corrientes: art. 258; Entre Rios: art. 380; Jujuy: art. 222; La Rioja: art. 269; Mendoza: art. 299; Salta: art. 205; San Juan: art. 151; San Luis: art. 152; Santa Fe: art. 232; Santiago del Estero: art. 199.

⁷⁹ Federal Code: art. 244; Catamarca: art. 263; Córdoba: art. 250; Corrientes: art. 255; Entre Rios: art. 378; Jujuy: art. 224; La Rioja: art. 269; Mendoza: art. 299, last part; Salta: art. 202; San Juan: art. 148; Santa Fe: art. 229; Santiago del Estero: art. 199.

⁸⁰ Provisions quoted in note 75.

⁸¹ Federal Code: art. 239; Buenos Aires: art. 120; Catamarca: arts. 260 and 262; Entre Rios: art. 371; Jujuy: art. 219; La Rioja: art. 267; Mendoza: art. 298; Salta: art. 197; San Juan: art. 143; San Luis: art. 149.

⁸² Federal Code: art. 254; Buenos Aires: art. 128; Catamarca: art. 264; Córdoba: art. 253; Corrientes: art. 264; Entre Rios: art. 390; Jujuy: art. 231; La Rioja: art. 273; Mendoza: art. 304; Salta: art. 212; San Juan: art. 158; San Luis: art. 158; Santa Fe: art. 239; Santiago del Estero: art. 202.

⁸³ Federal Code: arts. 9 and 255; Buenos Aires: arts. 1, para. 1 and 128; Catamarca: arts. 75 and 77; Córdoba: arts. 99 and 102; Corrientes: arts. 9 and 265; Entre Rios: arts. 218 and 220; Jujuy: art. 103; La Rioja: arts. 100 and 103; Mendoza: arts. 99 and 102; Salta: arts. 9 and 213; San Juan: arts. 14 and 159; San Luis: arts. 64, 65 and 157; Santa Fe: arts. 48, 49 and 240. If a defendant does not provide his own defence, the judge must designate counsel for him, unless the judge authorizes him to defend himself. Almost all the provisions quoted state this with absolute clarity.

⁸⁴ Federal Code: art. 339; Buenos Aires: art. 161; Catamarca: art. 177; Córdoba: art. 214; Entre Rios: art. 495; Jujuy: art. 193; La Rioja: art. 215; Mendoza: art. 211; Salta: art. 297; San Juan: art. 242; San Luis: art. 202; Santa Fe: art. 308; Santiago del Estero: art. 155.

⁸⁵ Provisions quoted in note 89.

judge is in agreement.⁸⁶ Defending counsel is also authorized to communicate with his client outside hearings,⁸⁷ but this power is severely restricted by the judge's right to forbid communication between a person held under arrest and outside persons for a more or less extended period, depending upon the particular legislation.⁸⁸

The other items of the preliminary hearing are kept rigorously secret in the older systems.⁸⁹ In more recent systems, the accused and his defending counsel may examine the evidence and the judge must allow them to present any petitions and even to participate in the procedure relating thereto. All legislative systems state that petitions may be addressed to the judge, without imposing on him any obligation to comply with them.⁹⁰

⁸⁶ Provisions quoted in note 90.

⁸⁷ Federal Code: art. 680; Corrientes: art. 685; Entre Ríos: Act. 2445, art. 20; Salta: art. 610; San Juan: art. 498; Santa Fe: art. 615. We believe this freedom of communication to be a basic defence requirement: In a case of *habeas corpus* entered on behalf of persons held by the Executive during the state of emergency, severe restrictions were imposed on visits by defending counsel to the defendants. When an appeal was made to the Supreme Court it ruled that there was no substantial restriction of defence, in opposition to the opinion of the President of the Court, Alfredo Orgaz, and the Attorney-General, Sebastian Soler (*Fallos*: Vol. 236, p. 632).

⁸⁸ Federal Code: arts. 256 and 257; Buenos Aires: art. 444; Catamarca: art. 182; Córdoba: art. 216; Corrientes: arts. 266 and 267; Entre Ríos: arts. 414 and 415; Jujuy: art. 232; La Rioja: art. 217; Mendoza: art. 216; Salta: arts. 214 and 215; San Juan: arts. 160 and 161; San Luis: art. 516, (however, without hindering communication between defending counsel and defendant); Santa Fe: arts. 199 and 200; Santiago del Estero: art. 183. This is the power to keep a person *incomunicado*, for which a strict limit is set, of three days under the laws of Catamarca, Córdoba, Entre Ríos, Jujuy and La Rioja, 48 hours in those of Mendoza, San Luis and Santa Fe, 24 hours in Santiago del Estero, and in the Federal Code, and in those of Buenos Aires, Salta and San Juan: five days. These periods may be replaced by another in the Federal Code and in those of the provinces of Corrientes, Jujuy and Salta. The police may keep persons held under arrest *incomunicado* (Federal Code: art. 184, para. 10; Catamarca: art. 162, para. 8; Corrientes: art. 171, para. 4; Entre Ríos: art. 321, para. 9; Jujuy: art. 173, para. 4; Mendoza: art. 192, para. 7 – for two hours only; Salta: art. 143, para. 10; San Juan: art. 87, para. 10; Santa Fe: art. 108, para. 10 – only 24 hours; Santiago del Estero: art. 134, § 4). The constitutions of the new provinces of Chaco, Chubut, Formosa, Rio Negro and Santa Cruz, in which the Federal Code still applies, have reduced the period: from 5 days to 48 hours in the case of Chaco, Formosa and Rio Negro (arts. 17, 18 and 8 respectively) and to 3 days in the case of Chubut and Santa Cruz (arts. 32 and 23 respectively).

⁸⁹ In actual fact, only in the Federal Code (art. 180) and of Salta (art. 139) and San Juan (art. 83), because the other codes following the structure of the Federal Code do not maintain its requirement of secrecy of hearings. Corrientes: art. 165; Entre Ríos: art. 270; Santa Fe: art. 101.

⁹⁰ Code of Catamarca: arts. 179 and 181; Córdoba: arts. 212 and 213; La Rioja: arts. 213 and 214; Mendoza: arts. 213, 214 and 215. In principle, these codes state that preliminary hearings are public for the parties, but in all except that of La Rioja the judge may require absolute secrecy for a limited period (10 days; in Catamarca, 15 days). The code of Jujuy also establishes

No right of reference to a higher court is recognized with regard to simple warrants for arrest.⁹¹ However, the new codes establish that the order for trial is subject to appeal,⁹² the same applying consequently to an accompanying commitment.⁹³ Older laws lay down no provisions in this respect, but in general it has been understood that a sentence of preventive detention causes irreparable hardship and that it is therefore to be regarded as a judicial decision which, although not a final sentence, may be appealed against.⁹⁴

2) Habeas Corpus

The traditional method of obtaining review of arbitrary arrest is through *habeas corpus*. This method is governed in our country by national and provincial provisions which, except in certain cases in the latter instance, have been criticized as limiting application to the cases occurring less frequently, namely those of arrest ordered by administrative officials without proper powers to do so. The Federal Code, together with the provincial codes following its model, states (in art. 617), that a claim of *habeas corpus* may be lodged against "any order or procedure by a public official tending to restrict personal freedom in an unlawful manner". Decisions of the court have found that this provision includes threats against personal freedom⁹⁵ and the Supreme Court established, although not in a binding form, that an appeal was not maintainable against decisions by judges, without any distinction as to whether they were adopted arbitrarily or without proper competence.⁹⁶ In any case, this method of opposing decisions by judges with competence to hear cases

the public character of preliminary hearings but without requiring the facilities detailed in the text. The constitutions of the new provinces of Chaco, Chubut, Formosa and Neuquén, which are still governed by the Federal Code, have abolished secrecy of preliminary hearings (arts. 17, 32, 18 and 42 respectively).

⁹¹ Federal Code: art. 180; Catamarca: art. 176; Córdoba: art. 211; Corrientes: art. 166; Entre Ríos: art. 270; Jujuy: art. 189; La Rioja: art. 212; Mendoza: art. 210; Salta: art. 139; San Juan: art. 83; Santa Fe: art. 101.

⁹² Niceto Alcalá Zamora y Castillo and Ricardo Levene, *Derecho Procesal Penal*, Buenos Aires, 1945, vol. II, p. 276, No. 17.

⁹³ Code of Catamarca: art. 275; Córdoba: art. 343; La Rioja: art. 334; Mendoza: art. 311; Santiago del Estero: art. 265, and provisions quoted in note 38.

⁹⁴ Barberis, op. cit. Vol. I, p. 402, art. 366. This is the view of the appeal courts, but the Supreme Court rejects on principle the submission that commitment causes irreparable hardship, with regard to appeal alleging breach of constitutional provisions (*Fallos*: Vol. 4; 238, p. 76; 239, p. 495).

⁹⁵ *Fallos*: Vol. 151, 238, 216 and 606 and "Camara Federal de la Capital" in *Revista de Jurisprudencia Argentina*, Buenos Aires, Vol. 27, section on jurisprudence, p. 444.

⁹⁶ *Fallos*: Vols. 60, p. 397; 67, p. 63; 71, p. 427 and 72, p. 328.

resulting in an order for arrest was found unlawful,⁹⁷ and it was stated that, as a matter of principle, the use of *habeas corpus* did not provide authority for judges to be overruled in decisions that were within their competence, that is to say, in the review of action taken in connection with the trial.⁹⁸

In a recent very important judgment concerning the so-called appeal for asylum (the Kott Case),⁹⁹ the majority of the Supreme Court declared, although in the form of a rider that, in accordance with the National Constitution, the sphere of *habeas corpus* extends to any unlawful detention, without distinction as to the person imposing it, and even against judicial acts; and that this scope of appeal, normal in English and American law, corresponds to the letter and the spirit of the Constitution.

The extent of these observations was, however, considerably reduced by the verdict of the Supreme Court in *re Pucci Vicente*,¹⁰⁰ in which it was stated, against the opinion of the then President of the Court, that *habeas Corpus* may not be used for the purpose of appeal in order to reverse final verdicts of the courts. Since the particular instance dealt with a person tried and sentenced by a military tribunal, the Court departed from English and American precedent when it decided the question in this manner.¹⁰¹

A few days earlier in the Kelly Case the Court had confirmed its previous line, by repeating, even if only as a matter of principle, the traditional rule under which *habeas corpus* does not authorize judges to be overruled in decisions that are properly within their competence.

Nevertheless, certain provincial codes, such as that of Buenos Aires¹⁰² and San Luis¹⁰³ provide quite different powers of appeal, taking the Anglo-Saxon model of *habeas corpus*. These codes deal with any arrest ordered by judicial or administrative authorities or made by private individuals and an appeal makes it possible to review the competence of judges and the justification for any of their acts resulting in deprivation of freedom, in undue prolongation of arrest or in failure to comply with procedure established in order to safeguard the position of persons under trial. Several provincial constitutions provide similar powers for the right of appeal.¹⁰⁴

⁹⁷ *Fallos*: Vol. 219, p. 111.

⁹⁸ *Fallos*: Vol. 233, p. 103.

⁹⁹ *Fallos*: Vol. 241, p. 291.

¹⁰⁰ *Fallos*: Vol. 243, p. 306.

¹⁰¹ *In re Allen*, 30 L. J. (Q.B.) 38, *ex-parte* Milligan (1866) 4, Wall. 2, *Duncan v. Kahanamoku* (1946) 327 U. S. 304, to quote cases universally known.

¹⁰² Code of Buenos Aires: arts. 415 ff.

¹⁰³ Code of San Luis: arts. 466 ff.

¹⁰⁴ Constitution of Chaco: art. 16; Formosa: art. 14; Catamarca: art. 42 and Entre Ríos: art. 25.

In the Federal Code the appeal procedure is not dealt with at length.¹⁰⁵ The person arrested or another person acting on his behalf may enter a petition for *habeas corpus*; this can not be directed to any judge, but must be directed to the court of first instance with criminal jurisdiction. The judge at first instance must immediately require the person who ordered arrest to provide a report, and he then decides the matter upon receiving such information. Presentation of the person arrested, the fundamental requirement giving its name to this form of appeal, is only demanded when the official or authority responsible for issuing a warrant for arrest is not empowered by its functions to give such orders. The Judge's decision is subject to appeal, primarily in cases favourable to the petitioner, but an appeal may not result in suspension of the order for the release of the person held under arrest.

Habeas corpus has been used to any extent in Argentina only during the repeated periods of a state of emergency, when persons were detained and transferred under the authority of the President, by virtue of the constitutional provisions referred to above.

The Supreme Court has found on several occasions that such measures are not subject to judicial review, except in cases where the limits laid down by Article 23 of the Constitution have been overstepped, as would be the case if the President applied a penalty or denied the right of option to leave Argentine territory when a request had been duly submitted by the person concerned.¹⁰⁶

Although certain recent judgments have extended the possibility of judicial control over the manner in which the Executive exercises its powers during a state of emergency, with regard to the right of association and free publication of ideas,¹⁰⁷ a recent verdict maintained the traditional line with specific regard to arrest of persons.¹⁰⁸

The above survey has been made in a spirit of complete objectivity, and it therefore contains references to certain situations that are not satisfactory from the point of view of individual guarantees. Fortunately, the more serious irregularities, such as recourse to declaration of a state of war, have been of a transitory nature and were used by the dictatorship which fell in 1955. Complete knowledge of the abuses of power and the defects of legislation is perhaps more indicative in this connection than a description of a situation marked by no problems or conflicts. In order that human rights should receive a high degree of recognition and perfection, experi-

¹⁰⁵ Arts. 617 ff.

¹⁰⁶ *Fallos*: Vols. 158, p. 391; 160, p. 104; 167, p. 254; 170, p. 246.

¹⁰⁷ *Fallos*: Vols. 243, p. 504 and 244, p. 59.

¹⁰⁸ Zarate José Miguel, verdict of 23 September 1960.

ence of practical blemishes is a proper path towards realization of problems and elimination of wrong concepts.

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OUTLINE OF PROVISIONAL OR PROCEDURAL DETENTION IN BRAZIL

In Brazil, the various forms of provisional or procedural detention – i.e., all those resulting from a sentence which is subject to appeal – are governed by the following constitutional provision: “No one shall be arrested except *in flagrante delicto*, or by written order of the competent authority in the cases specified by law”. This text, obviously, also governs detention resulting from a sentence.

In principle, therefore, provisional or procedural detention – the latter term describes the more usual type of detention – may only be based on a written order issued by the competent authority. An exception is made where a person is caught in the act of committing a crime or misdemeanour, in which case the police authorities or their representatives are required, or any member of the public is entitled, to arrest the person found committing the criminal offence in question.

In most cases, the authority competent to issue a written order is the criminal judge; occasionally it is the civil judge or, more rarely, the administrative authority.

We shall begin with a few brief comments, starting with the less frequent cases.

Under the generic term “administrative detention” the 1941 Code of Criminal Procedure includes: (a) administrative detention by the police authorities at the demand of an agent of the executive power as a coercive measure to compel a person who has misappropriated public funds to make restitution; (b) administrative detention by the police authorities at the request of the consul of the country concerned of a deserter from a warship or merchant vessel anchored in a Brazilian port; (c) disciplinary detention, which may be summarily applied by the criminal or civil judge as a punitive measure in the interests of the case; (d) civil detention, at the discretion of the civil judge, as a coercive and to some extent disciplinary measure.

(a) The law wisely indicates, according to a scale, the grade of court vested with the stringent power of ordering the detention of a misappropriator of public funds. The term of detention, which will cease when restitution is made, must not exceed three months. This, too, is the maximum term of deprivation of freedom in the case referred to under (b) above.

(b) Among the other forms of administrative detention (not referred to, however, in the Code of Criminal Procedure) can be included that prescribed by the Minister of Justice in the case of a foreign national summoned to appear before the Supreme Federal Court with a view to determining the legality of a formal request for extradition. Furthermore, that authority may, in the exercise of its administrative powers, order the preventive detention of the person to be extradited where the request has not been fully examined but has to be regularized within a period of sixty days, which is the maximum limit beyond which deprivation of freedom must not be prolonged or renewed in the form of preventive detention.

(c) Disciplinary detention for a period not exceeding fifteen days may be imposed by a criminal judge, without prejudice to the trial or possible sentence for contumacy, on a witness who fails to comply with a summons to appear in court. It may also be inflicted in the case of infringement of restrictions relating to local banishment, a security measure designed to prevent the banished person from residing or remaining for at least one year in the locality, municipality or district where the offence was committed. The criminal judge may keep the offender under detention until a decision is made.

A civil judge may order disciplinary detention for a period not exceeding five days in the case of a witness who refuses to testify but without giving any reasons for his refusal, or after his refusal has been pronounced unacceptable. Similarly in the civil sphere, in connection with marriage, a judge to whom a fraudulent application to marry has been made may, in deciding to challenge the application, impose disciplinary detention for a term ranging from ten to thirty days.

(d) As to civil detention, it is provided for in scattered texts of substantive civil and commercial law and of civil procedural law. The civil judge may impose it on a trustee guilty of a breach of trust for a term not exceeding one year; for up to three months in case of failure to pay a maintenance allowance or where a debtor fails to make restitution for a credit note when presented to him for acceptance or payment. It may also be imposed on a merchant who refuses to submit his books when ordered by court to do so; on a broker who, where the law requires him to do so, refuses to produce his records in court; on an auctioneer guilty of delay in making payment; on warehouse owners, contractors, managers, superintendents, and administrators of general warehouses who are responsible for the surrender of goods of which they have taken receipt; and – for a period not exceeding sixty days – on a bankrupt who neglects to fulfil his obligations under the bankruptcy law. The

latter case is not to be confused with preventive custody of a bankrupt, which may be ordered by the civil magistrate at the judicial examination stage or by the criminal magistrate at a later stage, on receipt of a denunciation or complaint.

Except in the case of the imprisonment of the bankrupt, combining as it does the disciplinary and the coercive and having a duration of not more than sixty days, civil detention by reason of its coercive nature ceases to apply once the purpose has been served.

A perusal of the Code of Criminal Procedure conveys the impression that the guarantee of *habeas corpus* is not applicable, in the broad sense, to the various forms of administrative detention mentioned. The Code embodies principles that tend to withhold from the person deprived of liberty any recourse to the constitutional remedy. That barrier is not insurmountable, however, and in many cases it leaves loopholes for upholding the right to liberty where it has been unlawfully impaired. Article 647 declares that *habeas corpus* must be granted wherever a person has suffered unlawful violence or coercion in his freedom of movement, except in cases of disciplinary punishment. But even here, *habeas corpus* may be granted if the decision whereby the punishment was inflicted does not completely square with the suppositions on which it was based. Nor could it be otherwise, despite the fact that the Constitution also declares that "*habeas corpus* is not admissible in the case of disciplinary transgressions".

As regards the coercive administrative detention of persons guilty of the misappropriation of public funds, the Code, after declaring *habeas corpus* to be inadmissible, sets out the exceptions pointing in favour of the protection of the impaired or threatened liberty: "unless the application is accompanied by proof of receipt or of deposit of the amount, or where detention exceeds the lawful term". It is inevitable, too, that the criminal jurisdiction in which *habeas corpus* is incorporated should come into question in considering the alleged absence of just cause of detention or of the lawfulness or otherwise, from various aspects, of the order issued by the administrative authority.

There is a rule in civil procedure providing for regular appeal, with suspensive effect, against a civil detention order. Once such an appeal has been lodged, (for example lodgement of appeal), the judgement is not enforced until confirmed by higher authority. Where such an appeal is possible, therefore, there is no need to apply for *habeas corpus*, which nevertheless is not excluded as an ultimate appeal. And recourse may be had to it without any restriction in the event of the regular appeal lacking suspensive effect, as in the case of the imprisonment of a bankrupt for failure to fulfil his lawful obligations.

Arrest *in flagrante delicto*, as the sole form of deprivation of freedom not requiring the existence of a written order, has to be supported by a duly regularized statement, which will include the declarations made by the person leading off the prisoner, by the accompanying witnesses and by the accused himself. Should there have been no witnesses of the offence, two persons present when the prisoner was brought before the authority will sign the statement. Should the accused refuse to sign, or be unable or incapable of doing so, the statement concerning the arrest *in flagrante delicto* will be signed by two attesting witnesses, to whom it will have been read in the presence of the accused, of the person who led him off and of the witnesses. Should the accused, although criminally responsible by reason of his age (having reached the age of 18) be below the age of 21, he must be assisted by a guardian at the time the statement is prepared.

The judges keep a careful eye on the observance of procedural formalities in the preparation of the statement, and annul it if it contains any essential defects and release the prisoner unless they consider it preferable to decree preventive detention instead, as they do in exceptional cases.

In the chapter on arrest *in flagrante delicto*, the Code provides for the delivery of an indictment to the prisoner within 24 hours of his arrest. It is signed by the authority and specifies the reason for his imprisonment, the name of the person leading off the prisoner and the names of witnesses. The prisoner gives a receipt, which is signed by two witnesses if he is incapable of signing his name or is unable or unwilling to do so.

The indictment constitutes an important guarantee for the defence, as can be seen from the reference made to it not only in procedural law but also in the Constitution which reflects a tradition going back to the days of Empire. The necessity of handing the indictment to the prisoner diminishes the risk of unlawful detention, since the text contains sufficient data to evaluate the lawfulness of the order.

Although, as already stated, arrest *in flagrante delicto* is possible in the two types of offence existing under Brazilian Law (crimes and misdemeanours), it does not necessarily entail the continued imprisonment of the accused. Should the evidence collected in preparing the statement confirm suspicion of the person arrested, he will be imprisoned. Should the contrary be the case, he will be released by decision of the prosecuting police authority.

Release may also take place in the following circumstances:

(a) In case of an offence for which bail is permitted the prisoner will be freed on giving bail. The main rule as to whether bail is allowable or not is that, in general, crimes punishable by solitary

confinement [*reclusão*] are not subject to bail, whereas those punishable by simple imprisonment are. In general, misdemeanours are also subject to bail when the penalty of deprivation of liberty (simple imprisonment) exceeds three months.

(b) In case of an offence where the accused is released, which occurs only when a fine is involved (certain misdemeanours), or when the maximum penalty of deprivation of liberty does not exceed three months.

(c) Where the offence is found to be of a private nature, or even of a public nature depending on representation by the injured party, and the latter makes no immediate declaration of his intention to institute criminal proceedings.

Thus there can be no doubt that detention *in flagrante delicto* may take place even in the event of private action or of public action depending on the injured party's representation. No exception would be possible, inasmuch as the executor usually lacks the legal knowledge which might enable him to make it. But once the arrest has been made, keeping the offender in prison depends on whether the injured party proposes to institute proceedings.

The conduct of the person detained *in flagrante delicto* may not have been unlawful, and may have arisen from one of the penally justifiable causes (legitimate defence, state of necessity, strict compliance with legal duty). Detention in such cases must likewise be discontinued. However, the procedural law empowering the police authority to take decisions in the other situations described above, vests the right to decide whether the agent's behaviour was justifiable or not in the criminal judge and not in the police authority. The latter must convey the statement to the judge as a matter of urgency so that it can be dealt with.

Influenced as it is by European models, the present penal procedural law in Brazil contemplates, besides the state of flagrancy proper, that of quasi-flagrancy, which entails the same effects. Not only a person committing a criminal offence is considered to be *in flagrante delicto* but also one who, "immediately after" the offence has been committed, is prosecuted by the authority, the injured party or any other person in circumstances which lead to the presumption that he is the author of it. The same applies to a person who, "immediately after" the offence, is found to be in possession of instruments, weapons, objects or papers leading to the presumption that he is the author of it.

Procedural doctrine has recommended discretion in interpreting and applying the texts on quasi-flagrancy in order to ensure that the concept of *in flagrante delicto* is not distorted to the point of permitting the arrest of mere suspects under conditions without

establishing proof of the commission of a criminal offence shortly before. In connection with the meaning of the terms expressing the time element, it is recommended that the discretionary margin allowed by law be limited to what a fair interpretation permits; arrest must immediately follow the occurrence giving rise thereto, or the pursuit of the offender who escaped after committing the offence must at least have taken place without any break in continuity, in order to maintain the idea of the continuing actuality of the deed, justifying the immediacy of the repressive steps initiated by detention *in flagrante delicto*.

On the basis of an order handed down by a criminal judge in a decision which gives reason for the finding, the accused may be provisionally deprived of his liberty when the charge is first made or during the course of the examination. This is "preventive detention" (custody pending trial).

In the broad sense, any imprisonment preceding the passing of sentence is preventive detention. But in procedural practice the term is used in a limited sense, as it does not cover imprisonment following the passing of a sentence against which an appeal lies, or even imprisonment under a sentence by order. Under Brazilian procedure, a sentence by order (*sentença de pronúncia*) is a decision whereby, in case of premeditated crimes against life, the judge, recognizing the fact of the crime and the existence of sufficient evidence that the accused is the author of it, orders his imprisonment, or, if he has already been imprisoned, his continued detention pending the jury's verdict.

Preventive detention is obligatory in the case of crimes punishable by a term of imprisonment of ten years or over. The judge, in ordering it, will confine himself to establishing its admissibility in view of the certainty as to the fact of a crime entailing so heavy a penalty, and the existence of significant evidence that the accused is the author of it. The lack of either of these prerequisites will preclude the use of such exceptional restraint. Nor will the judge order preventive detention if the preliminary evidence indicates the presence of one of the four justifying motives referred to above.

He must therefore proceed, although with circumspection, to examine the evidence in order to see whether the suspicion regarding the accused is wellfounded. This preliminary assessment of the soundness of the charge is particularly important, since the denunciation leading to the action often involves rash charges. It often happens that the judge's failure to observe the directive laid down provides an opportunity for an effective appeal to the higher courts by means of *habeas corpus*, the sole remedy open at that stage and one, moreover, which has the advantage of providing a reasonably rapid issue. When preventive detention is unduly ordered, the error

may be corrected within one month by the Court of the federal district where the event occurred. Should the order for release be refused, recourse may then be had to the Federal Supreme Court, whose rules grant absolute priority to hearing appeals of this kind. It should be added that it is not necessary, for re-examination of the lower court's decision in this way, for the accused to have been placed in detention. In most cases, in fact, the quashing of the measure entailing deprivation of liberty occurs without its ever having been put into effect.

Hence, despite the relative nature of these obligatory provisions (which limits the application of strict legal requirements based on the heaviness of the sentence in prospect), the consensus of opinion is that the obligatory element should be entirely excluded in the matter of preventive detention and a return made to the former system, under which the measure was always subject to the judge's assessment.

In the case of crimes punishable by a term of less than ten years' imprisonment, preventive detention remains optional where one of the universally accepted reasons applies: maintenance of law and order, interests of the judicial examination of the crime, or the desirability of ensuring the application of the penal code. In general, it is agreed that individual liberty would be better safeguarded if the existence of one of these three reasons were always required before any adverse verdict could be given regarding deprivation of liberty.

Preventive detention is not applicable in respect of misdemeanours (*contravenções*).

Through an inevitable association of ideas, the question of preventive detention brings up another one: that of unlawful detention. So wide is the judge's power to order the preventive detention of a person accused of a crime that it may appear absurd that the police authorities should still resort to arbitrary detention with a view to elucidating crimes during the investigation stage. Indeed, the law states that "during any phase of the police investigation or judicial examination, preventive detention shall be admissible when ordered by the judge, by virtue of his office, at the request of the State Counsel Department (*Ministério Público*) or of the injured party, or in response to a representation by the police where there is proof of the fact of the crime and sufficient evidence as to its author". Thus the police authority may at any stage of its investigation, should it deem it necessary, request the judge to order the detention of the suspect once the fact of the offence and the existence of serious evidence against him have been demonstrated.

It should however be noted that the police do not usually follow this straight path but prefer to adopt the improper procedure

of detaining suspects during the course of their investigation, and informing the legal authorities of such investigation only after the latter has been concluded and has resulted in a case for determination before the court; thus, of course, the police conceal the unlawful act that has been committed. In my comments on the Code of Criminal Procedure which were published shortly after its promulgation, we made the point that the police authorities should conform to the system laid down by law and apply during the investigation for the preventive detention of the suspect in cases where such action was necessary rather than arrest him *ex proprio motu*, as had been the common practice. I added that the system of so-called detention "for the purposes of police inquiry" prevailing at the time (in 1945) continued to be deplorably enough in existence; everyone working in the legal field was aware of this. While this evil would not be entirely eliminated by making it a practice to apply for preventive detention in the interests of establishing proof in the investigation, it would undoubtedly reduce its proportions. My criticism, after the lapse of fifteen years, still stands. Although the unlawful procedure in question has always been condemned by the country's juridical conscience, the necessary steps have not been taken to check it despite the fact that any violation of the right to liberty committed by public officials in the course of their duties constitutes a crime under Article 350 of the Criminal Code.

With a view to remedying this state of affairs, the possibility was even considered of expressly empowering the police authorities to effect imprisonment in the interests of criminal investigation in cases other than ones of imprisonment *in flagrante delicto*. That would be one way of legalizing an indefensible situation which has not been remedied. Nevertheless, I do not believe that the problem can be solved by vesting the police with additional power. It is always dangerous to widen the faculty of preventive detention. Pointless excesses would continue to be perpetrated under the more flexible protection of the law. Nor is it conceivable that the latitude afforded by a new provision would put an end to the abuses. The likelihood is that it would only encourage them.

The above-mentioned constitutional precept, which defines cases of imprisonment and makes them subject – other than in the case of arrest *in flagrante delicto* – to a written order by the competent authority, was reinforced by a further provision stating that "notification of the imprisonment or detention of any person shall be immediately communicated to the competent judge, who will remit it in the event of its being unlawful, and in the cases laid down by law will establish the responsibility of the coercing authority".

This apparently reassuring provision has not, however, produced the anticipated results, for the reason that the arbitrary police authorities simply refrain from notifying the judge of the imprisonment (or detention, which is the same thing) when it is unlawful, and thus no legal protection can be afforded against excesses. The notifications they make relate solely to lawful detention. And when there is an application for *habeas corpus*, the excuse offered by the coercing authority frequently takes the form of a denial of unlawful imprisonment in spite of the facts or, even more frequently, of concealing the unlawful action by an explanation to the effect that no imprisonment has taken place but that the accused merely appeared for the purpose of making a statement.

I recognize, in the judicial field, that preventive imprisonment, the benefits of which nobody doubts, is sparingly used when left to the judge's discretion. The duty of motivating the imposition of that measure, as a legal necessity, serves as a barrier to any excesses, since the reasons motivating the decision are at all times subject to reconsideration by the higher courts by means of an application for *habeas corpus*.

In the field of restrictions on physical freedom, leaving aside those resulting from the infliction of punishment, we must also consider personal security detention measures, which are applicable not only where a person is sentenced to imprisonment but also where he is acquitted, and even as precautionary measures during the criminal proceedings or before.

One of these is imposed on defendants who have been acquitted: confinement in a judicial asylum in the case of an insane person or an irresponsible mental defective. The duration of the measure, as in all cases of personal security measures, is indefinite and may end once it is concluded from periodic re-examinations of the patient's condition that he has ceased to be dangerous. He will be at liberty on discharge from the asylum, but will remain under supervision during the period laid down by law.

But the most important point to note as regards security measures, for the purposes of this survey, is the possibility of internment not only in a judicial asylum but also at a detention and treatment centre, either during the period of investigation or in the course of the judicial examination, in a manner very similar to preventive detention, of persons merely suspected of punishable acts. The Criminal Code lays down that during the trial the judge may apply appropriate security measures to mentally sick persons, habitual drunkards or drug addicts. In the case of the first-mentioned, these measures are limited to internment in a judicial asylum; while in the case of the other two types of mental abnormality, provision

is made for confinement in a detention and treatment centre — a hybrid institution designed for custodial and therapeutic purposes.

For provisional internment to be admissible in the latter case, the patient must have committed a crime when in a state of intoxication induced either by alcohol or a narcotic drug, and this state must be habitual. There is a presumption *ex vi legis* of the dangerous character of the person, and in the event of sentence being passed the measure becomes compulsory. In anticipation of the sentence, as well as in the interests both of the patient's health and of social protection, the judge will provisionally decree the aforementioned security measure.

The utility of this measure cannot be doubted. Nor is there any affront to individual liberty, for the jurisdictional nature of the measure frees it from any stigma.

We do not, in Brazil, employ the term "administrative internment", which has been the subject of controversy elsewhere. Apart from the few situations already considered, there are no cases of imprisonment left to the initiative and the discretion of organs of the executive power; one can only regard the custody of drunkards and the mentally sick, in accordance with the existing police regulations, as a welfare and protection measure coming within the scope of preventive action by the police. Were the matter to be raised in court, the justifying motive of a state of necessity would certainly be accepted.

Leaving the field of penal offences for a moment and entering that of misfortune, a word should be said about the compulsory internment by the public health authorities of persons who carry certain infectious or contagious diseases, in an attempt to effect a cure by the most expert means and especially to check the spread of the disease through infection or contagion.

What has been said in the paragraph above naturally presupposes a normal state of affairs in the life of the nation, that is to say, that the constitutional guarantees remain in force. Those guarantees may however be partly suspended, as provided for in the Constitution itself, in the event of any serious internal disturbance or of facts indicating that there is about to be one, or in case of external war. The National Congress, or the President of the Republic when Congress is not in session, may then decree a "state of emergency" vesting the executive power with much wider powers, as laid down in the Constitution, for the purpose of maintaining public order.

The law decreeing a state of emergency will specify the rules for its enforcement and list the constitutional guarantees which remain in force. Obviously, physical liberty of movement is always among the guarantees suspended. In specifying the measures that may be

adopted against persons during a state of emergency decreed owing to the imminence of serious disturbance of the internal order, or during such disturbance, the Constitution explicitly includes "detention in a building not intended for common criminals" and "banishment to any inhabited and salubrious place on the national territory".

These then are forms of imprisonment subject to the decision of the President of the Republic or of such agents as he may appoint to enforce a state of emergency which may extend to the entire national territory or be limited to a specific area, depending on the circumstances.

Fortunately, in this country we have long enjoyed a system of constitutional liberties without there having been any necessity for emergency measures.

Having briefly described the machinery of Brazilian law as regards the forms of provisional or procedural restriction on physical liberty, we shall conclude by singling out one or two more points.

In the interests of public security when a criminal offence has been committed, deprivation of liberty is legally applicable only on the basis of criminal proceedings even though in the initial stages, and is always subject to more or less extensive control by the judicial authority. That control is sometimes evaded through unlawful acts, as happens also in other countries. But the purpose of the law is that it shall be widely applied. That remedy may be used even in cases where the possibility of recourse to *habeas corpus* appears to be excluded, to challenge any detention violating the conditions of basic legality.

Actual warrants for arrest are issued by the judicial authorities. In cases of administrative detention, the administrative authority may require the police to proceed to the arrest. It does not itself actually issue a warrant but an instruction or request. Obviously such an instruction cannot be ignored, and is therefore tantamount to a warrant. However, as administrative detention is more or less rare, it does not occasion any concern, nor does it invalidate the almost absolute rule that warrants for arrest are issued by the judicial authority.

In the case of arrest *in flagrante delicto*, as has been seen, it is the indictment that gives the person accused official notification fully and promptly of the terms of the charge. Should the arrest occur in execution of a judicial warrant, that warrant is subject to strict formalities ensuring that the person detained is notified of the offence with which he is charged. The document is authenticated by the signature of the competent authority. The person arrested must be designated with the utmost exactness so as to avoid any error in the execution of the order. The legal ground for the arrest

must be clearly stated, and reference must be made to the section of the penal law violated. Since a simple reference to the provisions of the law makes it possible to ascertain whether the offence is subject to bail, the requisite bail may be given and the execution of the warrant dispensed with accordingly. It is therefore essential, both for this reason and for the sake of clarity, to specify the amount of bail fixed.

In addition, there are rules setting a time-limit to deprivation of liberty. Imprisonment *in flagrante delicto* ceases in cases where the police investigation is not concluded within a period of ten days. Once the suspect has been arrested, the witnesses for the prosecution at the judicial examination stage must be heard within twenty days from the end of the three-day period set aside for the preliminary defence, or, should the accused have renounced that right, from the date of questioning, which is the first act in the examination of the case before the court. The courts have recognized the legality of a somewhat excessive prolongation of imprisonment when there are justified reasons for the delay.

Should it be in the interest of the investigation, the police may decide (the decision to be recorded in the investigation report) that a lawfully arrested suspect shall be held incommunicado for a period not exceeding three days. This is the only situation where the law tolerates the accused being deprived of the possibility of maintaining contact with his lawyer or any other person. However, this provision is seldom applied.

Except during the police investigation stage, nobody may be prosecuted without a lawyer to defend him. A constitutional provision guarantees complete defence by every means that may be necessary. Should the accused not appoint a lawyer to defend him, the judge appoints one *ex officio*. This is a dative lawyer. In practice, the figure of the dative lawyer is often very far removed from that of the authentic battling defender regarded as the ideal. His signing of the records and proceedings of the trial on behalf of the absent defendant is barely more, at times, than an empty formality. This practice continues despite the fact that the body which officially represents and controls lawyers has warned against it in an effort to prevent it.

However, if the accused really has a lawyer, there is no restriction worth mentioning or enlarging on in the exercise of his task in regard to procedural imprisonment. No obstacle is put in the way of his consulting with his client; and his efforts to prove that the imprisonment is unjustified always meet, if not with complete success, at least with careful consideration by the courts, which in Brazil display unquestionable zeal in upholding the prerogatives of the citizens of a democratic country.

This praise would be more unqualified if it could be announced – which unfortunately is not the case – that a rigorous preventive control had been instituted over police excesses which would be clearly confirmed by prompt repressive action against violators of the guarantees laid down in the Constitution.

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PREVENTIVE DETENTION IN CANADA

In Canada the liberty of the subject is regarded as something to be carefully preserved and jealously guarded. That this is true is shown by the Statute 8—9 Elizabeth II, Chapter 44, Part I of which is to be known as the Canadian Bill of Rights.¹ A copy of the Act is attached hereto. It will be observed that Section 1 begins by saying that it is recognized in Canada that certain human rights and freedoms have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex.

There can be no doubt that Canada, by virtue of British connection, has inherited the freedoms slowly broadened down through Magna Carta, the Petition of Right and the Bill of Rights of 1688. In that view the Canadian Bill of Rights is declaratory. In subsection (1) of Section 5, it is said that nothing in Part I is to be construed to abrogate any human right or fundamental freedom not enumerated therein that may have existed before the Canadian Bill of Rights was enacted. However, there is still a question whether it has altered the law or *enlarged* pre-existing rights. This question must await interpretation of the Act by the courts.

More particularly in point for present purposes is the provision that no law of Canada shall be construed or applied so as to authorize or effect the arbitrary detention, imprisonment or exile of any person.²

In order to narrow the inquiry still further, it may be noted in passing that Section 6 of the above mentioned statute applies to the War Measures Act. The latter, the Defence of Canada Regulations, established under its authority, and the Treachery Act, which can effect detention and internment, are not in force in peacetime.

However, this is not to say that there is a lack of recognition of the principle that the safety of the State is the supreme law. The Official Secrets Act, which penalizes the communication of official secrets to an agent of a foreign power, is in force in peacetime. Section 10 provides as follows:

"10. Every person who is found committing an offence under this Act, or who is reasonably suspected of having committed, or having attempted to commit, or being about to commit, such an offence, may be arrested without a warrant and detained by any constable or police officer."

¹ Statutes of Canada, 1960, c. 44.

² Section 2(a).

but offences against the Act are dealt with in the same way as other criminal offences.

Subsections (1) and (2) of Section 52 of the Criminal Code of Canada read as follows:

52. (1) Every one who does a prohibited act for a purpose prejudicial to
- (a) the safety, security or defence of Canada, or
 - (b) the safety or security of the naval, army or air forces of any state other than Canada that are lawfully present in Canada,
- is guilty of an indictable offence and is liable to imprisonment for ten years.
- (2) In this section, 'prohibited act' means an act or omission that
- (a) Impairs the efficiency or impedes the working of any vessel, vehicle, aircraft, machinery, apparatus or other thing, or
 - (b) causes property, by whomsoever it may be owned, to be lost, damaged or destroyed."

With reference to the safety, security or defence of Canada, there may be quoted the following in regard to a category described as economic information:

"Regarding the evaluation of this material, we will say only that this information appears to have been such as would be designed to facilitate detailed estimates of Canada's post-war economic and military potential. Parts of this information could also be useful in connection with possible sabotage operations . . .

"Again, Canadian citizenship documents . . . were sought for illegal purposes and in some cases obtained . . . Such planted agents could in time be used not only for espionage but for sabotage, leadership of subversive political groups, and other purposes." ³

and in the case of *Rose v. The King*,⁴ there is reference to "the strict, rigid and necessary rule that the State, first and foremost, owes to its own citizens, independently of its foreign duties, to assure its own security and to repress crimes which its own nationals might commit against the King and against the security of the country."

With more particular reference to the Criminal Code, it should first be pointed out that it provides that a person shall be deemed not to be guilty of an offence until he is convicted thereof and that a person who is convicted is not liable to any punishment other than that prescribed by the Criminal Code or by the enactment that creates the offence.⁵

³ Report of the Royal Commission on Espionage, 1946, page 618.

⁴ 1946, 88 C.C.C. 114 at 144.

⁵ Section 5(1) of the Criminal Code of Canada.

Section 435 of the Criminal Code provides that a police officer may arrest without warrant a person who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence. Similarly Section 80 makes it an indictable offence for a person without lawful excuse, the proof of which lies upon him, to make or have in his possession an explosive substance that he does not make or have in possession for a lawful purpose. Perhaps it might be argued that these provisions authorize arrest on suspicion but it is to be remembered that it is the fundamental requirement that there be reasonable and probable cause.

However, under Section 438, when a person comes into the custody of a peace officer, it is the duty of the latter to bring him before a justice within twenty-four hours if a justice is available, or otherwise as soon as possible. In one well-known case,⁶ the Supreme Court of Canada awarded damages in an action against policemen, not because the arrest was unjustified, but because they had detained their prisoner too long before bringing him into court.

A person in custody who wishes to question the legality of his detention may do so by application for a writ of *habeas corpus*.⁷

PREVENTIVE DETENTION UNDER THE CRIMINAL CODE

The term "preventive detention" is used in Part XXI of the Criminal Code in relation to habitual criminal and criminal sexual psychopaths.

Where a person is convicted of an indictable offence, the Court, on application by the prosecution, may declare him to be an habitual criminal if he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions, been convicted of an indictable offence for which he is liable to imprisonment for five years or more and is leading a persistently criminal life, or has previously been sentenced to preventive detention.⁸

Where an accused is convicted of certain sexual offences,⁹ the court, on application by the prosecution may declare him to be a criminal sexual psychopath if psychiatric and other evidence warrants such a finding.

In either of these cases, the court may impose a sentence of preventive detention in addition to any sentence that is imposed for the offence that brought him before it. Observe that preventive detention cannot be imposed by itself. Theoretically this sentence of preventive detention might turn out to be for life, but it is

⁶ *Frey v. Fedoruk* (1950) S.C.R. 517.

⁷ Section 681 of the Criminal Code of Canada.

⁸ Section 660.

⁹ Enumerated in Section 661.

subject to review by the National Parole Board at least once in three years.

How the Part is interpreted is shown by a judgment of the Supreme Court of Canada¹⁰ in which it was held that the habitual criminal provisions do not create a new offence but merely establish a status or condition in which a person may, after conviction, be dealt with under those provisions.

THE POSITION OF THE POLICE GENERALLY

It is hoped that sufficient has been said to show that Canada is not a police State. In fact arbitrary action or excessive zeal on the part of the police is quickly resented. For example, in a civil action for damages for unlawful arrest,¹¹ the Ontario Court of Appeal held that the fact that the plaintiff and a companion were found abroad late at night wearing rubber-soled shoes and wind-breakers and the further fact that the plaintiff refused to identify himself, did not constitute reasonable and probable grounds for arrest under section 435 of the Criminal Code to which reference has already been made. In another case,¹² a conviction for obstructing a peace officer was quashed on the ground that under the circumstances, the accused was not under any duty to identify himself.

However, to speak generally, one cannot do better than to quote from a publication issued by the Royal Canadian Mounted Police themselves.¹³

"...In Canadian democracy the police, in principle and fact, are representatives of the people doing their will as it expressed through the government. They are not the armed tool of any group, but specially qualified and trained persons to whom the people have delegated some of their own authority for the prevention of crime, the enforcement of laws, and the maintenance of peace, order, and security, within the country. In Canada the term 'police' designates that civil instrument of government which enforces the laws and regulations that the people deem necessary for the maintenance of the recognized standard of behaviour..."

"...The police in Canada are not recognized as being different from the general public. They possess few powers not enjoyed by the ordinary citizen, and public opinion is very jealous of any attempt to increase their authority even in the interests of efficiency. Under the common law, the police are paid to perform duties which, if they were so minded, they might have done voluntarily, acting within their rights as citizens. The policeman, in short, is a citizen acting on behalf of his fellow citizens..."

J. C. MARTIN *

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¹⁰ *Brusch v. R.* (1952) 105 C.C.C. 340.

¹¹ *Koechlin v. Waugh and Hamilton* (1957) O.W.N. 245.

¹² *R. v. Carroll* (1960) O.W.N. 9.

¹³ *Law and Order in Canadian Democracy*, pp. 263—264.

8—9 ELIZABETH II**Chap. 44****An Act for the Recognition and Protection of
Human Rights and Fundamental Freedoms***[Assented to 10 August, 1960]**Preamble*

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

THEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Part I**BILL OF RIGHTS***Recognition and declaration of rights and freedoms*

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of the law;
- (c) freedom of religion;
- (d) freedom of speech;
- (e) freedom of assembly and association; and
- (f) freedom of the press.

Construction of law

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

- (a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
- (b) impose or authorize the imposition of cruel and unusual treatment or punishment;
- (c) deprive a person who has been arrested or detained
 - (i) of the right to be informed promptly of the reason for his arrest or detention,
 - (ii) of the right to retain and instruct counsel without delay, or
 - (iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;
- (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;
- (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
- (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
- (g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

Duties of Minister of Justice

3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Short title

4. The provisions of this Part shall be known as the *Canadian Bill of Rights*.

Part II

Savings

5. (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

"Law of Canada" defined

(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

Jurisdiction of Parliament

(3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

War Measures Act, R.S., c. 288

6. Section 6 of the *War Measures Act* is repealed and the following substituted therefor:

Coming into force by proclamation

"6. (1) Sections 3, 4 and 5 shall come into force only upon the issue of a proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended, exists.

Proclamation to be submitted to Parliament

(2) A proclamation declaring that war, invasion or insurrection, real or apprehended, exists shall be laid before Parliament forthwith after its issue, or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting.

Opportunity for debate

(3) Where a proclamation has been laid before Parliament pursuant to subsection (2), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within ten days of the day the proclamation was laid before Parliament, praying that the proclamation be revoked, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made.

Revocation of proclamation by resolution

(4) If both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect, and sections 3, 4 and 5 shall cease to be in force until those sections are again brought into force by a further proclamation but without prejudice to the previous operation of those sections or anything duly done or suffered thereunder or any offence committed or any penalty or forfeiture or punishment incurred.

Canadian Bill of Rights

(5) Any act or thing done or authorized or any order or regulation made under the authority of this Act, shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the *Canadian Bill of Rights*."

PREVENTIVE DETENTION IN COLOMBIA*

I

Chapter 3 of our Constitution, concerning civil rights and social guarantees, contains provisions with regard to the legal detention of persons, particularly in Sections 23 to 28, in which connection Section 26 should be quoted:

"No one may be tried except in conformity with laws enacted prior to the commission of the offense with which he is charged by courts having competent jurisdiction, and in accordance with all the forms proper for each case.

In criminal matters, the law favorable to the defendant, even if enacted after the commission of the alleged offense, shall be applied in preference to the restrictive or unfavorable law."

Section 28 establishes a form of exception in the following terms :

"No person may, even in time of war, be punished *ex post facto*. No punishment shall be inflicted if it is not under a law, order, or decree in which the act has been previously prohibited and the punishment for its commission established.

This provision shall not prevent, even in time of peace, if there are serious reasons to fear a disturbance of the public order, the arrest from being made by order of the government, upon previous advice of the ministers, of persons suspected with good reason of attempting to disturb the public peace."

As may easily be seen from the wording of this provision, even in time of war, supreme legislation safeguards the liberty and safety of persons, but in time of peace it prevents disturbance of the public order when there is serious reason to fear a threat. In these circumstances there are provisions for persons plotting against the said public order to be apprehended and detained under sufficiently serious circumstances as determined by the Government under the advice of the Executive Ministry.

In the case of general violation of the law, that is to say common offences, the Code of Criminal Procedure specifies circumstances in which preventive detention may be ordered, according to the penalty attaching to the particular offence. As penalties are

* The following article was prepared on the basis of an outline on preventive detention prepared by the International Commission of Jurists in accordance with Committee III of the New Delhi Congress held by the Commission in January 1959.

classified in various categories, precautionary detention is not applicable in all cases, because it is required that only those offences punishable by imprisonment or penal servitude should be subject to preventive detention.

Preventive detention is administered by the officials or judges responsible for criminal investigation, who also bring the proceedings themselves, since only in exceptional cases may police or administrative officials order preventive detention; for instance in circumstances coming under Section 28 of the Constitution, quoted above, when the conditions set forth therein are satisfied.

Authority in the sphere of penal law is given to police inspectors, permanent criminal investigation, municipal, district and senior judges. The country is divided into areas called judicial districts in each of which there is a higher court generally competent for cases of final appeal, except where an issue of particular gravity is involved, in which event the Supreme Court of Justice acts as the court of appeal. The latter is also responsible for hearing offences by high officials at all stages.

When detention is decreed by an authority so empowered it is required by law that the accused be informed of the charges against him; further the grounds for arrest must be stated in the warrant.

This warrant may be the subject of an appeal before the immediate superior official, not only by the accused or his attorney but also by the representative of the Public Ministry (e.g. national or municipal attorneys) participating in the proceedings. This branch of public authority is represented at the highest level in the office of the National Attorney-General, which is the supreme power responsible for ensuring proper and normal administration of justice. It may also intervene at the simple request of a citizen who considers that his legitimate rights, in particular his freedom, have been violated.

A defendant in all criminal proceedings is entitled to the services of a registered lawyer from the beginning of the inquiry. This is so because the law requires that the accused should be assisted by a legal adviser whom he shall designate, and that, if he does not do so, such an adviser should be designated by the authorities. This procedure must be followed in all cases unless sufficient legal cause can be shown to the contrary.

II

Following the above analysis, mention must also be made of a historical aspect of our Constitution which has now been in force for nearly a century, having been adopted in 1886, to take the place of various Basic Charters, most of them short-lived.

The present Constitution contains a provision in Section 121 that was conceived expressly for a state of war, or for internal disorder, but was subsequently converted in practice into something far removed from its precise wording, with vague and far-reaching interpretation, resulting in the most contradictory and controversial application of any article in our laws.

This text must be quoted for proper understanding of what is involved:

Section 121:

"In case of foreign war or domestic commotion the President may, with the signatures of all the ministers, declare the public order to have been disturbed, and the whole or part of the Republic to be in a state of siege. After such a declaration the government shall have, in addition to the powers conferred by domestic law, such powers as exist during war between nations in accordance with the rules accepted by international law.

The decrees which, within the said limits the President may issue, shall be binding if bearing the signatures of all the ministers.

The government may not repeal the laws by the said decrees. Its powers are limited to suspension of the laws that are incompatible with the state of siege.

The government shall declare public order to be re-established as soon as the foreign war has ceased or the uprising has been put down and the decrees of extraordinary character which may have been issued shall cease to be in effect.

The President and the ministers shall be responsible if they declare the public order to be disturbed in the absence of foreign war or internal commotion; they shall likewise be responsible, together with other officers, for any abuse that they have committed in the exercise of the powers granted to them in the present Article.

Upon the re-establishment of the public order, the government shall convoke Congress and present to it a statement of the measures taken and of the reasons therefor.

In the case of foreign war, the government, in the decree declaring the public order to have been disturbed and the Republic to be in a state of siege, shall summon Congress to meet within the next sixty days; if it is not summoned, Congress may meet by its own right."

The above Section clearly states that the Government may not repeal legislation under such decrees, and that its powers are limited to suspension of provisions incompatible with a state of emergency. Nevertheless whenever Section 121 has been applied, the powers it confers have been exceeded. This had led to violation of the essential separation of power in the three independent organs of government, as provided for in public law and has also resulted in violation of the rights of citizens counter to Colombian juridical principles.

Fortunately such instances of application of this provision have been few in number, since the country has enjoyed a long period of peace and order following one of the most bloody internal upheavals which ended in 1903. In that year a regime based on force, resulting perhaps from the anomalous situation caused by the three-year civil war, was set up by a general, who, although popularly elected, instituted an irregular Government known as the Five-Year Government. During that period many rights were violated, Congress was forcibly suspended, and the Executive assumed the legislative function under extraordinary decrees based on Section 121.

It is not appropriate to discuss in detail the general juridical chaos of that period but following the subject of this study, it should be noted that the provisions for normal criminal proceedings were suspended and replaced by special Legislative Decrees, such as No. 26 of 1905, which provided for the establishment of courts of exceptional jurisdiction and empowered special officials to hear cases concerning various offences, not only of a political nature, but also – which is even more irregular – those included in the category of common offences.

When therefore constitutional order was re-established in 1909 a committee of notable jurists, headed by the man who was to be mentor for future generations of lawyers and was the Dean of the law faculty, stated to Congress held that year as a result of the irregular state of affairs:

“It is absolutely necessary that the science of judgement should reject as contrary to justice the institution of exceptional courts of jurisdiction, which is incompatible with any political system proposing the Rule of Law and is reconcilable only with systems in which material force predominates. It is not tolerable within a system based on normal legal principles that citizens should be tried by courts of jurisdiction other than those established in accordance with normal law, in which proper procedure is observed and in which there is full provision for exceptional circumstances. In all countries there have been exceptional courts of law, but only in periods and circumstances in which, for more or less justifiable reasons respect for individual liberty and social guarantees have been suspended.”

As may be inferred from the above, legal provisions were not observed during that period, and detention was not only preventive but for long periods took the form of imprisonment for political reasons, since the basic aim was to protect an illegal and dictatorial situation rather than to correct criminal offences or to preserve public order against existing threats. The legal justification on which such action was falsely based was the wording of Section 121.

Forty years later a political crime committed on April 9, 1948, that cost Dr. Jorge Eliecer Gaitan the eminent penal expert his life,

was used as a pretext to upset legal order. The social repercussions led one year later in November 1949, to the proclamation of a new state of emergency throughout the country, which was lifted in part on May 10, 1957, several departments still remaining subject to a disturbance of public order. During what seemed an interminable period lasting nine years, and particularly from 1953 to 1957 when another general assumed power and set up a *de facto* Government, Section 121 was interpreted to justify the violation of many rights and the proclamation of extraordinary decrees for a wide variety of actions not limited to suspension of legislation incompatible with the state of emergency, which is the only legal power conferred by that section.

One of the particular features of that dictatorship was to intervene in criminal proceedings ignoring regular procedure and ordering unjustified detention. The culmination was the wrongly termed reorganization of the Supreme Court of Justice by which its proper structure laid down in the Codes was abolished, for it was divided, extended and given illogical and illegal powers designed to justify the ways of a despotic regime.

In this connection it is only proper to reproduce a provision dated June 14, 1951 – that is to say during the state of emergency issued by the author in his capacity as military judge of the Brigade of Military Institutes of Bogota. This clearly shows how at that time subordinate authorities were using the pretext of danger to national security so as to order preventive detention without any proper justification. The decision may stand without further comment:

"It happens all too frequently that elements of the security forces, stating their grounds in more or less detail, that it is not possible to go into here owing to lack of space, arrest large numbers of persons, acting on information supplied by some member and alleging that they are *Communists*. The party to which these individuals are alleged to belong is not prohibited by the Constitution for its political activities, nor by the legislation of the land. So long as it is not demonstrated in legal form that a crime has been perpetrated of a type, order or category in respect of which preventive detention is authorized, a person legally exercising his right to subscribe to a belief that is not prohibited, cannot and must not be imprisoned. It would be tantamount to depriving of his liberty a member of another party, for example a conservative or a liberal, for the mere reason that he professes the beliefs of one of those associations. From the above statement and the preceding passages of this report, it may be clearly concluded, as has previously been the case in similar circumstances, that it is wrong to maintain indefinitely a situation created on such foundations and leading to the detention for a more or less extended period of persons against whom there is as yet no evidence of having committed an offence such as to justify their further detention. When time and circumstances permit prosecution of the 14 persons held, their individual legal position will be clarified, and in the meantime they are to be set free, against bail of 20 pesos each, being required to attend this office once a week, for the purpose of further legal action."

As frequently occurs under dictatorial regimes, the faint mention of Communism is sufficient to give a semblance of preservation of order to episodes arising from mere opposition to the reigning despotism. In the case described above, it appeared subsequently, when proceedings were continued against the accused, that there was no Communist among them and that one of them was in fact in receipt of a scholarship granted by the then Minister of Education, enabling him to study the arts in Spain. Similar findings were established for the others also.

Colombia has boasted of its adherence to juridical practice and has enjoyed that reputation among the nations of America in particular. With the exception of the two despotic Governments described above, there have been no other interruptions in this century to the course of its institutional life, based on the Rule of Law, through popular election of its governing authorities and its legislative bodies; only very brief episodes, with very limited and temporary effects, have disturbed the existing state of law in the last 60 years. The occasions on which the successive Governments found it necessary to proclaim that the public order had been disturbed amounted to one or two only, apart from the aforementioned exceptional instances; the disturbances lasted for a short time only, and there were only slight security measures, which were justified by Section 121 of the Constitution.

The National Congress is at present debating an amendment to that Section, which would even further reduce the extraordinary powers of the Government, in those cases where there are legitimate fears for social peace. There would be provision for immediate intervention by Congress in all actions of this nature, thus restraining the powers of the Central Executive. It seems possible, however, that political forces might succeed in frustrating the amendments directed of this end.

At the present time, it would be very difficult to provide statistics on detentions which are not based upon common crimes but are of a political nature. The reason being that despite the partial continuation of the state of emergency due to the fact that the peaceful course of the nation's business has not been fully restored, the traditional state of law has been re-established, under a statesman who was for a long time Secretary of the Organization of American States and is an untiring defender of justice, earnestly endeavouring to correct any human deficiencies. This has meant that cases of arbitrary detention occur only sporadically and there is general guarantee of protection by the authorities in their vigilant action and sincere endeavours towards a proper administration of justice.

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GHANA'S PREVENTIVE DETENTION ACT

INTRODUCTION

In this article it is proposed to examine the Preventive Detention Act of Ghana passed in 1958 in the light of recent events and court decisions there, and to compare the Act with other similar legislation which has been passed from time to time in certain Common Law countries. The text of the Act is given at Appendix I.

As is known, Ghana became an independent member State of the Commonwealth on March 6, 1957. The party in power, the Convention People's Party, had a large majority in Parliament and overwhelming support in the country. There was a good measure of homogeneity with the Akans as the principal people in the south and centre of the country.¹ The Constitution was designed for a unitary state. The transition from colonial to independent status had been effected smoothly with a minimum of violence. There were, however, during March 1957 some disturbances in Togoland, a part of Ghana formerly a Trusteeship territory administered by the United Kingdom, where certain elements were disinclined to be associated with the new state of Ghana.²

The Government invoked on December 30, 1957, the Emergency Powers Act 1957 for the first time to deal with a local emergency in Kumasi; tensions had arisen there in regard to filling the vacant post of local head of the Moslem community.³ A few months later another state of emergency was proclaimed on April 29 in Accra after demonstrations as a result of the cancellation of the Accra municipal elections.⁴ The next emergency was declared on September 8, 1961, on account of the strike of government workers at Takoradi and Secondi.⁵

Outward relations between the People's Convention Party and the opposition party, the United Party, had deteriorated during the first twelve to eighteen months following independence. A number of leading members of the United Party had been deported and two

¹ W. E. F. Ward, *History of Ghana* (London: George Allen & Unwin Ltd., 2nd ed., 1958), p. 37.

² *Keesing's Contemporary Archives*, April 26-May 3, 1958, p. 16155.

³ *The Guardian* (Manchester), December 31, 1957, and January 8, 1958.

⁴ *The Guardian* (Manchester), May 1, 1958.

⁵ Government of Ghana White Paper: "Statement by the Government under Recent Conspiracy," published on December 11, 1961.

opposition Members of Parliament, Mr. Antor and Mr. Ayeke, had been arrested and found guilty at their trial at Accra on charges of conspiring to attack certain people with armed force.⁶ Their conviction was later quashed on appeal. Against this general background the Preventive Detention Bill was introduced into Parliament on July 14, 1958,⁷ and received the Governor-General's Assent on July 18, 1958.

Since the coming into operation of the Act the Government has made extensive use of its powers under Section 2. The Executive has been especially severe in making detention orders against members of the Opposition. For example, 43 persons, many of them members of the United Party, were arrested on November 10, 1958, and detained under the Act.⁸ On December 23, 1960, the Government issued preventive detention orders against 118 persons following acts of "violence, gangsterism and brigandry" in Ashanti and other regions of the country.⁹ Many of these persons were alleged to be members of the opposition party. Very recently it was reported that the President's office on October 3, 1961, had ordered the detention of about 50 persons.¹⁰ Those arrested included J. Appiah who became deputy leader of the opposition party in August 1958, Dr. J. B. Danquah,¹¹ a leading opposition party lawyer, and P. K. K. Quaidoo, a former Cabinet Minister and recently a strong critic of the Government. In early October there were between 200 and 250 persons detained under the Act.¹² Out of a total population of 6,690,730¹³ this represents about 0.0034 % of the population. In India there were in 1960 only 94 persons detained under the Preventive Detention Act 1950, which represents out of a total population of around 400,000,000¹⁴ a mere 0.000024 % of the population. In the United Kingdom in 1944 during the Second World War there were about 230 persons detained

⁶ *Keesing's Contemporary Archives*, April 26-May 3 1958, p. 16155.

⁷ *Ibid.*, September 6-13, 1958, p. 16382.

⁸ *Keesing's Contemporary Archives*, March 7-14, 1959, p. 16687.

⁹ *The Times*, (London), December 24, 1960.

¹⁰ *The Times* (London), October 4, 1961. The High Commissioner for Ghana in the United Kingdom stated in a letter to *The Times* which appeared on October 14, 1961, that the Government of Ghana would be publishing a White Paper setting out the full facts concerning the recent arrests and detentions. The White Paper was published on December 11, 1961.

¹¹ Dr. Danquah is also the Chairman of "Freedom and Justice", the Ghana National Section of the International Commission of Jurists.

¹² *Daily Telegraph* (London), October 4, 1961, read in conjunction with *The Times* (London), October 4, 1961. The situation has again changed since this article was prepared. No official figures have been published.

¹³ Ronald Segal, *Political Africa* (London: Stevens and Sons, 1961), p. 335.

¹⁴ *Journal of the International Commission of Jurists*, Vol. III, No. 1 (Spring 1961), p. 96.

under Regulation 18B ¹⁵ out of a population of about 48,000,000 ¹⁶ which represents 0.00048 % of the population.

THE COURTS AND PREVENTIVE DETENTION

The legality of the Governor-General's order for detention, and from July 1, 1960, when Ghana became a Republic, the President's order for detention, has been repeatedly and fearlessly tested by counsel in the courts by applications for writs of *habeas corpus*. Thus in the case of *in re Okine and 42 others* the High Court refused to make an order for *habeas corpus*. Mr. Justice Smith, said in his judgment delivered on January 10, 1959 :

"The Preventive Detention Order sets out that the Governor-General is satisfied that it is necessary to make the detention order in question. It is signed, as I have said, by the Minister of Defence: there is nothing against his signing this order either in law or in the circumstances of this case. The question of the necessity of making the order at all is not for the Court to consider (*Progressive Supply Company v. Dalton* 1943 1 Ch. p. 54). It also appears well established that where a statute requires only that a Minister shall be "satisfied" that certain action is necessary the effect is "virtually to exclude all judicial review on the ground that Ministerial action taken under (such) authority is purely administrative". (Laws and Orders - Sir Carleton Kemp Allen). Many cases and authorities have been cited in support of this. In *Land Realisation Co. Ltd. v. P.M.G.* 1950 1 Ch. p. 434 at p. 445, Lord Romer said:

It is well settled that where a statutory provision empowers a Minister to do something if he is satisfied with regard to a certain state of affairs then a statement by him that he is so satisfied will be accepted by these Courts..."

The applicants appealed, but on April 11, 1960, the Court of Appeal held it had no jurisdiction to entertain an appeal in a *habeas corpus* matter.¹⁷ Again, on June 6 of the same year, the Court of Appeal followed this decision and did not allow a similar appeal¹⁸ this time by R. Amponsah, M.P., and M. Apaloo, M.P., two members of the United Party who had been placed in detention. A right of appeal in this type of case was given in the Courts Act 1960.

On April 21, 1961, the High Court gave a ruling in the case of the detention of Van der Pujie and 4 others, one of whom was I. Asigri, another opposition M.P. The submissions by the applicants for the release of the detainees by writ of *habeas corpus* were based on wide grounds the chief of which were :

¹⁵ Statutory Rules and Orders 1939 No. 1681 made under Emergency Powers (Defence) Act 1939.

¹⁶ *Whitaker's Almanac* (London: J. Whitaker and Sons Ltd., 1961), p. 588; the figure is approximate, based on 1931 and 1951 census figures.

¹⁷ Civil Appeal No. 6/60.

¹⁸ Civil Appeal No. 7/60.

(i) The grounds upon which the applicants were detained alleged the commission of offences punishable under the criminal code and since the Preventive Detention Act was a preventive and not a punitive Act the orders made by the President were punitive and therefore *ultra vires*.

(ii) By Section 39 of *Magna Carta* the detention violated the bulwark of the liberty of the citizen.

(iii) Under the *Habeas Corpus* Act 1816, Section 3, the Court should have inquired into the truthfulness of the facts set out in the grounds for detention.

(iv) The President should have informed the applicants of the real grounds of their detention.

The Court rejected all these grounds and refused the application. In the course of a lucid judgment Mr. Justice Ollenu, maintained that the essentials for a valid order made under Section 2(1) of the Preventive Detention Act were : -

"In my opinion the main essentials of a valid order made under section 2 (1) of the Preventive Detention Act are:

- (I) the person against whom the order is made must be a citizen of Ghana, in other words question of nationality and jurisdiction;
- (II) the identity of the person;
- (III) satisfaction by the President that the order is necessary to prevent; i.e. good faith of the President.

"I consider that the other essentials set out in the case of *in re: Okine & Ors.* G.L.R. 1959, 1, and the other cases cited are all comprised in the points I have mentioned above.

"A number of cases local and English were cited to me by both sides and I have given careful consideration to everyone of them. The majority of the English cases are based upon interpretation of regulation 18B of the English Defence (General) Regulations, 1939, the relevant part of that regulation is as follows:

"If the Secretary of State has reasonable cause to believe a person to be of hostile origin etc. and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained."

"It is important to observe in contrast with this regulation that section 2 (1) of the Preventive Detention Act does not prescribe any special premises which should lead the President to the satisfaction upon which alone he could make the order. The President is the sole judge of his satisfaction and the grounds for it; once he says he is satisfied that an order is necessary for one or other of the purposes laid down in the section, his satisfaction cannot be questioned unless his bona fides is challenged. Of course if there were a way, apart from his own assertion, of determining whether or not he was in fact satisfied before he made the order, that would have been a proper matter for enquiry into, because if it is shown that he was not in fact satisfied, the order would be invalid. In this regard, I share in the views of Lord Atkin expressed in his minority speech in the case of *Liverside (sic) v. Anderson* (1941) 3 A.E.R., 338 at 349-363, and I would apply it to this case . . ."

On August 28, 1961, the Supreme Court at Accra, which became the final court of appeal in the new Ghana Constitution of 1960,¹⁹ gave judgment in the appeal of B. O. Akoto and 7 others from the decision of the High Court in which an application for release by writ of *habeas corpus* had been refused. The 8 applicants had been placed in detention in November 1959 for a period of 5 years for "acting in a manner prejudicial to the security of the State". The Supreme Court, whose judgment is reproduced in full in Appendix II, dismissed all 8 applications, the arguments for which, as can be seen, were based on very wide grounds.

In the cases which have come before the Ghana courts, as far as is known, none of the applications for release by writ of *habeas corpus* has succeeded. The judges, in judgments which reflect much care in their preparation, have constantly interpreted the words "if satisfied" in Section 2 of the Act in the subjective sense. That is to say, in the words of Mr. Justice Ollenu, quoted above, "... The President is the sole judge of his satisfaction..." The courts then have constantly refused to examine the grounds for the Governor-General's and, later, the President's satisfaction.

In reaching their decisions the courts have commonly equated the Preventive Detention Act to Regulation 18B, one of the Defence Regulations made under the Emergency Powers (Defence) Act 1939 by the United Kingdom Government. For instance Chief Justice Korsah, in his judgment in the Akoto case,²⁰ and Mr. Justice Ollenu, in that part of his judgment in the Van der Puije case cited above refer to Regulation 18B.

THE NATURE OF THE GHANA PREVENTIVE DETENTION ACT

Turning to the text of the Act, it would be appropriate to examine here the specific legal points of interest, especially *vis-à-vis* legislation of a similar nature in other Common Law countries.

The Power to Make Detention Orders under Section 2(1) of the Act

(i) Only the President himself may order the detention;²¹ the Minister concerned (Minister of Defence or Minister of the Interior) signs the order on behalf of the President; previously the Governor-General had made the order acting on the advice of his Ministers. In practice it is the Police who make the recommendations for detention orders, which reach the President through the office of the Attorney-General.

¹⁹ Article 42(1).

²⁰ See Appendix II, 86-99.

²¹ Preventive Detention Act 1958, Section 2(1).

(ii) Only a citizen of Ghana can be detained under the Act;²² this provision is aimed at a class of persons wholly different from those detainable under Regulation 18B.²³ However, Indian and Burmese preventive detention legislation is even wider in effect, being aimed at any person at all who behaves in a proscribed manner.²⁴

(iii) There are only three grounds for detention *viz.*, by reason of a person acting in a manner prejudicial either to the defence of Ghana, or to the relations of Ghana with other countries, or to the security of the state.²⁵ The grounds for detention are wide but not as wide as the Indian legislation, as is seen below, although the Indian section says "foreign powers" while the relevant Ghanaian words are "other countries".

The purpose of the Indian Preventive Detention Act 1950, as laid down in Section 3(1)(a), 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 Malayan provisions²⁶ are even wider than the Indian.

It is appropriate here to draw attention to the actual grounds specified in orders for the detention of persons as given in the Akoto case.²⁷ These particulars are phrased in bare outline and in the most general terms with scarcely any reference to actual locality or specific date. Also the details of the conduct of the persons detained are conspicuously absent. The same paucity of information is apparent in the grounds of detention cited in the Van der Puij case which were as follows : -

"... Acting in a manner prejudicial to the security of the State in that you have constantly advocated and encouraged the commission of acts of violence in the Accra District (Northern Region), and generally adopted and have associated with other persons who have adopted a policy of violence as a means of achieving their political aims in the District (Region)..."

In this connection the lack of information about the grounds of detention can adversely affect the preparation of the detainee's representations to the Executive.^{27a}

²² Idem.

²³ Regulation 18B(1).

²⁴ For the purpose of the Indian Preventive Detention Act 1950 see below this page and for the purpose of the Burmese Public Order (Preservation) Act 1947 see p. 75.

²⁵ Preventive Detention Act 1958, Section 2(1).

²⁶ Article 149(1) of the Federation of Malaya Constitution.

²⁷ See Appendix II, pp. 86-99.

^{27a} See below, p. 77.

The Satisfaction of the President under Section 2(1) of the Act

The President may make an order for detention *if satisfied* (emphasis added) that the order is necessary to prevent the person acting in the prejudicial manner described.²⁸ We have already noticed that the courts have considered the President's discretion absolute and have commonly relied for authority on the analogy of Regulation 18B and case law resulting from it. Therefore an examination must here be made first of the background conditions which led to the making of Regulation 18B, and secondly of the actual wording of 18B. In this way some comparison may be made between the Ghana Preventive Detention Act 1958 and Regulation 18B.

In 1939 the United Kingdom was engaged in a war which was shortly to develop into a struggle for survival. At the outset of the war it became necessary to check, with the speed required for a wartime emergency, the background of the large number of aliens and refugees who were already in or entering the United Kingdom. For amongst these aliens and refugees were to be found spies and persons specially planted in the country by the enemy for the purpose of causing mischief and damaging the war effort, i.e., "the fifth column". Hence Parliament gave the Executive, in the person of the Home Secretary, the power to detain under certain circumstances persons of hostile origin and association. In this way there was a maximum chance of containing as quickly as possible the activities of "the fifth column", and thereby safeguarding the security of the country. The power to detain was contained in Regulation 18B.²⁹ This Regulation was an exceptional measure and was due purely to wartime circumstances. Its effect expired at the end of the war with the termination of wartime regulations; there have since been no such detention measures. But it should be clearly understood that while there were persons who were detained for the duration of the war by virtue of Regulation 18B, there were many persons who were released once their background and associations had been favourably checked and no cause for continued detention found.

It will be seen therefore that the background situation which necessitated the making of Regulation 18B in 1939 can be strongly contrasted with the very different circumstances which have pre-

²⁸ Preventive Detention Act 1958, Section 2(1).

²⁹ See fn. 15 above.

vailed in Ghana over the last three years and which have already been described above.³⁰

Now the actual wording of Regulation 18B must be studied. As originally drafted on September 1, 1939, Section I of the Regulation³¹ ran as follows:—

“The Secretary of State, if satisfied, with respect to any particular person with a view to preventing him acting in any manner prejudicial to the public safety or the defence of the realm it is necessary so to do may make an order... [that he be detained]...”

This wording found no favour with the House of Commons, because it was thought that the wording “if satisfied... it is necessary...” gave an unfettered power to the Secretary of State; the point was made that no person should have such wide powers.

An amended regulation, Regulation 18B was issued on November 23, 1939, Section (1) of which was as follows:—

“If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.”

Besides the change of the wording from *if satisfied... it is necessary* to the words *has reasonable cause to believe... it is necessary*, the amendment also considerably narrowed the class of persons who could be detained. Originally it was *any particular person*; the new amendment was directed at *any person to be of hostile origin or associations* [etc.].

Another section of Regulation 18B provided for the constitution of an advisory committee³² to which body the person detained could object. Further representations could be made by the detainee in writing to the Secretary of State himself.³³ Under

³⁰ It should be noted here that it is true that certain other Common Law countries besides Ghana have initiated in the last 15 years legislation for preventive detention in times of peace. India has its Preventive Detention Act of 1950. Burma has its Public Order (Preservation) Act 1947, although it should be remembered that when Burma obtained independence in 1948 the government had on its hands a serious and continuing insurrection. Ceylon has this year invoked the powers to detain persons under its Public Security Ordinance of 1947. Malaya passed an Internal Security Act in 1960 under which persons can be detained without trial, but this country had only just emerged from a long drawnout emergency with guerilla war lasting for 12 years and resulting in the loss of 11,000 lives. The South African government have powers at their disposal to detain persons without trial. Southern Rhodesia passed a Preventive Detention (Temporary Provisions) Act in 1959, when there was no state of emergency.

³¹ Statutory Rules and Orders 1939 Defence No. 978.

³² Regulation 18B(3).

³³ Regulation 18B(4).

Section 5 of the Regulation the Secretary of State was bound to report to Parliament at least once a month as to the action taken under the Regulation and the number of cases, if any, in which he had declined to follow the advice of the advisory committee.

There followed a number of amendments to Regulation 18B which had the effect, *inter alia*, of slightly enlarging the class of persons who could be detained.³⁴ The wording of Section 1 and the safeguards, however, remained.

Although it was still open for the subject to challenge the legality of the detention by an application for a writ of *habeas corpus*, such application had small hope of succeeding, for – despite the rejection of the *if satisfied* in favour of *reasonable cause to believe* wording – the courts interpreted the Regulation as giving an absolute discretion to the Home Secretary.

In the leading case of *Liversidge v. Anderson*³⁵ the applicant sought a declaration that his detention was unlawful, and claimed damages for false imprisonment. The applicant had asked for particulars of the grounds on which the respondent had reasonable cause to believe that the applicant was a person of hostile association. It was held that particulars could be ordered only if the burden was on the respondents to prove the various facts which justified the detention order. The burden of proving these matters, the House of Lords held by a majority of 4 with Lord Atkin dissenting, was not on the respondents and therefore no order for particulars should be made. Where Regulations were made for the safety of the country and the “administrative plenary discretion” was vested in the Secretary of State it was for him to decide whether he had reasonable grounds and to act accordingly.³⁶ The court in fact could not inquire into the actual grounds on which the Home Secretary had reasonable cause to believe, if only because in time of war the security of the country might be endangered by revealing the grounds of the Home Secretary’s belief. Lord Macmillan posed the question before the House in this way:³⁷

“Does this mean that the Secretary of State must have such cause of belief regarding the relevant facts as a court of law would hold sufficient to induce belief in the mind of any ordinary reasonable man, or does it mean that he must have such cause of belief as he himself deems to be reasonable?”

The test applied then was the subjective one. The power to detain could not be controlled by courts, except to ensure that the Home Secretary had directed personal attention to the matter; and further

³⁴ See, for example, Statutory Rules and Orders Defence 1940 Nos. 681, 770, 942, 1682.

³⁵ 1942 A C 206.

³⁶ [1941] 3 All England Reports 338.

³⁷ *Ibid.*, p. 363.

that he was not acting in bad faith and was not mistaken in identity of the detainee.³⁸

Professor E. C. S. Wade has written in this connection : -

"... Indeed, the House of Lords appeared to go very near to upholding the doctrine of State necessity so decisively rejected in the eighteenth century in *Entick v. Carrington*..."³⁹

In an article published in the *Law Quarterly Review*⁴⁰ in 1942 Sir Carleton Allen strongly supported the view expressed by Lord Atkin in his minority opinion. Sir Carleton wrote : -

"The hinge of Lord Atkin's speech is that the term 'reasonable cause' has up to the date of this decision had one clear meaning, and one plain effect, in every branch of our law, whether common or statutory. It has evolved an objective test by an independent tribunal, of the reasonableness claimed for the conduct which is impugned. Lord Atkin had supported this proposition by an abundant illustration and has stated categorically that there is no known exception to it..."⁴¹

And a little later the author continues in the same article :

"None of this is denied or even challenged in respect of English law up to November 1941..."

Comparing the original Regulation with the amended one Sir Carleton made a significant point : -

"... when the Regulation requires the Minister merely to be 'satisfied' apparently it is not necessary for him to be convinced that it is reasonable to detain a subject without trial, whereas when he is required to have 'reasonable cause', his satisfaction - his 'mental state' must be accompanied by an element of reasonableness, *determined however by himself*." (Italics by the author)⁴²

Sir Carleton believed the objective test should have been used by the House of Lords in *Liversidge v. Anderson*. And in conclusion wrote : -

"The spectacle of dispassionate justice and of calm adherence to the law of the land, even in the face of imminent danger will always be more admired... than the immunity of executive action on any grounds of temporary urgency; and it will be particularly admired at a time when the nation is embattled against no enemy more sinister than the odious doctrine that the administration of justice is subservient to the requirements of 'policy'..."⁴³

It is only fair to record that Professor A. L. Goodhart writing

³⁸ 1942 A.C. 261 per Lord Wright.

³⁹ E. C. S. Wade and G. G. Phillips, *Constitutional Law* (London: Longmans, Green & Co. Ltd., 6th ed. 1960), p. 675.

⁴⁰ [1942] 58 Law Quarterly Review 232.

⁴¹ *Idem*.

⁴² *Ibid.*, p. 238.

⁴³ *Ibid.*, p. 241.

at the same time took the opposite view and believed the House of Lords had come to the right decision.⁴⁴

A discussion on the interpretation of the words "have reasonable cause to believe" would not be complete without reference to the case of *Nakkuda Ali v. Jayaratne*⁴⁵ in which the Judicial Committee of the Privy Council in an appeal from Ceylon decided that there was no general rule by which the court was precluded from inquiring into the reasonableness of the belief of the official concerned.

It must be recognized that many judges in Common Law countries have been profoundly influenced by the decision in *Liversidge v. Anderson*. For instance, Indian judges have also followed the subjective test in their interpretation of the Indian Preventive Detention Act of 1950, which contained the "if satisfied" clause.⁴⁶ The same interpretation has been applied by Singapore judges in cases of detention arising under the Preservation of the Public Security Ordinance 1955.⁴⁷

However, in Burma the judges have not felt constrained to follow the subjective test in their interpretation of the Public Order (Preservation) Act 1947. Despite the circumstances at the time, i.e., of virtually civil war in Burma, the judges with commendable courage preferred to adopt the objective test. In this way it was found more easy to reconcile preventive detention with Article 16 of the Constitution of Burma which guarantees the liberty of the subject.

Section 5A(1) of the Burmese Public Order (Preservation) Act 1947 begins 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 [inter alia]... directing that he be detained."

The judges in Burma, then, were faced from 1947 onwards with the same problem that had faced the English judges in the 1940s and that was to face judges in Ghana from 1958 onwards with regard to the precise interpretation of legislation that deprived the subject of his liberty without a trial. A very significant ruling was given by the Supreme Court of Burma in 1950 in the case of *Tinsa Maw Naing v. The Commissioner of Police Rangoon* and another.⁴⁸

⁴⁴ *Ibid.*, p. 243.

⁴⁵ 1951 A.C. 66.

⁴⁶ *Journal of the International Commission of Jurists*, Vol. III, No. 1 (Spring 1961), p. 95.

⁴⁷ *Ibid.*, p. 131.

⁴⁸ 1950 Burma Law Reports (Supreme Court) 17.

The appellant had been detained under the provisions of the Public Order (Preservation) Act 1947 for allegedly planning the overthrow of the government and had applied for release by way of *habeas corpus* proceedings. The Court held 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".⁴⁹ Here then is a direct and definite rejection of the doctrine of *Liversidge v. Anderson*. The court further continued:⁵⁰

"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."

The detention was held to be unjustified on the basis of the facts disclosed.⁵¹

The wording of the Ghana Act is more nearly analogous to the Burmese Act than to the wording of Regulation 18B. Certainly neither Ghana nor Burma was engaged in a war at the time of the passing of their respective Acts; in fact the political situation in Burma in 1947 was more conducive to a harsh interpretation of the words "if satisfied" than the comparative situation in Ghana in 1958. Furthermore the words used by the Supreme Court of Burma, (cited above), "... apprehension born of vague anticipation..." are interesting in view of the comments that have already been made above on the particulars of the grounds of detention under the Ghana Preventive Detention Act. The stand, therefore, taken by the Burmese judges ensured some real measure of judicial control over the Executive in cases of preventive detention.

The Opportunity to Make Representations under Section 2 (2) of the Act

The detainee is permitted to make representations *in writing* (emphasis added) to the President with regard to the detention order.⁵² The question must be asked – is this an adequate safeguard against the use of unfettered power by the Executive? It certainly

⁴⁹ *Journal of the International Commission of Jurists*, Vol. III, No. 1 (Spring 1961), p. 60.

⁵⁰ 1950 B.L.R. (S.C.) 35.

⁵¹ 1950 B.L.R. (S.C.) 36.

⁵² Preventive Detention Act 1958 Section 2(2).

does not appear adequate, for there is no provision for the detainee to be heard in person nor can he face his accusers. In a matter where the President is exercising quasi-judicial powers, the basic needs of natural justice should be met. One of the basic rules of natural justice is the rule *audi alteram partem*, that is, no person should have his case decided without being given the opportunity of presenting his side of the argument⁵³ and also hearing what his accusers are saying against him. This principle of natural justice does not appear to have been fully met in the Ghana Act. Furthermore it is arguable whether the power to deprive a subject of his liberty for possibly as long a period as five years should be in the hands of only one member of the Executive; even in Regulation 18B the Home Secretary could lean, if need be, on his advisory committee. Finally in Regulation 18B the Home Secretary was answerable to Parliament for his acts.⁵⁴ But under Article 8(2) and 8(4) of the Ghana Constitution of 1960 the President appears to be answerable neither to Parliament nor to any identifiable body for his executive acts.

It is illuminating in this regard to observe that the Indian courts have considered as a justiciable matter the question of whether or not the details of the grounds of detention filed are too vague for the detainee to make his representations to the Executive.^{54a}

The Absence of Provisions in the Act for an Independent Tribunal

Besides the opportunity to make representations, it has been customary for countries enacting preventive detention legislation to provide a further important safeguard against the indiscriminate use of detention orders by the Executive. This other safeguard has been the creation of some kind of independent tribunal which can hear objections made by the detainee and decide whether or not in the tribunal's opinion there are grounds for the detention, passing on their recommendations to the Minister concerned. The provision of an advisory committee appointed by the Home Secretary under Regulation 18B has already been noted above. The Home Secretary was not, however, obliged to accept the advice tendered by the committee. While the Indian Constitution makes provision for judicial review in cases where persons are placed in preventive custody, the original Indian Preventive Detention Act 1950 made no provision for the detainee appearing before a tribunal but this omission was set right by an amending Act in 1951.⁵⁵ In

⁵³ Wade and Phillips, *op. cit.*, p. 617.

⁵⁴ Regulation 18B(6).

^{54a} See this *Journal*, p. 10.

⁵⁵ *Journal of the International Commission of Jurists* Vol. III, No. 1 (Spring 1961), p. 95.

Malaya there are elaborate provisions for an "advisory board" to be set up under Article 151(b) of the Constitution to hear representations made by the detainee, who will then be informed by the board of the allegations of fact on which he is being detained, unless disclosure would be against the national interest.⁵⁶ The Preventive Detention (Temporary Provisions) Act of Southern Rhodesia passed in 1959 also provides for a review tribunal.⁵⁷ In Nigeria there is no preventive detention legislation on the statute book. But under the Emergency Powers Act 1961 the Governor-General may make Regulations under Section 3 providing for the detention of persons. However there can be no exercise of any of the emergency powers under the Act unless the Federation is at war, or until Parliament has assembled to declare a state of emergency or to pass a special resolution to the effect that democratic institutions in Nigeria are threatened with subversion. Furthermore all Regulations made under the Act must be approved by Parliament or, in default of such approval, become inoperative within two months. According to the Nigerian Constitution if, in consequence of the enactment of legislation authorizing detention (and the Emergency Powers Act 1961 clearly falls into this category), a person is deprived of his liberty, his case must periodically be referred to a tribunal with a Chairman appointed by the Chief Justice of the Federation of Nigeria who will advise the authority concerned with the finding of the tribunal.⁵⁸ With reference to the Ghana Preventive Detention Act it appears a matter for regret that there is no provision in it for some kind of independent tribunal before which the detainee can be heard in person.

Duration of Detention under Section 4(1) of the Act

It is revealing to compare the length of time for which a person may be detained under preventive detention legislation obtaining in certain Common Law countries.

India : No time limit for detention is prescribed.⁵⁹

Malaya : 2 years is the maximum period for detention.⁶⁰

Burma : Detention can be indefinite.⁶¹

⁵⁶ See this *Journal*, p. 108

⁵⁷ Southern Rhodesia's Preventive Detention (Temporary Provisions) Act, 1959, Section 4.

⁵⁸ Nigeria (Constitution) Order-in-Council, 1960, 2nd Schedule, Section 29.

⁵⁹ Preventive Detention Act 1950, Section 3(1); but note Section 12, which provides for detention of up to one year in certain classes of cases.

⁶⁰ Internal Security Act 1960, Section 8.

⁶¹ Public Order (Preservation) Act 1947, Section 5A(1)(b).

Southern Rhodesia: Detention is during the Governor's pleasure; but the detention order is reviewed by the Governor every 12 months.⁶²

Singapore: 3 years is the maximum period for detention.⁶³

South Africa: Under Emergency regulations which were in force from March 30 to August 31, 1960, the period was at the discretion of the Minister. Otherwise forms of detention are possible for 2 years.⁶⁴

Ghana: 5 years is normally the maximum period for detention, but under certain circumstances the detention can be for 10 years.⁶⁵

CONCLUSIONS

It is felt that certain conclusions can be drawn from the foregoing analysis and comparative study of aspects of preventive detention legislation.

First, the best situation is obtained in a country which has no preventive detention legislation at all in times of peace. The Nigerian example is one to be preferred.⁶⁶ Here reference must be made to the *Law of Lagos*, the third paragraph of which reads as follows: -

"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."⁶⁷

Thus the Lagos Conference categorically rejected preventive detention, in times of peace, without a proper trial.

Secondly, when a government feels obliged for reasons of security to invoke preventive detention legislation, then such legislation must be hedged with reasonable safeguards to ensure its proper and not indiscriminate use by the Executive. Reasonable safeguards would include the right to make representations to the authority concerned and the right to appear before an independent tribunal. In this context reference is again made to the Lagos Con-

⁶² Preventive Detention (Temporary Provisions) Act 1959, Section 3(2)(b) and Section 12.

⁶³ Preservation of Public Security Ordinance 1955, as amended.

⁶⁴ See *South Africa and the Rule of Law*, published by the International Commission of Jurists, Geneva, 1960, pp. 64-69.

⁶⁵ Preventive Detention Act 1958, Section 4(1) and Section 3(3).

⁶⁶ It must, however, be remembered that there are special occasions when persons are deprived of their liberty by statute, for example, for reasons of public health or hygiene; e.g. United Kingdom's Mental Health Act 1959.

⁶⁷ *African Conference on the Rule of Law*, January 3-7, 1961, Lagos, Nigeria, p. 11. The Conference was held by the International Commission of Jurists.

ference; paragraph 5 subsections (i) and (ii) of the Conclusions of Committee II read as follows: —

“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).”⁶⁸

These observations clearly make a valuable contribution to an appreciation of the safeguards necessary in preventive detention legislation.

Thirdly, there should be an opportunity for judicial review: in this regard it is felt that to promote the dynamic and liberal concept of the Rule of Law, courts should always be enabled to inquire, in times of peace at least, into the grounds of detention and decide whether they are adequate. The objective test as laid down in Burma should be followed.⁶⁹

Fourthly, a final safeguard would be for the Legislature to receive regular reports from the Executive, or through Ministers, of the numbers of persons detained and of the occasions when the Executive have not followed the advice tendered by the independent tribunal.

Without going into the political questions as to whether there existed or exists in Ghana a situation calling for legislation providing for preventive detention, it is apparent that there are certain factors in connection with the Ghana Act which, from a legal point of view, are not satisfactory.

(i) The maximum duration of the preventive detention seems long especially when it is taken into account that there is no indication that the term of detention comes up for regular review by the executive as it does, for example, in Southern Rhodesia, and in view also of the recommendation of Committee II of the African Conference on the Rule of Law quoted above.

(ii) On account of the inability of the detainee to face his accusers and put his case there appears to be an infringement of a

⁶⁸ *Ibid.*, p. 18.

⁶⁹ Also see this *Journal*, p. 15.

rule of natural justice ; written representations, it is submitted, are not enough.

(iii) There is no independent tribunal before whom the detainee can make his objection.

(iv) Those persons detained give the appearance certainly of being drawn very considerably from one political party.

(v) If the Akoto and the Van der Puije cases are typically illustrative the specific details filed of the grounds of detention appear inadequate.

(vi) Because of the narrow subjective interpretation of the words "if satisfied", the courts have precluded themselves from investigating the grounds of the President's satisfaction. Judicial review, therefore, does not seem to have provided in Ghana a strong safeguard for the liberty of the subject.

APPENDIX I

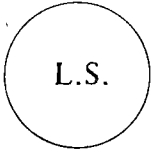
Preventive Detention Act, 1958

No. 17 of
1958.

ARRANGEMENT OF SECTIONS

Section

- 1. Short title.
- 2. Power to make detention orders.
- 3. Provisions as to detention orders.
- 4. Duration of detention.
- 5. Duration of Act.



GHANA

NO. 17 OF 1958.

Assented to in Her Majesty's Name and on Her Majesty's behalf this 18th day of July, 1958.

K. A. KORSAH
Acting Governor-General

AN ACT to provide for preventive detention.

[18th July, 1958.] Date of
assent.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the National Assembly of Ghana in this present Parliament assembled, and by the authority of the same as follows : —

1. This Act may be cited as the Preventive Detention Act. 1958. Short title.

2. (1) The President may order the detention of any person who is a citizen of Ghana if satisfied that the order is necessary to prevent that person acting in a manner prejudicial to —
(a) the defence of Ghana,
(b) the relations of Ghana with other countries, or
(c) the security of the State.

Power to
make
detention
orders.

(2) A person detained under this section shall, not later than five days from the beginning of his detention, be informed of the grounds on which he is being detained and shall be afforded an opportunity of making representations in writing to the President with respect to the order under which he is detained.

Provisions
as to
detention
orders.

3. (1) An order under this Act shall constitute an authority to any police officer to arrest the person against whom the order is made and that person shall, while detained in pursuance of the order, be in lawful custody.

(2) If the Minister responsible for Defence has reason to believe that a person against whom an order under this Act has been made and who has not been taken into custody under the order is attempting to evade arrest, the Minister may by a notice in the *Gazette* direct that person to report to a member of the Police Force at such place and within such period as may be specified in the notice.

(3) If any person in respect of whom a notice has been published in the *Gazette* under the provisions of the last foregoing subsection fails to comply with the notice, he shall, on being arrested, be detained, during the President's pleasure for a period not exceeding double the period specified in the order made under this Act.

(4) At any time after an order has been made against any person under this section the President may in a notice in the *Gazette* direct that the operation of the order be suspended subject to such conditions, if any, as the President may specify in the direction —

(a) requiring him to notify his movements in such manner, at such times and to such authority or person as may be so specified, and

(b) requiring him to enter into a bond with or without securities for the observance of any conditions imposed on him under the foregoing paragraph,

and if that person fails to comply with a condition attached to a direction given under this subsection he shall, whether or not the direction is revoked in consequence of the failure, be detained under the original order or during the President's pleasure for a period not exceeding five years.

(5) The President may include in an order under the Act a provision that it shall cease to have effect on a date specified in the order and may at any time vary or revoke an order made under this Act or a direction given under this section.

Duration
of
detention.

4. (1) Subject to the provisions of subsection (3) of the last foregoing section no person shall be detained in pursuance of an order under this Act for a period exceeding five years and where a person has been detained in pursuance of an order under this

Act no further order shall be made under this Act against that person except on the ground of activities in which that person may have been concerned and which have been carried on at times subsequent to the date on which the first mentioned order was made.

(2) For the purpose of this section any period during which a person is released in pursuance of a direction of the President under the last foregoing section shall count as a period of detention.

5. (1) Subject to the provisions of this section, this Act shall cease to have effect at the expiration of a period of five years beginning with the date on which it is passed. Duration
of Act.

(2) The period during which this Act is in force may from time to time be extended for a further period of three years by a resolution of the National Assembly.

(3) On the expiration of this Act any order made thereunder shall cease to have effect and subsection (2) of section 11 of the Interpretation Act, 1957 (which relates to the effect of repeals), shall apply as if this Act had been repealed.

This printed impression has been carefully compared by me with the Bill which has passed the National Assembly, and found by me to be a true and correctly printed copy of the said Bill.

K. B. AYENSU

Clerk of the National Assembly.

APPENDIX II

In the Supreme Court ACCRA, GHANA.

Coram :

Korsah, C. J.
van Lare, J. S. C.
Akiwumi, J. S. C.

Civil Appeal
No. 42/61

28th August, 1961.

IN THE MATTER OF THE PREVENTIVE
DETENTION ACT, 1958

and

IN THE MATTER OF THE ARREST AND
DETAINMENTS OF BAFFOUR OSEI AKOTO
AND SEVEN (7) OTHERS,

APPELLANTS

and

IN THE MATTER OF AN APPLICATION
FOR WRIT OF HABEAS CORPUS AD
SUBJICIENDUM TO ISSUE DIRECTED
TO THE MINISTER OF INTERIOR ACCRA,
AND THE DIRECTOR OF PRISONS, JAMES
FORT PRISON, ACCRA FOR THE RELEASE
OF THE SAID DETAINEES,

RESPONDENTS.

JUDGMENT

Dr. Danquah for the Appellants.
Bing, Attorney-General, with Amissah, Senior State Attorney for
the Respondents.

JUDGMENT

KORSAH, C. J.: This is the judgment of the Court in an appeal from the refusal of the High Court to grant an application made jointly by the appellants for writs of Habeas Corpus ad Subjiciendum.

The appellants were arrested and placed in detention on the 10th and 11th November, 1959 under an order made by the Governor-General and signed on his behalf by the Minister of Interior under Section 2 of the Preventive Detention Act, 1958. The order reads :

"L.N. 310

THE PREVENTIVE DETENTION ACT, 1958**THE PREVENTIVE DETENTION ORDER (NO. 5) 1959.**

WHEREAS the Governor-General is satisfied that this Order is necessary to prevent the persons in the Schedule to this Order acting in a manner prejudicial to the security of the State :

NOW, THEREFORE, in exercise of the powers conferred to the Governor-General by section 2 of the Preventive Detention Act, 1958, it is hereby ordered as follows : -

- 1.(1) This Order may be cited as the Preventive Detention Order (No. 5), 1959.
- (2) This Order shall take effect at 7 o'clock in the forenoon of 10th day of November, 1959.
- 2.(1) The persons described in the Schedule to this Order shall be taken into custody and detained under section 2 of the Preventive Detention Act, 1958.
- (2) Subject to the power under section 3 of that Act to suspend, vary or revoke this Order, and subject to subsection (3) of section 5 of that Act, the period of which the persons described in the Schedule to this Order are to be detained shall be for a period of five years.

SCHEDULE

| Name | Further particulars |
|---|--|
| 1. Baffour Osei Akoto | Senior Linguist to the Asantehene, of House No. 0.1.141, Ashanti New Town, Kumasi. |
| 2. Peter Alex Danso alias Kwaku Danso | Lorry Driver, of House No. M.E. 70, Kumasi. |
| 3. Osei Assibey Mensah | Storekeeper, House No. M.E. 60 Ashanti New Town, Kumasi. |
| 4. Nana Antwi Busiako alias John Mensah | "Nkofehene" of Kumasi, of House No. O.B. 473, Mbrom, Kumasi. |
| 5. Joseph Kojo Antwi-Kusi alias Anane Antwi-Kusi | of Kumasi. |
| 6. Benjamin Kwaku Owusu | Produce Manager, of House No. B.H. 149, Asafo, Kumasi. |
| 7. Andrew Kojo Edusei | Auctioneer and Letter Writer of House No. 0.1.165, Ashanti New Town, Kumasi. |
| 8. Halidu Kramo | Transport Owner of House No. 8.51, Suame, Kumasi. |

Made at Accra this 10th day of November, 1959.

By the Governor-General's Command.

A. E. INKUMSAH
Minister of the Interior."

It is admitted that the Order is regular on its face, that it was duly signed by the Minister of Interior, and that the appellants are the persons named in it.

The main issues raised by Counsel for the appellants are that :

1. The learned Judge acted in excess of jurisdiction in refusing the application without making an order for a formal return.
2. By virtue of the Habeas Corpus Act of 1816 the Court is required to inquire into the truth of the facts contained in "The Grounds" upon which the Governor-General was satisfied that the order was necessary to prevent the appellants from acting in a manner prejudicial to the security of the State.
3. The Minister of Interior who signed the order for and on behalf of the Governor-General was actuated by malice.
4. The grounds upon which the appellants were detained do not fall within the ambit of the expression "Acts Prejudicial to the Security of the State".

5. By virtue of section 3 of the Criminal Procedure Code Cap. 10 of the laws of the Gold Coast now section 1 of the Criminal Procedure Code 1960 Act 30, the Governor-General is precluded from exercising the powers conferred on him under The Preventive Detention Act, to make an order for the arrest and detention of the appellants without trial except in accordance with the Criminal Procedure Code.
6. The Preventive Detention Act, 1958, by virtue of which the appellants were detained, is in excess of the powers conferred on Parliament by the Constitution of the Republic of Ghana with respect to article 13(1) of the Constitution, or is contrary to the solemn declaration of fundamental principles made by the President on assumption of office.
7. The Preventive Detention Act not having been passed upon a declaration of emergency is in violation of the Constitution of the Republic of Ghana.

On the first issue, it is observed that the application of the appellants for the writ of habeas corpus is supported by affidavit with exhibits disclosing all the material facts essential to determine the regularity of the order, namely:— (a) The order of detention (b) the written information furnished in accordance with the requirements of the Act (c) written representations by the detainees to the Governor-General, and (d) the reply of the Governor-General.

There is little wonder therefore that upon service of the copies of the motion and other relevant papers on the respondents the Permanent Secretary of the Ministry of Interior, on behalf of the Minister, filed an affidavit which briefly stated the following additional facts:

"1. Since 1st July, 1959, matters relating to preventive detention, other than the statutory power conferred on the Minister responsible for Defence by section 3(2) of the Preventive Detention Act, 1958 have been placed within the portfolio of the Minister of the Interior."

"2. I am authorized to say that the Preventive Detention Order (No. 5) 1959 (L.N. 310) was made by the Governor-General in good faith under section 2 of the Preventive Detention Act, 1958, and the making therefore was duly signified in good faith by the Minister of the Interior."

"3. The reason for the making of the said Order is as set out in the recital thereto, namely that in accordance with the provisions of section 2 of the Preventive Detention Act, 1958, the Governor-General is satisfied that the said Order is necessary to prevent the persons detained acting in a manner prejudicial to the security of the State. The grounds of detention served upon the said detainees contain particulars of the previous acts or conduct upon which the conclusion of the Governor-General is based."

In these circumstances we consider that all the facts relevant for determination whether the writ should issue or not having already been disclosed in the affidavits filed, a formal return was unnecessary and that the learned Judge was entitled to dispose of the application upon the affidavits. It is not disputed that (a) the appellants belong to the class of persons to whom the Preventive Detention Act applies, (b) that they are the persons mentioned in the order and (c) the order was made by the authority.

It was further contended on behalf of the appellants that where a judge does not order a release under rule 14 of the Order he is obliged to order a formal return to the writ. We do not accept this view as a correct interpretation of rule 14 which reads :

"On the hearing of the application the Judge may, in his discretion, order that the person restrained be released, and the order shall be a sufficient warrant to any gaoler, constable or other person for the release of the person under restraint."

We are clearly of opinion that rule 14 does not make it compulsory that in every case the judge should order a formal return. In this, view, we are fortified by what Lord Goddard said in *Ex Parte Greene 1941*, 3 All. E.R. 104 at p. 123 "To avoid any misunderstanding, I desire to add that, both in the present case and in *R. v: Home Secretary, Ex p. Lees* the applicants themselves exhibited to their affidavit copies of the orders under which they were detained, and no question was raised as to the accuracy of the copies. However, cases may arise where persons who are detained, whether under defence regulations or otherwise, do not, and perhaps cannot, inform the court of the order or warrant under which they are detained. In such a case, if the court sees fit to grant an order *nisi* or summons to show cause, it will be necessary for the person who has the custody of the prisoner to make an affidavit exhibiting the order or warrant under which he detains the prisoner. Although, as I have pointed out above, the old procedure did not require a return to be verified, at any rate in the first instance, modern practice does require an affidavit, and care should be taken in these cases under the regulations to exhibit the actual order signed by the Secretary of State, which alone is the authority for detaining the prisoner."

On the second issue, the contention is that by virtue of section 3 of the Habeas Corpus Act 1816 the court was bound to enquire into the truth of the facts alleged in the grounds upon which the Governor-General was satisfied that the order was necessary to prevent the appellants acting in a manner prejudicial to the security of the State. There is of course the preliminary question whether the Habeas Corpus Act 1816 is a statute of general applica-

tion within the meaning of section 14 of the Supreme Court Ordinance 1876. In our opinion it is a statute of general application; because the act was law in force in England on 24th July 1874, and there are no local circumstances which can possibly operate to exclude its application in this country. The question the Habeas Corpus Act 1816 raises is one of procedure. At common law the return to a writ of habeas corpus could not be controverted but the 1816 Act permitted the court to enquire into the truth of the facts set forth in the return if ordered, except in cases where detention order is made for the security of the state and the administrative plenary discretion is vested in the person making the order, as decided in *Liversidge v. Anderson & Another* 3 All Eng. Law Report (1941) 338. Following the above decision, we held that although the Habeas Corpus Act 1816 is a Statute of General Application, it does not apply in this case because the Preventive Detention Act under which the appellants are detained vests plenary discretion in the Governor-General, now President, if satisfied that such order is necessary. The court could not therefore enquire into the truth of the facts set forth in the grounds on which each appellant has been detained.

In this matter we are guided by the legal principles enunciated in the decisions in *Liversidge versus Anderson* 1941 All Eng. R. 338, *R. v. Home Secretary, Ex Parte Greene* 1941, 3 All Eng. R. 104, *R. v. Home Secretary, Ex Parte Budd* 1942, 1 All Eng. R. p. 373. In these cases the question raised was whether it was open to any court to enquire into the reasonableness of the belief of the Secretary of State in the matters in which regulation 18B(1) required him to have reasonable cause to believe before a detention order could be made. It will be noted that under the Preventive Detention Act the Governor-General, if satisfied that it is necessary, may make the order for the detention of the person or persons named. On this point, Lord Greene, M.R. in *Ex Parte Budd supra* said "It is clear that, if the Courts have no power to inquire into the reasonableness of the belief of the Secretary of State in the matter in which he is required to believe, they can have no power to inquire into the grounds of his satisfaction in regard to matters of which he is required to be satisfied."

We may also refer to the opinion of the majority of the House of Lords on this issue in *Liversidge versus Anderson*.

Viscount Maugham said, at p. 348 :

"The result is that there is no preliminary question of fact which can be submitted to the courts, and that, in effect, there is no appeal from the decision of the Secretary of State in these matters, provided only that he acts in good faith."

Lord Macmillan said, at p. 370 :

"...I am unable to accept a reading of the regulation which would prescribe that the Secretary of State may not act in accordance with what commends itself to him as a reasonable cause of belief without incurring the risk that a court of law may disagree with him..."

Lord Wright said, at p. 378 :

"On the view which I have formed that there is under reg. 18B no triable issue as to reasonableness for the court, these authorities cease to be of any value. As the administrative plenary discretion is vested in the Home Secretary, it is for him to decide whether he has reasonable grounds and to act accordingly. No outsider's decision is involved, nor is the issue within the competence of any court."

Lord Romer said, at p. 384 :

"...if at the trial the Home Secretary gives rebutting evidence to the effect that, in his opinion, there were reasonable grounds for his belief, his statement, being merely a statement as to his opinion, must necessarily be accepted unless it can be shown that he was not acting in good faith, and the onus of showing this would lie upon the plaintiff."

Upon the principles so clearly enunciated by the majority of the House of Lords in *Liversidge's* case, Lord Greene said in *Ex Parte Budd* at p. 375 : "It is scarcely necessary to say that language used in earlier decisions which may suggest that the courts may inquire into the reasonableness of the belief of the Secretary of State cannot now be regarded as correct."

Upon the production of the order the only question which has to be considered is its legality, if the order is lawful the detention is lawful.

Thirdly even if bad faith is impugned, it is clear from the decided cases, that the burden of proof is on the person who alleges it, and not on the constituted authority as in this case the Minister of Interior, to disprove it. In this matter the main ground alleged for impugning malice is that on the next day after their detention the Minister informed the appellants that the grounds of their detention would be sent to them, and that they would be permitted to see their lawyers to make representations, and further that the government wished to do them as much justice as possible. It is further alleged that the Minister addressed the appellants thus : "Some of you may not be guilty of the crimes charged, and if you make representations your cases would be considered," and further that in answer to a remark by one of the appellants that he had seen the "warrant of arrest" with many names on it, some of them struck out, the Minister replied : "You sit down in Kumasi and Alex Osei holds a pistol in each hand shooting at women in the streets of Kumasi. When we were fighting the British for freedom we were

arrested." Upon this, it is urged that because there is no return filed or no denial by the Minister concerned there is therefore evidence from which malice must be inferred.

Assuming that the Minister made the statement attributed to him, it cannot be held to be evidence of malice; on the contrary it could support the view that the Minister acted promptly by informing the appellants of their rights and advised them that under the Act they were entitled to make representations to the Governor-General, which advice the appellants acted upon. The fact that their representations to the Governor-General did not result in their release is not evidence of malice nor is the allegation that the Minister had accused them of complicity in street shooting in Kumasi. We agree with the opinion expressed by the learned Judge of the court below that these allegations do not constitute evidence of bad faith or malice.

The courts must presume that high officers of State have acted in good faith in the discharge of their duties. It will be wrong in principle to enquire into the bona fide of Ministers of State on a mere allegation of bad faith by a petitioner. The court can only look into allegations of bad faith if there is positive evidence, which is singularly absent in this case – *Nakkuda Ali v. M. F. De S. Jayaratne*, 1951 A.C. 76–77.

It is fourthly contended that the grounds for the detention served on the appellants did not disclose that they were suspected of preparing to commit acts prejudicial to the security of the State, within the ordinary meaning of the expression "Security of State" and that the intention of the Preventive Detention Act was to prevent persons acting in a manner prejudicial to the defence of this country i.e. from foreign power.

It is clear from section 2 of the Preventive Detention Act 1958 that power to make a detention order is not limited to the defence of Ghana against a foreign power; on the contrary the section specifically empowers the Governor-General to make such an order in respect of

- “(a) the defence of Ghana,
- (b) the relations of Ghana with other countries, or
- (c) the security of the State.”

We cannot therefore accept the narrow interpretation which counsel for the appellants seeks to place on the purpose of the Act. We agree with appellants' counsel that as a guide to what acts may be adjudged to fall within the expression "the security of the State" one may look at those offences under Part IV, Chapter 1, of the Criminal Code, 1960, Act 29, or under Title 23 of the Criminal Code, Cap 9, now repealed, under the heading "Offences against the

safety "of the State". It will be observed that this includes a large number of offences which have nothing to do with defence of Ghana or with foreign countries, but in respect of which the Governor-General may if satisfied that the order is necessary, make an order under the Preventive Detention Act, 1958. The object of the Act is to restrain a person from committing a crime which it is suspected he may commit in the future. Its aim is to prevent the commission of acts which may endanger public order and security of the State.

The grounds for the detention of each of the appellants attached to the affidavit in support of the application for Habeas Corpus are :

1.

"BAFFOUR OSEI AKOTO

Acting in a manner prejudicial to the security of the State, in that you have encouraged the commission of acts of violence in the Ashanti or Brong-Ahafo Regions and have associated with persons who have adopted a policy of violence as a means of achieving political aims in these Regions.

2.

**PETER ALEX DANSO alias
KWAKU DANSO**

Acting in a manner prejudicial to the security of the State, in that you have consistently particular in October 1959, advocated and encouraged the commission of acts of violence in the Ashanti and Brong-Ahafo Regions and generally have adopted, and have associated with other persons who have adopted a policy of violence as a means of achieving political aims in these Regions.

3.

OSEI ASSIBEY MENSAH

Acting in a manner prejudicial to the security of the State, in that you have advocated and encouraged violence in the Ashanti or Brong-Ahafo Regions and generally have adopted and have associated with other persons who have adopted, a policy of violence as a means of achieving political aims in those Regions.

4.

**NANA ANTWI BUSIAKO alias
JOHN MENSAH**

Acting in a manner prejudicial to the security of the State, in that you have consistently and in particular in October, 1959, advocated and encouraged the commission of acts of violence in the Ashanti and Brong-Ahafo Regions and generally have adopted, and have associated with other persons who have adopted, a policy of violence as a means of achieving political aims in those Regions.

5.

JOSEPH KOJO ANTWI-KUSI alias
ANANE ANTWI-KUSI

Acting in a manner prejudicial to the security of the State, in that you have consistently and in particular in September, 1959, advocated and encouraged the commission of acts of violence in the Ashanti and Brong-Ahafo Regions and generally have adopted, and have associated with others who have adopted, a policy of violence as a means of achieving political aims in those Regions.

6.

BENJAMIN KWAKU OWUSU

Acting in a manner prejudicial to the security of the State, in that you have encouraged the commission of acts of violence in the Ashanti or Brong-Ahafo Regions and have associated with persons who have adopted a policy of violence as a means of achieving political aims in those Regions.

7.

ANDREW KOJO EDUSEI

Acting in a manner prejudicial to the security of the State, in that you have consistently and in particular in April, 1959, advocated and encouraged the admission of acts of violence in the Ashanti and Brong-Ahafo Regions and generally have adopted, and associated with other persons who have adopted a policy of violence as a means of achieving political aims in those Regions.

8.

HALIDU KRAMO

Acting in a manner prejudicial to the security of the State, in that you have encouraged the commission of acts of violence in the Ashanti or Brong-Ahafo Regions and have associated with persons who have adopted a policy of violence as a means of achieving political in those Regions."

It cannot be denied that in these circumstances, the Governor-General may order the detention of these persons if satisfied that the order is necessary to prevent the person concerned from acting in a manner indicated which cannot fail but be prejudicial to the security of the State. Where the very basis of law is sought to be undermined and attempts are made to create a state of affairs which will result in disruption, and make it impossible for normal government to function, the Governor-General would be justified in evoking the special powers under the Preventive Detention Act to prevent those whom he is satisfied are concerned in it, acting in a manner prejudicial to the security of the State.

Fifthly: In our view section 3 of the Criminal Procedure Code, to which we have been referred which reads :

“(1) All offences under the Criminal Code shall be enquired into, tried and otherwise dealt with according to the provisions of this Code.”

“(2) All other offences shall be enquired into, tried and otherwise dealt with according to the provisions of this Code, subject, however, to the provisions of this Code, subject, however, to the provisions of any Ordinance regulating the manner or place of inquiry into, trial or other dealing with such offences.”

merely makes provision for trial of offences committed, but cannot operate to restrain the exercise of powers of detention for prevention of acts calculated to be prejudicial to the safety of the State. The mischief aimed at by the Preventive Detention Act is in respect of acts that may be committed in the future, whereas the Criminal Code concerns itself with acts which have in fact been committed.

By notice filed during the pendency of this appeal, Counsel for appellants invoked the powers of the Supreme Court under Section 2 of Article 42 of the Constitution to declare the Preventive Detention Act invalid on the ground that it was made in excess of the power conferred on Parliament because :

“1. That the Preventive Detention Act, 1958, was made in excess of the power conferred on Parliament by or under the Constitution with respect to Article 13(1) of the Constitution, that until that Article is repealed by the people, (a) Freedom and Justice shall be honoured and maintained, (b) No person should suffer discrimination on grounds of political belief, and (c) No person should be deprived of freedom of speech, or of the right to move and assemble, or of the right of access to the courts of law.

2. That the Preventive Detention Act, 1958, is contrary to the Declaration of Fundamental Principles solemnly subscribed to by KWAME NKRUMAH on accepting the call of the people to the high office of PRESIDENT OF GHANA and to which HE adhered upon that declaration, namely that ‘The powers of Government spring from the will of the people and should be exercised in accordance therewith’, in particular, with reference to the honouring and maintaining of freedom and justice, prohibition of discrimination on grounds of political belief, non-deprivation of the freedom of speech, or of the right to move and assemble without hindrance or of the right of access to the courts of law.

3. That the Preventive Detention Act, 1958, which was not passed upon a declaration of emergency or as a restriction necessary for preserving public order, morality or health, but which nevertheless placed a penal enactment in the hands of the President to discriminate against Ghanaians, namely to arrest and detain any Ghanaian and to imprison him for at least five years and thus deprive him of his freedom of speech, or of the right to move and assemble without hindrance, or of the right of access to the courts of law, constitutes a direct violation of the Constitution of the Republic of Ghana and is wholly invalid and void.”

Article 42 Section 2 reads :

"The Supreme Court shall have original jurisdiction in all matters where a question arises whether an enactment was made in excess of the powers conferred on Parliament by or under the Constitution, and if any such question arises in the High Court or an inferior court, the hearing shall be adjourned and the question referred to the Supreme Court for decision."

As the legal issues arising from those questions could not properly be raised and/or determined at the High Court, we deemed it appropriate to grant the leave sought, and the issues have been accordingly argued in the course of this appeal.

All the grounds relied upon appear to be based upon Article 13 of the Constitution. It is contended the Preventive Detention Act is invalid because it is repugnant to the Constitution of the Republic of Ghana 1960, as Article 13(1) requires the President upon assumption of office to declare his adherence to certain fundamental principles which are : -

"That the powers of Government spring from the will of the people and should be exercised in accordance therewith.

That freedom and justice should be honoured and maintained.

That the union of Africa should be striven for by every lawful means and, when attained, should be faithfully preserved.

That the Independence of Ghana should not be surrendered or diminished on any grounds other than the furtherance of African unity.

That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief.

That Chieftaincy in Ghana should be guaranteed and preserved."

That every citizen of Ghana should receive his fair share of the produce yielded by the development of the country.

That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law.

That no person should be deprived of his property save where the public interest so requires and the law so provides."

This contention, however, is based on a misconception of the intent, purpose and effect of Article 13(1) the provisions of which are, in our view, similar to the Coronation Oath taken by the Queen of England during the Coronation Service. In the one case the President is required to make a solemn declaration, in the other the Queen is required to take a solemn oath. Neither the oath nor the

declaration can be said to have a statutory effect of an enactment of Parliament. The suggestion that the declarations made by the President on assumption of office constitute a "Bill of Rights" in the sense in which the expression is understood under the Constitution of the United States of America is therefore untenable.

We may now consider the effect of the Constitution of the Republic of Ghana 1960 with regard to the Preventive Detention Act 1958 enacted by Parliament of Ghana under the Ghana Constitution Order in Council 1957. We observe, that by the Constitution (Consequential Provisions) Act 1960 enacted by the same Constituent Assembly which enacted the Republican Constitution, the Preventive Detention Act 1958 was amended thus :

In section 2, in subsections (3), (4) & (5) of section 3, and in subsection (2) of section 4, for "Governor-General" in each place where it occurs substitute "President". Also that by Article 40 of the Republican Constitution 1960 the laws of Ghana comprise inter alia enactments in force immediately before the coming into operation of the Constitution, a fortiori, the Preventive Detention Act 1958 being law in force in Ghana at the time the Constitution was enacted and having been amended by the same body which enacted the said Constitution, it cannot be denied that it must have been the intention of the people of Ghana by their representatives gathered in a Constituent Assembly to retain the Preventive Detention Act 1958 in full force and effect. The contention that the legislative power of Parliament is limited by Article 13(1) of the Constitution, is therefore in direct conflict with express provisions of Article 20. We hold that the Preventive Detention Act does not constitute a violation of the Constitution of the Republic of Ghana, consequently it is neither invalid nor void.

We are of opinion that the effect of Article 20 of the Constitution which provides for "The Sovereign Parliament", is that subject to the following qualifications, Parliament can make any law it considers necessary : The limitations are that

- (a) Parliament cannot alter any of the entrenched articles in the Constitution unless there has been a referendum in which the will of the people is expressed.
- (b) Parliament can however of its own volition, increase, but not diminish the entrenched articles ;
- (c) The articles which are not entrenched can only be altered by an Act which specifically amends the Constitution.

It will be observed that Article 13(1) is in the form of a personal declaration by the President and is in no way part of the general law of Ghana. In the other parts of the Constitution where

a duty is imposed the word "shall" is used, but throughout the declaration the word used is "should". In our view the declaration merely represents the goal to which every President must pledge himself to attempt to achieve. It does not represent a legal requirement which can be enforced by the courts.

On examination of the said declarations with a view to finding out how any could be enforced we are satisfied that the provisions of Article 13(1) do not create legal obligations enforceable by a court of law. The declarations however impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy for any departure from the principles of the declaration, is through the use of the ballot box, and not through the courts.

We do not accept the view that Parliament is competent to pass Preventive Detention Act in war time only and not in time of peace. The authority of Parliament to pass laws is derived from the same source, the Constitution, and if by it, Parliament can pass laws to detain persons in war time there is no reason why the same Parliament cannot exercise the same powers to enact laws to prevent any person from acting in a manner prejudicial to the security of the State in peace time. It is not only in Ghana that Detention Acts have been passed in peace time.

Finally, the contention that the Preventive Detention Act 1958 is contrary to the Constitution of the Republic of Ghana is untenable and for the reasons indicated the appeal is dismissed.

K. A. KORSAH

Chief Justice

W. B. VAN LARE

Judge of the Supreme Court

A. M. AKIWUMI

Judge of the Supreme Court

Dr. Danquah for the Appellants.

Bing, Attorney-General, with Amissah, Senior State Attorney for the Respondents.

PREVENTIVE DETENTION IN THE FEDERATION OF MALAYA

A proper understanding of the law permitting administrative detention in the Federation of Malaya is impossible without knowledge of the post-war history of Malaya.

After the Japanese occupation (1941—45), the country enjoyed a brief period of calm during which the British Administration was re-established. Disturbances began late in 1947 and as these "incidents" grew in number and frequency, an Emergency was declared in 1948.¹ The "incidents" were caused by bands of terrorists who were inspired by the Malayan Communist Party. Many of the terrorists had fought with Communist-leaning sections of the underground against the Japanese. British and other Commonwealth troops were employed to assist local security forces. The revolt reached its peak in 1951 when the highest British Official in the Federation, the High Commissioner² was murdered by terrorists. Gradually, government forces re-established law and order in large parts of the country. At the time of the independence of the Federation of Malaya in August 1957, victory was virtually assured. The Emergency continued as security forces attempted to wipe out all pockets of resistance. The State of Emergency finally ended on the July 31, 1960. This was done, however, only after the government had armed itself with wide powers to combat subversion.³ The terrorists are no longer a serious threat but they have not been completely dispersed. According to official sources there are about 600 terrorists along the Malayan-Thai border. Of these only 60 are on the Malayan side. Special regulations have been made for these areas.⁴

It is proposed to present in this article the law as it stood on the August 1, 1960, after the Emergency regulations had been

¹ On June 16th. During the 12 years of the Emergency 6, 710 terrorists were killed. 4,338 of the security forces and civilians lost their lives. During the same period 12,220 people were banished from the Federation. There were over 20,000 'incidents' during the Emergency. See official figures published in the Sunday Times on 31st July 1960.

² Sir Henry Gurney.

³ (a) Constitutional (Amendment) Act 1960.

(b) Internal Security Act 1960 - 67 Persons already detained under the Emergency Regulations Ordinance, had their detention orders resigned under this Act on 1st August 1960. There is no information as yet as to the results of representations made by such detainees to the Advisory Board constituted under the Act.

⁴ By virtue of Section 71 of the Internal Security Act.

repealed. The discussion will be limited to those powers of the Executive which can be used to detain persons. Those acts which give the Executive power to restrict the movement of persons or subject them to police supervision without trial will not be discussed.⁵ It is proposed to deal first with those provisions of the Constitution which pertain to the liberty of the subject and then with those enactments which give the Executive powers of detention. An exposition of the law is impeded by the absence of case law due to the fact that the relevant statutes have only recently been enacted.

Constitutional Guarantees

The Constitution of the Federation of Malaya follows the Constitution of India, on which it is closely modelled, in its inclusion of a Part devoted to Fundamental Liberties.⁶

The Federation of Malaya Constitutional Commission 1957,⁷ whose report preceded the enactment of the Constitution, observed that it was usual and proper that a Federal Constitution should define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life. But the Commission remarked:

"... the rights which we recommend should be defined and guaranteed are all firmly established now throughout Malaya and it may seem unnecessary to give them special protection in the Constitution. But we have found in certain quarters vague apprehensions about the future. We believe such apprehensions to be unfounded, but there can be no objection to guaranteeing such rights subject to limited exceptions of emergency and we recommend that this should be done..."⁸

⁵ The relevant legislation is:

1. Banishment Ordinance. F.M.S. Cap. 38 as amended by Nos. 18 of 1937, 3/1938, 5/1948, 51/1951, 64/1953. A person may be held for 10 days prior to Banishment.
2. Restricted Residence Enactment. F.M.S. Cap. 39 as amended by 4/1948, 13/1948, 70/1958.
3. Prevention of Crime Ordinance 1958.
4. Women and girls Ordinance F.M.S. Cap. 156. Amendments 1/1936, 50/1936, 18/1937, 15/1938, M.U. 27/1947; F. 1/1948, 49/1957.
5. Vagrants Ordinance F.M.S. Cap. 191; F. 1/1948, 49/1957.
6. Quarantine Ordinance F.M.S. Cap. 185, 13/1936, F. 1/1948.
7. Prevention of Disease Ordinance F.M.S. Cap. 186, 16/1938, F. 1/1948.
8. Mental Disorders Ordinance F.M. 31/1952. AM. 27/1956.
9. Leprosy Ordinance. F.M.S. Enactment Cap. 180, 1/1936, 18/1957, 3/1938, F. 1/1948.
10. Children and Young Persons Ordinance M.U. Ordinance 33/1947. Amd. F. 1/1948, F. 49/1957.
11. Public Order Ordinance F.M. 46 of 1958.

⁶ Part II, Articles 5 to 13.

⁷ The Reid Commission.

⁸ Page 70, Paragraph 170.

This section of the Constitution deals with liberty of the person (Article 5), equality before the Law (Article 8), freedom of speech, assembly and association (Article 10), freedom of religion (Article 11), rights in respect of education (Article 12), and rights in respects of property (Article 13). It prohibits slavery and forced labour (Article 6), and protects individuals against retrospective criminal laws and repeated trials, and citizens from banishment (Article 9).

For purposes of this paper it is the section dealing with the liberty of the person that requires closer examination.

Article 5(1) states: "No person shall be deprived of his life or personal liberty save in accordance with law."⁹

This Article protects the life and personal liberty of all persons – citizens and non-citizens – in Malaya except when that protection is denied in accordance with the procedure established by law. Personal liberty, it is submitted, is the right not to be subjected to all forms of physical coercion and not merely to imprisonment.

A person deprived of his liberty can insist that there must be a valid law empowering the Executive to deprive him of his liberty and that the procedures laid down by such law should be followed. He cannot claim that the procedure should conform to any principles of natural justice. He can, however, insist that laws which do not take effect as Constitutional amendments should conform to procedures laid down in other subsections of Article 5. This section does not act as a limitation on the powers of the Legislature, otherwise competent under the Constitution. Its object is to restrain the Executive and to ensure that individuals are deprived of their life and liberty only in accordance with a valid law and in conformity with the procedure provided therein.

Sub-sections 2 to 4 of Article 5 state the procedure to be followed when a person is deprived of his liberty. Sub-section 2 gives statutory form to the *habeas corpus* procedure. The Supreme Court is required to inquire into any complaint of unlawful detention. Unless the Court is satisfied as to the legality of the detention it shall order the detained person to be brought before Court and release him.

An arrested person must be informed, as soon as possible, of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.¹⁰

Once a person is arrested he must, without unreasonable delay and in any case within 24 hours (not counting the time required for any necessary journeys), be brought before a magistrate and

⁹ Cf. Constitution of India section 21.

¹⁰ Sub-section 3.

he shall not be further detained in custody without the magistrate's authority.¹¹

An enemy alien is specially excluded from the right to be produced before a magistrate within 24 hours. He is also denied the right to be informed of the grounds of his arrest and the right to consult and be defended by a legal practitioner of his choice.¹² By implication it follows that his right to have the legality of his detention examined by the Supreme Court is not impaired. His right to counsel in order to bring such a complaint is however denied. The sub-section excluding enemy aliens does not extend to others acting on their behalf. Complaints may be made by third parties. Presumably therefore if a third-party were to bring a complaint, his right to be represented by counsel is not denied.

Special powers under the Constitution

Part XI of the Constitution contains provisions relating to the Legislature's Emergency powers and its special powers to deal with subversion. Legislation formally enacted under these provisions is valid notwithstanding inconsistency with those sections of the Constitution which guarantee freedom of the liberty of the person, freedom of movement and freedom of speech, assembly and association. Further under this section the Federal Parliament can enact any law which would if not for this clause be outside its legislative powers.¹³

In order to exercise the wide powers under this section, all that Parliament has to do is to *recite* in an Act of Parliament that action has been taken or threatened by a substantial body of persons either within or without the Federation

- (a) to cause, or to cause a substantial number of citizens to fear organised violence against persons or property; *or*
- (b) to excite disaffection against the Yang di-Pertuan Agong (the King) or any government in the Federation; *or*
- (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; *or*
- (d) to procure the alteration, otherwise than by lawful means, of anything established by law; *or*
- (e) which is prejudicial to the security of the Federation or any part thereof.¹⁴

¹¹ Sub-section 4

¹² Sub-section 5.

¹³ Article 149(1).

¹⁴ Article 149(1) as amended by section 28(a) of the Constitution (Amendment) Act 1960.

These are wide powers. Further it appears that the question whether any of the action has actually been taken or threatened is not subject to litigation. Recital in the Act is conclusive. The recital is the form in which the Legislature expresses its satisfaction that a dangerous situation exists. The situation here is similar to the one considered in *Liversidge v. Anderson*¹⁵ and *Nakkuda Ali v. Jayaratne*,¹⁶ only the problem is here within a legislative context. There are no Malayan case decisions on this point but it is possible to suggest with some certainty that in the present political climate of Malaya the judges would adopt a subjective test and be willing to accept the recitals in the Act as conclusive.¹⁷ A recent constitutional amendment has prolonged the validity of such enactments for a period of one year unless Parliament otherwise decides. Even when Parliament decides to the contrary it is without prejudice to all Acts under any such law or Proclamation of Emergency.¹⁸

Article 151 deals with the validity of any law or ordinance made or promulgated in pursuance of Part XI of the Constitution, which provides for preventive detention. This gives preventive detention a constitutional status, but it is only a status within the context of Emergency power. In the absence of Emergency conditions, the Executive has no power to detain persons. As it stands, Article 151 is an important restriction on the powers granted to Parliament under Article 149 and Article 150. The validity of any law passed under Article 149 is preserved from any inconsistency with the fundamental liberties but not from any inconsistency with Article 151. The provisions are consistent with the recommendations of the Constitutional Commission which were that preventive detention should be illegal except in so far as it might be allowed by emergency legislation.¹⁹ Article 151(a) provides that the authority on whose order any person is detained under that law or ordinance shall, as soon as possible, inform him of the grounds for his detention and the allegation of fact on which the order is based, and shall give him the opportunity of making representations against the order. Facts

¹⁵ [1942] A.C. 206.

¹⁶ [1951] A.C. 66.

¹⁷ Further it is suggested that "recites" more easily suggests a subjective test than "is satisfied". The subjective test would not be in accordance with the Reid Commission's intentions (p. 75 paragraph 174). However, Mr. Justice Abdul Hamid, a member of the Commission, dissenting, (at pp. 1104—1105) pointed out that the Commission's recommendations would permit Parliament to assume emergency powers by merely stating that a dangerous situation existed. His recommendation was to do away with the whole section on Emergency Powers, providing for exceptions whereby Parliament could act in an Emergency in complete disregard of constitutional guarantees. Whether a dangerous situation existed would then be determined by the Courts.

¹⁸ Article 149(2) of the Constitution as amended by Section 28(b) of the Constitution (Amendment) Act 1960.

¹⁹ Report of the Commission p. 93.

which in the opinion of the authority would, if disclosed, be against the national interest may be withheld. It is interesting to note that while under sub-section 5 of Article 5 an enemy alien is not entitled to be informed of the grounds for his detention, he is not denied such a right under Article 151(a). This leads to the curious result that in a state of Emergency or where the Legislature has assumed Emergency powers an enemy alien's position is improved.

Article 151(b) relates to the period during which a citizen may be detained. It follows that non-citizens have no rights under this provision. This is the only section which discriminates between citizens and non-citizens in matters of personal liberty.²⁰ Such a distinction is of practical importance because there are a significant number of people who have been resident in Malaya but have not secured Malayan citizenship. Many of these are citizens of the State of Singapore employed in the Federation. Under this paragraph the period of detention is limited to a period of 3 months. Prior to the amendment of the Constitution this year, a further period of detention was permissible only if the Advisory Board, which must be set up under the requirements of this section, has had the opportunity to consider any representations made by the detainee (by virtue of his rights under paragraph (a)) and had reported within the 3-month period that there was in its opinion sufficient cause for the detention.

The Advisory Board consists of three members. The Chairman is appointed by the Yang di-Pertuan Agong (King) from among persons who are judges, ex-judges or qualified to be judges of the Supreme Court.²¹ The other two members are appointed by the Yang di-Pertuan Agong after consultation with the Chief Justice. However, the Chief Justice need not be consulted in the selection of the Chairman of the Board. The Yang di-Pertuan Agong is not required to accept the advice the Chief Justice may tender with respect to the persons to be appointed to the Board.²² Although the members are of high calibre with much experience in the law, they are not "judges" in the sense of the Constitution. Therefore Constitutional provisions which assure the remuneration of judges and the procedures, which permit their removal only in the most exceptional circumstances, do not extend to the members of the Board.²³ They hold office at the pleasure of the Yang di-Pertuan Agong. It is not impossible to foresee situations where they may be exposed to pressure from the Executive.

A Constitutional Amendment has deprived the Board of its

²⁰ Except in the obvious case of banishment from the Federation. Article 9(1).

²¹ As to qualification for appointment as a Judge see Articles 123 and 174(2), (3) & (4).

²² Article 151(2).

²³ Remuneration and privileges are stated in Article 125 of the Constitution.

power of giving a conclusive opinion as to whether there was sufficient cause for the detention. The advisory Board is now truly advisory. Detention is legal beyond three months only if the Board has considered all representations made by the detainee and made recommendations thereon to the Yang di-Pertuan Agong.²⁴

There were no provisions for appeals from the decisions of the Advisory Board. This has not been altered by the amendments to the Constitution. Its recommendations can be challenged only if its powers have been exercised *mala fide* or *ultra vires*. The detainee has no right to be confronted by his accusers. It has been held in *Chia Khin Sze v. Mentri Besar, Selangor*²⁵ that the right to make representations does not include the right to be heard. And therefore it does not include the right to be represented by counsel. The respondent in exercise of powers under the Restricted Residence Enactment²⁶ had issued a warrant for the arrest and detention of the applicant and deemed a further enquiry necessary. He proposed to conduct it *in camera* not allowing the applicant to be represented by counsel. The Restricted Residence Enactment was not passed by virtue of the Emergency powers in the Constitution. Therefore the question was whether the detention was contrary to the rights conferred by section 5. The court dismissed the application holding that (a) as the respondent was under no obligation to hold the enquiry under the particular enactment, the applicant had no right to be heard. There could therefore be no right to be defended by counsel. (b) There was no right of representation by counsel in respect of an executive act and as Article 5 was merely declaratory applicant failed. (c) Article 5 (3) and 5 (4) of the Constitution were intended to apply to arrests under the Criminal Procedure Code and did not extend to the Restricted Residence Enactment.²⁷

The first of these grounds does not apply to cases coming before the Advisory Board. The Board has no discretion; it must consider the representation. Both the second and third grounds may be relevant. The decision has been criticised.²⁸ The second ground has been questioned on the ground that although the Enactment gives no right of defence, the Constitution states that an arrested person shall have the right of defence. The opportunity for defence must not be denied and the Enactment must give way. The judges' reference to English cases was irrelevant because in England there is no such constitutional right. It may be observed that if this cri-

²⁴ Constitutional (Amendment) Act 1960 Section 30.

²⁵ 24 M.L.J. 105.

²⁶ F.M.S. Cap. 39.

²⁷ Sutherland J. drew attention to the similarity of the provisions under the Criminal Procedure Code (Section 28) and the Article of the Constitution.

²⁸ 24 M.L.J. xli—xliii and by Professor L. A. Sheridan in Vol. I No. 2 University of Malaya Law Review 176.

ticism is correct, the Constitution has, contrary to the Reid Commission's recommendations, created new rights. The third ground has been assailed on the ground that whatever the similarity of words between the constitutional provision and the section of the Criminal Procedure Code, constitutional provisions must be construed in their constitutional context.

Internal Security Act 1960

With the end of the State of Emergency, the Emergency Regulations, which gave the Executive far-reaching powers of detention and supervision lapsed. The Internal Security Act was enacted to give the Federal Government the powers of preventive detention and supervision which the Government considered necessary to combat subversion and other forms of organised violence. This Act came into effect on August 1, 1960.

The act was passed by virtue of Article 149²⁹ of the Constitution, which permits Parliament to legislate against subversion by reciting in the Act that action has been taken or is threatened by a substantial body of persons sufficient to cause a substantial number of citizens to fear organised violence against persons or property. There are two major parts in the Act. The first part enacts general provisions relevant to internal security. The second part contains special provisions with respect to security areas. Although the latter part gives extensive powers to the Executive to interfere with the freedom of the individual, powers relating to preventive detention are only contained in part one.

A detention order can be made by the Minister against any person as soon as the Yang di-Pertuan Agong is satisfied that such detention is necessary to prevent that person from acting in any manner prejudicial to the security of Malaya or any part thereof. The scope of the order rests with the Minister. Instead of detaining him, the Minister may impose restrictions upon his activities, employment or residence. He may order the said person to remain indoors between certain hours. The person subject to the order may be required to inform a named authority of his movements. He may be prohibited from addressing public meetings or leaving the Federation. He can be prevented from participating in the activities of any organisation, political or otherwise. All orders of detention or restriction imposed under this section shall not exceed two years. There is, however, nothing to prevent another order from being made.³⁰

The question will arise here whether the Courts should apply a subjective or objective test in judging the satisfaction of the Yang

²⁹ As amended by Section 28 of the Constitution (Amendment) Act 1960.

³⁰ Section 8.

di-Pertuan Agong as to the applicants conduct being prejudicial to the security of Malaya. It has already been said that a subjective test is more likely to be applied by the judges. The Indian Courts in considering very similar problems have applied a subjective test if the Executive was not acting *mala fides*.³¹

Every person detained (not those subject to restrictions, however severe) is entitled as soon as possible to (a) be informed of the grounds of his detention; (b) be informed of the allegations of fact on which the order is based, except that no authority may be required to reveal facts, whose disclosure would, in the Authority's opinion, be against the national interest; (c) be given an opportunity of making representations against the order as soon as may be.³²

The detainee or a person subject to restrictions under this Act has the right to make representations before an Advisory Board.³³ For the purpose of enabling him to make such representations, he shall within 14 days of the order being served be informed of his right to make representations to the Advisory Board. In addition to the above rights he shall be informed by the Minister, in writing, of such particulars, if any, as he may in the opinion of the Minister reasonably require in order to make representations.³⁴

Questions are likely to arise as to what is meant by "grounds" of detention. Grounds are conclusions based upon facts and not a detailed recital of them. But it is the point at which the conclusion is drawn that is important. Both "being a member of the Communist Party in Kuala Lumpur" and "acting prejudicially to the security of Malaya" can be conclusions based upon the same facts. The Yang di-Pertuan Agong is required to detain people when he is satisfied that their conduct is likely to "prejudice the security of Malaya."³⁵ It is therefore arguable that the second conclusion above is sufficient. On the other hand, if the purpose of the information is to enable the detainee to make representations then the first is to be preferred. If the second is accepted, the right is one without content. The view taken is of importance to the detainee. "Grounds" are the only thing which the Executive cannot withhold. Only facts or documents can be withheld on the grounds of national interest.³⁶ If the second conclusion above is applied, the detainee will be in an extremely difficult position where facts and particulars have been withheld. He will not be in a position to know what acts or associations led to his detention.

³¹ *S. S. Singh v. State of Pepsu* A. I. R. 1954 S.C. 276, 277.

³² Section 9.

³³ Section 11(1).

³⁴ Section 11(2).

³⁵ Section 8(1).

³⁶ Section 16.

Whatever interpretation is given to "grounds" it is certain that they cannot be vague and must exist at the time the order was made. Once the order is made no grounds can be added, altered or deleted.

A distinction is made between "facts" and "particulars". The former can be withheld only for security reasons;³⁷ the latter are at the discretion of the Minister.³⁸

An important question to be decided here will be whether the procedure is primarily to enable the detainee to make representations. If so it is submitted that the sufficiency of the information for this paramount purpose should be a justiciable issue.

The Advisory Board must, within three months of the date of the detention, consider any representations which have been made by the detained person and make recommendations thereon to the Yang di-Pertuan Agong.³⁹ The time limit of three months is fixed from the date of detention, so the detainee is best advised to make early representations to ensure that the Advisory Board has sufficient time to consider them. However, this difficulty will not be a serious consideration in practice because the Board is required to review all orders for detention or otherwise at least once every six months.⁴⁰

The first report of the Committee shall be sent to the Yang di-Pertuan Agong who shall upon considering the recommendations give the Minister such directions he thinks fit. Every such decision, apart from the possibility of review by the Advisory Board, is final and shall not be subject to review by any court.⁴¹

The Advisory Board has all the powers of a court for the summoning and examination of witnesses, the administrations of oaths or affirmations and compelling the production of documents, except those withheld owing to the requisites of national security.⁴² Although the Board has power to follow court procedure, it is not obliged to do so. Further, the Yang di-Pertuan Agong has power to make rules relating to the procedure to be followed by the Board.⁴³ The members of the Board are deemed Public Servants and in the case of actions or suits brought against them they are entitled to the same protection and privileges which are given to judges in the execution of their office.⁴⁴ But they are not "judges" in the sense used in the Constitution and they do not therefore, have all the privileges of the judges.

³⁷ Section 9(b) and Section 16.

³⁸ Section 11(2)(b)(iii).

³⁹ Section 12(1).

⁴⁰ Section 13(1).

⁴¹ Section 12(2).

⁴² Section 14.

⁴³ Section 11(3).

⁴⁴ Section 15.

The Advisory Board is not a judicial body. It is in fact a body charged with the responsibility of advising the Executive Government with regard to cases of preventive detention, where it is intended that such detention shall last for more than three months.

The Act provides for the enforcement of warrants and orders made in the State of Singapore under any written law in force in that State which is similar or equivalent to Section 8. Such orders if received from the proper Singapore authority are enforceable as if the order has been duly made under Section 8, only if the Minister has indicated his approval of the order by endorsing same.⁴⁵ A Singapore warrant will not be enforced against a citizen of the Federation.⁴⁶ An interesting question could arise as to whether the Minister's endorsement is conclusive evidence of the similarity or equivalence of the Singapore law with Section 8 of the Act. Such a situation could arise where an arrest is ordered under the Singapore Criminal Law (Temporary Provisions) Ordinance 1955. This Ordinance is designed for gangsters and such like, not against those who threaten the security of a nation. It is submitted that the Minister's endorsement only signifies his approval of the Singapore order; it is not conclusive.

Conclusion

The recent Constitutional (Amendment) Act and the Internal Security Act have provided for wide powers of detention without trial. The ultimate decision as to the propriety of the detention has been shifted from the Advisory Board to the Executive, who now takes full responsibility for its own decisions.

The earlier legislation was not without its defects. Although the Board might consist of highly qualified judicial personnel, the procedure permitted was unsatisfactory for arriving at a "judicial" decision. In this respect, the recent Acts have achieved a great deal in broadening the procedural powers of the Board, but they do not as yet compare with the procedure of a court.

From the point of view of the detainee his rights have been reduced. The precise extent of such rights will, however, have to await judicial decision.

In this situation, a heavy responsibility is cast upon the Judiciary. These powers are widely believed to be necessary to safeguard the security of Malaya. Nevertheless their arbitrary character

⁴⁵ Section 19(1).

⁴⁶ Section 19(3).

permits easy abuse. The attitude of the Judiciary will depend upon the extent of the fundamental liberties of the individual so prominently set forth in the Constitution. However, the decision of Sutherland J. in *Chia Khin Sze v. Mentri Besar, Selangor*,⁴⁷ if representative of the attitude of the judges, does not promote a mood of optimism.

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⁴⁷ 24 M.L.J. 105.

JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS

July 1, 1961

As a concluding item in the series of studies on detention without trial, the Judgment published by the Registrar of the European Court of Human Rights may be of interest. The point of law which the Court had to decide was the validity of an administrative detention measure by the Government of the Republic of Ireland imposed on a national under the Offences against the State (Amendment) Act, 1940. This is, of course, the first case to be brought before this Court.

EUROPEAN COURT OF HUMAN RIGHTS

IN RE LAWLESS

The Registrar of the Court reports :

I

1. On 1 July 1961, the Chamber of the European Court of Human Rights called upon to examine the Lawless case rendered, under the Chairmanship of Mr. René CASSIN, Honorary President of the French *Conseil d'Etat*, its judgment on the merits of the case.

2. The case was referred to the Court by the European Commission of Human Rights on 13 April 1960. It concerns Gerard R. LAWLESS, a national of the Republic of Ireland, who, in December 1957, submitted to the Commission an Application against the Government of the Republic of Ireland.

In his Application, G. R. LAWLESS alleged that there had been a violation of the Convention in his case by the authorities of the Republic of Ireland, inasmuch as he had been detained without trial between 13 July and 11 December 1957 in pursuance of the Offences against the State (Amendment) Act, 1940. LAWLESS was suspected of being involved in the activities of the Irish Republican Army (IRA), an armed organisation declared unlawful in the Republic of Ireland.

3. The Commission, after declaring the Application admissible on 30 August 1958, examined it in accordance with the procedure set forth in Articles 28 and 29 of the Convention. As no friendly settlement could be secured, the Commission drew up a Report in accordance with Article 31 of the Convention. In that Report, the Commission expressed the majority opinion that there had been no violation of the Convention on the part of the Government of Ireland and that the question of the payment of the damages requested by the applicant did not arise.

Subsequently, the Commission, mindful of the fundamental importance of the legal problems arising in this case, deemed it advisable to refer it to the Court for a decision.

The Commission appointed Sir Humphrey WALDOCK as its principal Delegate before the Court and Mr. C. Th. EUSTATHIADES and Mr. S. PETREN as assistant Delegates.

4. The Court having been seized of the case, the Irish Government announced, in accordance with Article 21 (para. 2) of the Rules of the Court, that it would appear as a party in the case.

The Government was represented before the Court by Mr. Thomas WOODS, its Agent, and after his death during the period covered by the hearings, by Mr. Anthony O'KEEFE, Attorney-General.

5. When the case was brought up, several preliminary objections and questions of procedure were raised by the Irish Government and by the Commission. The Court ruled on these questions in its Judgment of 14 November 1960.

6. After the exchange of memorials, counter-memorials and pleadings in writing, the Court heard, in public session from April 7 to 11, 1961, the Commission's principal Delegate and the Attorney-General of the Irish Government.

II

7. The questions on which the Court was called upon to give a ruling were as follows :

- (a) whether the Irish Government was justified in sustaining against the plea in bar by G. R. LAWLESS, as involved in IRA activities, the provisions of Article 17 of the Convention, which provides as follows :

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention" ?

- (b) whether Lawless' detention without trial from 13 July to 11 December 1957 by virtue of Article 4 of the Offences against the State (Amendment) Act, 1940, was contrary to the obligations incumbent upon the Government under Articles 5 and 6 of the Convention?
 - (c) whether this detention was contrary to the obligations incumbent upon the Irish Government under the terms of Article 7 of the Convention?
 - (d) if this detention was recognised as contrary to the obligations incumbent upon the Irish Government under the terms of Articles 5 and 6 of the Convention, did the Court find legal justification in the right of derogation provided in Article 15 of the Convention? Article 15 provides that any High Contracting Party may "in time of war or other public emergency threatening the life of the nation . . . take measures derogating from its obligations under this Convention (with the exception of those mentioned in para. 2 of Article 15), to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. Any State availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor . . ." (Article 15, para. 3).
 - (e) in view of the above, whether, on the evidence, the Irish Government acted contrary to the obligations incumbent on it under the terms of the Convention, and, if so, whether G. R. Lawless has an enforceable right to compensation?
8. In its Judgment of 1 July 1961 the Court ruled unanimously:
- (a) whereas, by the terms of Article 17, no person should be able to avail himself of the provisions of the Convention in order to commit acts aimed at destroying any of the rights and freedoms set forth in the Convention; whereas this provision, which is negative in scope, cannot be construed as depriving G. R. LAWLESS – who did not avail himself of the Convention to justify or perform acts contrary to the rights and freedoms recognised in the Convention – of his fundamental rights guaranteed in Articles 5 and 6;
 - (b) whereas the fact that LAWLESS was detained and was not brought before a judge from 13 July to 11 December 1957 under Section 4 of the Offences against the State

(Amendment) Act, 1940 conflicted with the provisions of Article 5 (paras. (1) (c) and (3)) of the Convention. Under these provisions, any person, when it is reasonably considered necessary to prevent his committing an offence, may be lawfully arrested or detained only "for the purpose of bringing him before the competent legal authority"; everyone arrested or detained "shall be brought promptly before a judge . . . and shall be entitled to a trial within a reasonable time . . ."

- (c) that Article 7 of the Convention which debars the imposition of penalties for acts or omissions which did not constitute an offence at the time when it was committed, was not violated. The detention of G. R. LAWLESS cannot be deemed to be the consequence of his having been held guilty of a criminal offence within the meaning of Article 7 of the Convention.
- (d) that the Irish Government was justified in declaring that a public emergency threatening the life of the nation existed in the Irish Republic while LAWLESS was in detention.

that any person may be detained and not brought before the judge, (a procedure permissible under the Offences against the State (Amendment) Act, 1940) appeared to be a measure strictly limited to the exigencies of the situation, within the meaning of Article 15 (para. 1) of the Convention.

that this measure was not, furthermore, a breach of any other obligation incumbent upon the Irish Government under international law,

and, in conclusion, that the detention of G. R. LAWLESS from 13 July to 11 December 1957 was justified by the right of derogation exercised by the Irish Government in July 1957 under Article 15 of the Convention;

- (e) that the communication sent by the Irish Government to the Secretary-General of the Council of Europe on 20 July 1957 concerning the measures taken constituted adequate notification under the terms of Article 14 (para. 3) of the Convention.

9. The Court ruled, therefore, that the evidence did not disclose a breach by the Irish Government of the provisions of the European Convention on Human Rights and that consequently the question of entitlement by G. R. LAWLESS in respect of such a breach did not arise.

NOTE: Under Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms: "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence... (3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial".

On the other hand, under Article 15 of the Convention: "(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law". In addition, under paragraph 3, any government availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed "of the measures which it has taken and the reasons therefor".

The requirements of form and of substance to be met if a measure of administrative detention is to be lawful are thus very clearly specified.

In this instance, the Government of the Republic of Ireland had subjected G. R. Lawless to administrative detention in 1957 on the basis of a 1940 Act concerning Offences against the State. Lawless was detained for six months without being brought before a judge and without prosecution; this was therefore indubitably contrary to the terms of Article 5 of the Convention. The question therefore arose whether the Irish Government could rely on the terms of Article 15. By informing the Secretary-General of the Council of Europe of the detention measures the Irish Government had met the requirements of procedure prescribed by Article 15 (para. 3). But were the requirements of substance prescribed in paragraph 3 also met?

The European Court replied that they had been, since the Irish Government could legitimately claim that a public emergency threatening the life of the nation had existed during the period when Lawless was held in detention and that the measure taken was dictated by the exigencies of the situation. We cannot reproduce the text of the Judgment in full, as it is too long, but the passages expounding the reasons on which it was based in connexion with the application of Article 15 are given hereafter. The jurisprudence of the Court concerning the circumstances in which administrative detention may be considered lawful are very clearly defined there in the context of the particular case referred to the Court.

"As to whether, despite Articles 5 and 6 of the Convention, the detention of G.R. Lawless was justified by the right of derogation allowed to the High Contracting Parties in certain exceptional circumstances under Article 15 of the Convention.

"Whereas without being released from all its undertakings assumed in the Convention, the Government of any High Contracting Party has the right, in case of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention other than those named in Article 15, paragraph 2, provided that such measures are strictly limited to what

is required by the exigencies of the situation and also that they do not conflict with other obligations under international law; whereas it is for the Court to determine whether the conditions laid down in Article 15 for the exercise of the exceptional right of derogation have been fulfilled in the present case,

(a) *As to the existence of a public emergency threatening the life of the nation*

"Whereas the Irish Government, by a Proclamation dated 5th July 1957 and published in the *Official Gazette* on 8 July 1957, brought into force the extraordinary powers conferred upon it by Part II of the Offences against the State (Amendment) Act. 1940, "to secure the preservation of public peace and order";

"Whereas, in the general context of Article 15 of the Convention, the natural and customary meaning of the words "other public emergency threatening the life of the nation" is sufficiently clear; whereas they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed; whereas, having thus established the natural and customary meaning of this conception, the Court must determine whether the facts and circumstances which led the Irish Government to make their Proclamation of 5th July 1957 come within this conception; whereas the Court, after an examination, find this to be the case; whereas the existence at the time of a "public emergency threatening the life of the nation", was reasonably deduced by the Irish Government from a combination of several factors, namely: in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957;

"Whereas, despite the gravity of the situation, the Government had succeeded, by using means available under ordinary legislation, in keeping public institutions functioning more or less normally, but whereas the homicidal ambush on the night of 3 to 4 July 1957 in the territory of Northern Ireland near the border had brought to light, just before 12 July – a date, which, for historical reasons is particularly critical for the preservation of public peace and order – the imminent danger to the nation caused by the continuance of unlawful activities in Northern Ireland by the IRA and various associated groups, operating from the territory of the Republic of Ireland.

"Whereas, in conclusion, the Irish Government were justified in declaring that there was a public emergency in the Republic of Ireland threatening the life of the nation and were hence entitled, applying the provisions of Article 15, paragraph 1, of the Convention for the purposes for which those provisions were made, to take measures derogating from their obligations under the Convention ;

(b) As to whether the measures taken in derogation from obligations under the Convention were "strictly required by the exigencies of the situation"

"Whereas Article 15, paragraph 1, provides that a High Contracting Party may derogate from its obligations under the Convention only "to the extent strictly required by the exigencies of the situation"; whereas it is therefore necessary, in the present case, to examine whether the bringing into force of Part II of the 1940 Act was a measure strictly required by the emergency existing in 1957 ;

"Whereas, however, considering, in the judgment of the Court, that in 1957 the application of the ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland ; whereas the ordinary criminal courts, or even the special criminal courts or military courts, could not suffice to restore peace and order ; whereas, in particular, the amassing of the necessary evidence to convict persons involved in activities of the IRA and its splinter groups was meeting with great difficulties caused by the military, secret and terrorist character of those groups and the fear they created among the population ; whereas the fact that these groups operated mainly in Northern Ireland, their activities in the Republic of Ireland being virtually limited to the preparation of armed raids across the border was an additional impediment to the gathering of sufficient evidence ; whereas the sealing of the border would have had extremely serious repercussions on the population as a whole, beyond the extent required by the exigencies of the emergency ;

"Whereas it follows from the foregoing that none of the above-mentioned means would have made it possible to deal with the situation existing in Ireland in 1957 ; whereas, therefore, the administrative detention – as instituted under the Act (Amendment), 1940 – of individuals suspected of intending to take part in terrorist activities, appeared, despite its gravity, to be a measure required by the circumstances ;

"Whereas, moreover, the Offences against the State (Amendment), Act, 1940, was subject to a number of safeguards designed to prevent abuses in the operation of the system of administrative detention ; whereas the application of the Act was thus, subject to constant supervision by Parliament, which not only received precise details of its enforcement at regular intervals but could also at any

time, by a Resolution, annul the Government's Proclamation which had brought the Act into force; whereas the Offences against the State (Amendment) Act, 1940 provided for the establishment of a "Detention Commission" made up of three members, which the Government did in fact set up, the members being an officer of the Defence Forces and two judges; whereas any person detained under this Act could refer his case to that Commission whose opinion, if favourable to the release of the person concerned, was binding upon the Government; whereas, moreover, the ordinary courts could themselves compel the Detention Commission to carry out its functions;

"Whereas, in conclusion, immediately after the Proclamation which brought the power of detention into force, the Government publicly announced that it would release any person detained who gave an undertaking to respect the Constitution and the Law and not to engage in any illegal activity, and that the wording of this undertaking was later altered to one which merely required that the person detained would undertake to observe the law and refrain from activities contrary to the 1940 Act; whereas the persons arrested were informed immediately after their arrest that they would be released following the undertaking in question; whereas in a democratic country such as Ireland the existence of this guarantee of release given publicly by the Government constituted a legal obligation on the Government to release all persons who gave the undertaking;

"Whereas, therefore, it follows from the foregoing that the detention without trial provided for by the 1940 Act, subject to the above-mentioned safeguards, appears to be a measure strictly required by the exigencies of the situation within the meaning of Article 15 of the Convention."

BOOK REVIEWS

Hommage d'une génération de juristes au président Basdevant.
[Paris: A. Pedone, 1960. 561 pp. (a collection of essays).]

On the occasion of the eightieth birthday of President Jules Basdevant, Professor *honoris causa* in the Faculty of Law at Paris, Justice and former President of the International Court of Justice, thirty-two of his colleagues in French and other faculties of law, the International Court of Justice and the Institute of International Law dedicated to him this collection of essays, in which each of them deals with a special subject in international law. In the preface, Professor Charles Chaumont, of the University of Nancy, memorialises the stages in the exceptionally, brilliant and fertile career of Mr. Basdevant in his triple capacity as Professor at the University of Paris and the Academy of International Law at The Hague, as Legal Adviser to the Ministry of Foreign Affairs and as Justice of the International Court of Justice. The outstanding feature of the book is that it gives a very broad conspectus of contemporary international law as seen by several different legal systems. As it is, unfortunately, not possible to examine each of the thirty-two chapters within the bounds of a book review, we must confine ourselves to noting the studies which deal with the broader problems of international law.

Several essays examine critically the basic principles of international jurisprudence, as, for example, the important study by Professor Emile Giraud, of the University of Lille, on *positive law as related to philosophy and politics*, which sums up the substance of the positivist position in law, of which Professor Basdevant has been one of the most brilliant advocates in France. The author's position is that the essential problem in legal positivism is to place in their correct context philosophy, regarded as the totality of the aspirations of a given society and, as such, governing law, politics, which sets time and place for law through institutions, and law itself considered as the totality of the rules in force at any given time and place. It is for the jurist to interpret and apply positive law, and any legal theory is valid only insofar as it precisely reflects this. The notion of a "philosophy of law" or of a "natural law" not subject to time or place is flatly rejected. Professor Georges Scelle, of the University of Paris, deals with *the technique of the legal order as between States*. He stresses the contradictions of an international legal order based on the fiction of a multiplicity of equally acknowledged sovereignties, wherein the application of the rules of

law cannot be ensured by any system of effective sanctions by reason of that very multiplicity. The existence of a worldwide legal order cannot, however, be denied, and at that level, as at that of the smallest groupings, the subjects of law are always, in essence, individuals, whether governors or governed. The international institutions, from the earliest Associations to the United Nations, have grown up from the pressure of needs deriving from relations between individuals. The governors must be made aware that they are subjects of law possessing individual capacity, not the privileged members of closed community of rulers. Professor Charles Chaumont devotes a lengthy essay to *the question whether there is an irreducible content to the concept of the international sovereignty of the State*. Classical theory holds that sovereignty is the criterion by which the State is regarded as existent; the writer shows that this notion is artificial; the equally uncertain concept of reserved powers is inadequate to throw light on the content. The reason why one State cannot be reduced by another State is the national infrastructure, the special nature, in itself not susceptible to reduction, of the nation regarded as a collective will to survive. The purpose of the State is the assertion and preservation of the nation: "hence, sovereignty is found to be the international expression of the nation, of which the State is the external superstructure". Mr. C. Wilfred Jenks, Assistant Director-General of the International Labour Office, also raises doubts about the conventional concepts, in an essay entitled *The Will of the World Community as the Basis of Obligation in International Law*. He demonstrates the inadequacy of the theories which have been used to maintain that the rules of international law are mandatory and pushes on to base these rules on the will of the comity of nations. International law exists inasmuch as it conforms to this collective will, its rules, drafted in accordance with certain methods of procedure, are mandatory and suit the needs of a changing world. The concept of a worldwide community is the reflection of an actual state of fact which transcends the diversity of nations and of common purposes which are taking form and proliferating. Irrespective of the tensions that bedevil it, the world community is an entity sufficiently separated from the States which are its components to be an independent source of law. The main trend of this law will be towards the maintenance of peace and the protection of the freedom and security of individuals and nations. Professor Rollin, of the University of Brussels, goes into the prerequisites of *a genuinely international maintenance of the peace*. It is generally recognised that international law circumscribes the freedom of States to conclude treaties originating enforceable obligations. Legal machinery for the maintenance of the peace therefore exists in the community of States, just as similar machinery for the maintenance of domestic order exists in each State. Although no

case law or jurisprudence yet exist on this subject, two Justices of the International Court of Justice have vigorously asserted their view that the Court cannot possibly approve any treaties conflicting with the maintenance of public order or public morals. S. B. Krylov, a Soviet jurist and a Justice of the International Court of Justice, deals with *the codification of international law*. He refers to the work done by non-governmental organisations, such as the Institute of International Law and the International Law Association and the inter-governmental work of the League of Nations. Under Article 13 of the Charter, the United Nations has been made responsible for the codification and progressive development of international law. Fifteen reports have been drafted by the International Law Commission and have been submitted to the Sixth Committee of the Assembly. None of them has as yet, regrettably, been approved by the Assembly.

Another group of essays is devoted to classic questions of public international law. Professor André Gros, Legal Adviser to the Ministry of Foreign Affairs, in his article entitled "*Between two Conferences on the Law of the Sea*" (1958 and 1960), gives an account of the two subjects left pending by the first Conference – the breadth of the territorial sea and exclusive fishing rights in the contiguous zone. He stresses the fact that the latter raises a new question which will require the establishment of an original rule of international law and the difficulties set up by unilateral declarations by several States between the two Conferences. Professor Jan-H. Versijl, of the University of Amsterdam, deals with *The Law of the Sea in Succession States*. As so many new States have recently entered the community governed by international law, it is of great practical importance. Even though no great problems arise as regards the sea in the strict sense (territorial sea and continental shelf) by the succession of a State to the rights and obligations of the former administering Power by way of emancipation, succession in treaties concerning the sea may raise thorny questions. Professor Erik Castrén, of Helsinki University, sums up the solutions now accepted or proposed with regard to *the legal position with regard to outer space*. He gives an account of the history of the way in which State recognition of the sovereignty of each State over the air space above it was recognised for urgent practical reasons, assuming specific form in the Paris Convention of 1919 and the Chicago Convention of 1944 and several bilateral treaties. This sovereignty bestows on each State concerned the implicit right to make regulations for air traffic over the national territory. So long as air traffic was confined to traffic within the lower levels of the terrestrial atmosphere, there was no apparent reason for setting an upper limit to the national air space. New aspects of the problem were disclosed when satellites and inter-continental rockets were launched, from 1957

onwards. Henceforth, machines passed through the higher levels of the terrestrial atmosphere and outer space directly above territories other than those from which they had been launched. The idea that national space may be extended indefinitely upwards is untenable; hence, an upper limit must be set, and the higher levels must be given a freedom somewhat akin to that of the high seas. The writer suggests that the upper limit of the "territorial air space" be set at 50 km. Professor Hildebrando Accioly, of the University of São Paulo, studies *war and neutrality in the light of contemporary international law*. He situates neutrality within the collective security system established by the United Nations Charter and concludes that neutrality is possible even if the Security Council decides on collective action. Professor Maurice Bourguin, of the University of Geneva, deals with *resort to diplomatic negotiation* as the prerequisite to submitting a dispute to the International Court of Justice; a case considered by the Court in connexion with the dispute between India and Portugal about the Goa Enclaves. The writer expresses his opinion that neither the Court's Statute, nor its case law nor international custom dictate diplomatic negotiation as a prelude to resort to the Court; but negotiation may be required to define the precise point at issue and to determine the points of law which the Court will have to decide. Professor Hans Wehberg, also from Geneva, compares *the nature of sanctions by the League of Nations and the United Nations*. Under the Covenant, military action against an aggressor was decided and executed by each Member State individually. Under the Charter, however, the Security Council takes note of an act of aggression and determines the sanctions; so that the United Nations acts as a community. The writer stresses that coercion is a police measure to restore the law which has been violated and therefore does not give rise to a state of war. Professor Paul Reuter, of the University of Paris, devotes an interesting study to the *subsidiary organs of the international organisations*. He notes their proliferation at the United Nations level (in particular, large relief agencies such as UNWRA, UNKRA and UNICEF), as likewise at the level of the Security Council, the Economic and Social Council, the specialized agencies and the regional economic commissions, and classifies them in three groups: (1) bodies for study, information and consultation; (2) bodies specialising in the peaceful solution of disputes; (3) bodies responsible for collecting, managing and distributing supplies and equipment. However much they differ, these bodies have something in common: (1) they have been established on the basis of a decision by the international organisation, not by inter-governmental agreement; (2) their terms of reference are bounded by those of the organisation; (3) they are so constituted as to preserve their own personality with the organisation.

This brief review can give only an approximate idea of the interest of this collection of the individual opinions of leading experts in modern public international law.

PHILIPPE COMTE

World Peace through World Law. By Grenville Clark and Louis B. Sohn. [Cambridge: Harvard University Press. 1960, second (revised) edition, 387 pp.]; French edition published under the title "*La Paix par le Droit mondial*", with preface by P. Geouffre de la Pradelle. [Paris, Presses universitaires de France, 1961, 545 pp.]

Grenville Clark has behind him a long and brilliant legal career at the New York Bar, and he held important posts in the Administration during the two world wars. Louis B. Sohn went to the United States from Poland in 1938 and he lectures in international law at the Law School of Harvard University. Their collaboration dates back to 1945 when, a few months after the San Francisco Conference, Grenville Clark took the initiative of convening a meeting of jurists at Dublin (New Hampshire) in order to make a critical study of the United Nations Charter. Even at that time, many international lawyers considered that the structure and powers of the United Nations were unsuited to the tasks entrusted to it. But while one body of opinion, led by Emery Reeves, advocated a fresh beginning and the convening of a world-wide constituent assembly, Grenville Clark and Professor Sohn were the spokesmen for a less radical tendency, proposing that the United Nations in its existing form should be reformed and equipped with the minimum means for carrying out its objectives. In 1953, under the title "*Peace through Disarmament and Charter Revision*" the two authors published a draft revision of the San Francisco Charter, on an article-by-article basis, and a supplement was published in 1956. The substance of that draft was reissued in more detailed form, with due regard to the comments and criticisms which had been made, in the first edition of "*World Peace through World Law*", published in 1958. The recent publication of a second (revised) edition and the French translation gives us an opportunity to comment on a work whose importance has already been stressed by the most authoritative critics.

The authors state that the fundamental premise of the book is the notion expressed by President Eisenhower on October 31, 1956, when he said: "There can be no peace without law". In other words, the United Nations will only succeed in saving "succeeding generations from the scourge of war" to the extent that there exists a coherent body of law applicable to all nations and all individuals, accompanied by appropriate penalties and forbidding violence or the threat of it as a means for dealing with international disputes.

In the traditional concept of State sovereignty, the prerequisite for the application of a legal rule to a State is that the State must have freely entered into that obligation; moreover, the State is free to renounce such an obligation at any time, since no system of effective penalties exists. Mr. Clark and Professor Sohn have therefore sought a solution outside the traditional realm of international law. They propose the establishment of "institutions corresponding in the world field to those which maintain law and order in local communities and nations"; to this end, they envisage a far-reaching reform of the structure and responsibilities of the United Nations, so as to give that organization the appropriate legal powers and material means to enable it to carry out its tasks. The principles of this reform are expounded in a lengthy introduction. Then, taking the text of each article of the Charter in turn, the authors propose the drafting changes which would give effect to the reform. Lastly, in seven annexes, they give the draft text of supplementary provisions which would be incorporated in the revised Charter. Thus, the authors' intention is not to substitute completely new institutions for the existing world organization, but to make the minimum adjustments to the existing structure so as to enable it to achieve its objectives.

The central theme of the reform plan is to endow the United Nations with legislative competence in a field strictly limited to questions relating to the maintenance of peace and security among nations. More specifically, the plan envisages a three-level hierarchy of juridical rules. (1) The fundamental provisions regarding disarmament, the creation of a permanent police force and the manner of settling disputes would be of constitutional value and would be incorporated in the Charter itself and in certain annexes thereto. (2) The United Nations General Assembly would be empowered to enact implementing legislation on such matters. (3) Detailed regulations governing the application of such legislation would be laid down by authorities subordinate to the Assembly. Beyond the scope of these delegated powers, the Member States would retain their complete sovereignty.

The creation of a system of "world law" is the keystone of the proposed system. If the principle were accepted, the conditions for its effectiveness would result in far-reaching reforms in the structure of the United Nations.

1. The first condition for effectiveness is that the United Nations Assembly must be able to *adopt implementing laws by a majority vote*, and the majority might be either simple or reinforced. This solution can only be acceptable to the Member States if the Assembly is a democratic gathering truly representative of the world community. The following consequences ensue: (a) Any independent State must be able to gain admission to the United Nations on its

own request alone. (b) The present system, under which each Member State has one vote, regardless of its size, would clearly be incompatible with the majority voting system. States must be represented in the Assembly in a manner consistent with the size of their population. Various weighting methods might be considered, and in any event the authors recommend a ceiling level for the representation of the most populous States. (c) Representatives in the Assembly should be appointed, at least indirectly and, if possible, directly, through popular election.

2. The second condition is that the Assembly must have appropriate *legal powers* to enable it to ensure respect for the provisions of the revised Charter and the laws which it adopts. Under the reform plan, the revised Charter and annex I thereto would contain a plan for general, complete and controlled disarmament which the Assembly would be directly responsible for putting into effect. The following consequences ensue: (a) The present Security Council would be replaced by an Executive Council, whose members would be appointed by and responsible to the Assembly. Similar changes would be made in the structure of the Economic and Social Council and the Trusteeship Council. (b) The laws enacted by the Assembly, together with constitutional provisions contained in the Charter and implementing regulations, would be applicable not only to States but also to individual persons, who would be liable to prosecution in regional United Nations courts for any breach of "*world law*".

3. The third condition is that the Assembly must have the *material means* enabling it to ensure, if need be by force, that the constitutional provisions, laws and regulations on the maintenance of peace and security are put into effect. For his purpose, the reform plan provides for the establishment of: (a) an Inspection Service responsible for supervising the implementation of the disarmament plan; (b) a world police force, to be set up according to a programme coinciding with the step-by-step application of the disarmament plan. The Inspection Service and the police force would be placed under the authority of the Executive Council, the latter being responsible to the Assembly.

In parallel to these measures aimed at prohibiting in law and in practice any resort to the use of force, the reform plan makes provision for a comprehensive system for the pacific settlement of disputes. (a) The International Court of Justice would remain competent to settle all legal disputes, its jurisdiction being binding on all Member States. (b) Disputes of a political nature would have to be referred to a World Equity Tribunal, which could merely make recommendations to the parties concerned. (c) Before referring a dispute to one or other of the authorities mentioned above, the parties could bring it before a World Conciliation Board which would act as mediator.

We have been unable to do more than describe the broad outlines of the reform plan drawn up by Mr. Clark and Professor Sohn, and have not referred to some of the supplementary provisions, such as those relating to economic advancement and its financing out of resources available as a result of disarmament. As soon as the first edition of this work was published, in 1958, the American Bar Association stressed the importance of this contribution towards the establishment of a legal system governing relations between States. In addition to the French version, the second edition has been, or will be, translated into German, Russian, Spanish, Dutch, Norwegian and Swedish; an abridged version will be published in Arabic, Chinese, Italian and Japanese. It is to be hoped that this exceptionally wide dissemination will prove fruitful and will arouse comment on the need to adapt the United Nations to its objectives.

In his preface to the French edition, Professor Paul Geouffre de la Pradelle rightly points out that "the problem of the reform of the United Nations system cannot be shirked much longer".

The authors are to be commended for having, after ten years' reflection and research, drawn up the first complete reform plan. The watertight system they propose may well arouse a sceptical reaction in many quarters. Some people will object that the weakness of their harmonious edifice lies in the fact that it is built up in the abstract. But in reply, others may well point out that Utopia is a matter of dates: a few decades ago the notion that Burma, Cyprus or the Upper Volta would become sovereign States might have seemed Utopian. Jurists are all too frequently reproached with lagging behind the times, and praise is due when they sometimes succeed in looking ahead, and even forging far ahead, and thus in opening up the way for new solutions.

P. C.

Les libertés publiques. By Georges Burdeau. [Paris: Fichon et Durand-Ausias, 1961. 2nd ed. 388 pp. 34 New Francs.]

Professor Georges Burdeau, of the Paris Faculty of Law, is well known to the readers of this *Journal*. His many works, and especially his monumental *Traité de science politique*, have placed him in the front rank of theoreticians in the realm of public law, and his active participation in the New Delhi Congress and the Lagos Conference warrants our regarding him as a friend of the International Commission of Jurists. His work *Les libertés publiques* (public freedoms), of which a second and entirely revised edition has just been published, is modestly presented as a textbook, but it is in fact much broader in scope. In a condensed form and in an elegant and clear style, the author offers us on the one hand an original analysis of the notions of political freedom and individual

rights, and on the other a synthesis of the rules of French positive law with regard to the protection and regulation of public freedoms. Hence the division of the work into two parts (of unequal length incidentally), its theoretical and practical importance, and its value both as a cultural tool and as a compendium of knowledge.

In the first part, Professor Burdeau, postulating freedom as a given fact of human nature, raises the twofold question of its integration in the social order and its protection. Individual freedom presupposes, first and foremost, that the wellbeing of the individual should be regarded as the ultimate aim of law, the individual being, moreover, inseparable from his social context. Freedom itself can be regarded as having two aspects, to wit: absence of constraint [*"liberté-autonomie"* (autonomous freedom)], and freedom to participate in the establishment of the legal system [*"liberté-participation"* (freedom of participation)]. It is in this latter sense that it is possible to speak of "political" freedom; implying membership in a free community, freedom loses its individual character and "*devient liberté collective*" ("becomes collective freedom") (p. 12). In this conception, the subject of "human rights" is "*l'homme concret, défini, non par son essence ou son appartenance à un type abstrait, mais par les particularités qu'il doit à la situation dans laquelle il se trouve placé*" (the specific man, defined not by his individuality or his membership in an abstract type, but by the peculiarities he owes to the situation in which he finds himself); it is "*l'homme situé*" (situated man) (p. 19). Individual rights are no longer a safeguard for the individual against the State, but a complex of means enabling him to co-operate in the management of the community's affairs and to expect positive services from it. The conciliation of freedom with regulation is effected within the framework of the democratic system, subject to a delicate balance to be established between the traditional concept of political democracy and the new concept of social democracy; the study of the limits of the power of regulation leads the author to set out the solutions offered by French law in the matter of police powers in times of crisis. Turning to the problem of the protection of freedom. Professor Burdeau sees in the restriction of the State by law a consequence of the nature of political power. The State, like every authority, "*est tributaire d'une idée de droit qui le porte et légitime son action*" (is dependent on a concept of law which sustains it and legitimates its action), and decisions by governments are of value in law only "*dans la mesure où elles sont commandées par l'idée de droit qui leur sert de support*" (to the extent that they are commanded by the idea of law which sustains them) (p. 54). Accordingly, the protection of freedom will reside essentially in a system of controls or checks designed to ensure that decisions taken by governments at all levels are in accordance with the idea of law from which their powers derive. The

author gives a systematic survey of the guarantees appropriate for sanctioning breaches of law committed by the administration and the legislator.

The second part of the book, nearly 300 pages in length, is devoted to a study of the "rights and freedoms of the citizen" in French positive law according to a very rational classification: (1) *les libertés de la personne physique* (the freedoms of the individual); (2) *l'Etat et les groupes* (the State and non-governmental bodies); (3) *la liberté de la pensée* (freedom of thought); and (4) *les droits économiques et sociaux* (economic and social rights). The content of the chapters constituting each of these four parts cannot be summarized here. Presenting a synthesis of the rules of law which govern the protection and regulation of public freedoms, the author is led on into the most varied fields of criminal law, criminal procedure, administrative law, civil law and social law; the solutions offered by positive law are presented in their historical and sociological context, and the analysis of the legislation is supplemented by an analysis of administrative and court case law.

The book thus affords us a very complete and very clear picture of the provisions of French law on many questions which are of great theoretical and practical importance at the present time. We single out in particular: in the chapter on safeguarding the individual, the paragraphs concerning the independence of the Bench, protective custody in criminal proceedings, and administrative internment (*l'internement administratif*); in the chapter on freedom of association, a study of the regime of religious congregations and an analysis of the relations between groups, the individual and the State; in the chapter on freedom of opinion, the passages on the loyalty required from civil servants, and the limits to that loyalty. An important chapter deals with the regulation of the Press, and the reader will find of particular interest the analysis of the "contemporary components" (*"données contemporaines"*) of the Press problem in the fields of technology, economics, social affairs and law. The author goes deeply, incidentally, into the meaning, scope and limits of freedom of education, and investigates from this point of view the question of subsidised private education. Legislation concerning different religions is dealt with very thoroughly in the course of the author's study of religious freedom. The section devoted to social and economic rights opens with an analysis of the notion of social law, its content, and its place in the juridical hierarchy; the social laws tend towards "*la libération du travailleur à l'endroit des contraintes de toutes sortes liées à sa dépendance économique*" (the freeing of the worker from constraints of all kinds associated with his economic dependence) (p. 310); they necessitate positive intervention by the State, and add a social content to the political content of democracy; far from contradicting freedom, they confirm it

and restore to political rights their essential aim; in parallel, where economic freedom persists, it is a controlled and guided freedom.

Lastly, mention should be made of the analysis, in the chapter on economic rights, of the development of the law of property towards a social concept which subordinates the right of ownership to the requirements of the interest of the community: "*le fondement de la propriété est inséparable de la considération de son usage, c'est à dire de sa finalité*" (the basis of ownership is inseparable from a consideration of the property's use, i.e., its purpose) p. 342); private enterprise itself, where integrated into the framework of a planned economy, becomes associated, in many respects, with the performance of public functions.

The work is illuminated throughout by a constant concern to strike a balance between the respect for freedoms and the needs of the social order. That desirable balance cannot be satisfied by rigid solutions; and the author concludes: "Our traditional public freedoms emerged from the most dogmatic and most absolute of liberal régimes, since the State devoted all its power to the service of freedom itself. The question is: how can the freedoms created for man as an individual be so transformed as to persist in a society that claims to be the guardian of all?" (p. 362).

P. C.

Essays in African Law. By Antony Allott, M.A., Ph.D., Lecturer in African Law, School of Oriental and African Studies, University of London. [London: Butterworth & Co. Ltd., 1960. 323 pp., index, table of cases. 42s 6d net.]

These essays written by Dr. Allott are the first in a new series by Butterworth's on African law. At this time of swift political change in Africa a book which increases our knowledge of African law is to be welcomed. Butterworth's are to be congratulated on their enterprise in presenting this series and in their choice of author whose admirable work should ensure a good start to the series.

A number of these essays have appeared separately at some time or another in law journals or have been based on published articles. However, this collection of essays undoubtedly stands to gain by being presented in one volume. For it soon becomes clear to the reader that Dr. Allott is justified in claiming (as he does in his preface) that "there is a common theme running through the entire work". The theme, in brief, is the impact of English law on customary law in African countries with special reference to Ghana. It is understandable, then, that these essays are confined to a study of those African countries with a Common Law background.

The first part of the book is a necessary introduction to the later examination of certain aspects of customary law. We are shown initially how English law came to be administered in certain parts of Africa and how decisions in English courts have been relied upon as authority in those African countries with a Common Law heritage.

The second part is a critical study of the place of customary law in Africa containing a wealth of fascinating detail for the student of African law. Dr. Allott comes to the conclusion that "there is no universal general African law; there are a rather limited number of types of legal features, attitudes and procedures".

In the third and last part the author examines certain branches of customary law with major emphasis on the customary law of Ghana. Certain aspects of land law, together with written documents used by Africans in land transactions, marriage law and property law all come under scrutiny. The author is often closely concerned with the *internal* conflict of law problems. Private International Law is usually concerned with the external conflict of law question, but in African countries the judge often has to decide which of several local systems of law he will apply; for instance will it be English law, customary law or Islamic law?

In an interesting chapter on the development of the courts in Ghana it may cause surprise to many readers to learn that wide reforms in the customary courts only came fairly recently. For example, until 1939 the fees and fines collected by the customary courts went into the pockets of the court members. And it was not until the passing of the Local Courts Act 1958 that the jurisdiction of customary courts was extended to all persons – before only persons of African race had been subject to their jurisdiction.

A notice on this book would not be complete without mentioning the full use Dr. Allott has made of the decisions of the courts – from Privy Council appeals down to the unreported decisions of the customary courts themselves.

These essays will add much to our understanding of African law and its evolution in the company of the Common Law. We may look forward to other books in this series drawn widely from countries in tropical Africa.

A. A. DE C. HUNTER

Justice According to the English Common Lawyers. By F. E. Dowrick. [London: Butterworth & Co., 1961. 261 pp. 27s 6d.]

The author is too modest in intending this book to be "primarily for those who have been studying English law for only a year or two." This book will be of great interest not only for the student, but also for the experienced practitioner. Mr. Dowrick has

succeeded in a field where many before him have failed: he successfully defines, in every dimension possible, the concept of "Justice". His book is half-way between the philosophical treatise and the juridical handbook. It has the double advantage of containing a mass of information and of stimulating the reader's reflection on the idea of "Justice", a term which many a lawyer uses during a whole lifetime without considering its complex philosophical meaning.

The author, F. E. Dowrick, M.A. of Oxford, a Barrister-at-Law of the Inner Temple, is a Fellow of Trinity College and a Lecturer in Law at the University of Dublin. It is therefore natural that he treats his subject within the framework of the English Common Law. For Mr. Dowrick, the common lawyers include those who have professed and practiced Common Law and Equity in England. He sees the common lawyer in contrast, above all, with the "civilians"; that is, lawyers professing ancient or modern Roman Law and those professing the Canon Law. This exact definition of the author's point of view is especially useful to those of his readers who are continental lawyers and who therefore have only a vague idea of English Common Law.

Mr. Dowrick divides his book into seven main chapters. Each is devoted to a particular aspect of the concept of Justice. The seven aspects of Justice which he distinguishes are: Justice as Judicature, Justice as Fair Trial, Natural Justice, Moral Justice, Individual Utility, Social Justice and Legal Justice. One may disagree with his distinction, as being too schematic. In particular, one cannot see why Mr. Dowrick treats in separate chapters the concept of Moral Justice and that of Natural Justice. All the more, as the author himself admits that both terms derive from Aristotle's doctrine (found particularly in the *Nicomachean Ethics*) of Justice as an absolute value. In fact, the notion of Moral Justice as expounded by Mr. Dowrick is wholly contained in the traditional concept of Natural Law, as it is derived from the *De Re Publica* and *De Legibus* of Cicero. Mr. Dowrick himself refers to these sources. Therefore, one cannot see why the author treats Moral Justice as a concept apart from Natural Justice, the two being in fact synonymous.

The reader, particularly if he is a continental lawyer, should give special attention to Chapter Two, which treats from a very pragmatic point of view, Justice as Judicature. The author defines (p. 17) this aspect of Justice in the following terms:

"justice involves . . . proceedings in tribunals, before a judge or a judge and jury, in which persons are tried for alleged wrongs with the sequel of punishment or reparation. Justice thus conceived is no more than adjudication, arbitration, the

judicial settlement of public disorders and private disputes. As such it is the relatively civilised alternative to leaving disorders to multiply and private wrongs to be redressed by violent self-help. Justice in this sense is hardly an ethical value, but is rather a mechanism of government directed to realising the political value of social order. On this view 'justice' is synonymous with 'judicature'."

Despite the fact that Mr. Dowrick apparently refrains from showing any preference for any one of the seven definitions of Justice, this one appears to the reader as the most convincing of all.

JEAN ZIEGLER

Yearbook of the European Convention on Human Rights, 1958—1959 (European Commission and Court of Human Rights), 1958—1959. [The Hague: Martinus Nijhoff. 1960. pp. 684. 31 guilders.]

The first volume of this Yearbook published in October 1959 and entitled *The European Commission of Human Rights, Documents and Decisions*, covering the years 1955 to 1957, was reviewed in an earlier issue of the *Journal* (Vol. II, No. 2, pp. 231–232). This volume deals with 1958 and 1959. Owing to the establishment of the European Court of Human Rights in 1959, the title and scope of the work has had to be altered, and it now covers the main documents and information relating both to the Court and the Commission. The book is divided into three sections: Chapter I contains the basic texts relating to the application of the Convention; Chapter II gives documentation on the Commission's competence and operation; Chapter III deals with the Court and an account of the work of the Consultative Assembly of the Council of Europe, so far as it concerns human rights and outstanding occurrences connected with the Convention. It gives the Rules of the Court, regulating the details of its structure, operation and procedure, and declarations by Member States recognising the competence of the Commission or the Court. The second section reproduces a selection of decisions taken by the Commission in the two years under consideration. During that period, 329 requests were deposited with the Commission, three of which were declared justiciable. A score of selected decisions are given in chronological order. The final section embodies a digest of the decisions reproduced in this and the previous volumes. Jurists will be particularly interested in this section, a compilation of international case-law decisions in the special field of human rights. The third section deals

with the Convention as related to the municipal law of the Member States of the Council of Europe. It contains extracts from laws and regulations and from the official records of parliamentary debates (Chapter I) and a selection of case-law decisions by national courts relating to the interpretation and application of the Convention.

P. C.

General reports to the Fifth International Congress of Comparative Law. [Brussels: Emile Bruylant, 1960. 2 vols., 948 pp. 1,200 Belgian Francs.]

The International Academy of Comparative Law held its fifth Congress at Brussels from August 4 to 9 1958. Over four hundred special reports had been prepared; they supplied the material for the forty-four general reports to be submitted to the Congress's committees. These consolidated studies are reproduced in the two volumes published by the *Centre Interuniversitaire de droit comparé* (Inter-University Centre of Comparative Law), under the supervision of Mr. Jean Limpens, Professor at the Universities of Ghent and Brussels. The substance of the forty-four reports, which embrace the most widely-diversified fields – history of law, legal sociology, private international law, civil procedure, rural and commercial law, copyright, labour, air traffic, public, criminal and public international law cannot be summarized in a few pages. Jurists from forty countries had contributed to the preparatory work. The extent of the area covered and the variety of legal systems it brought into contact serve to show the importance of this confrontation.

The report by Professor Ganshof van der Meersch on "*La sécurité de l'Etat et la liberté individuelle en droit comparé*" (state security and individual freedom in comparative law), which is by far the longest, taking up 160 pages of the book, was reprinted (in a special printing, reviewed below).

Some studies merit special attention in that they deal in a general way, though briefly, with subjects that are of great theoretical and practical importance, e.g. those by Mr. H. V. Velidedeoglu on the trend towards codification in the Moslem countries, by Mr. René Piret on liability without *faute*, by Mr. A. de Cossio on the equalization of the legal status of spouses, and by Mr. Michel Eliescu on civil liability in air traffic law.

In several of the reports it is interesting to note a trend towards the unification of municipal legislation in certain particularly favourable fields. Mr. Jean Limpens shows how the study of comparative law may be a method of seeking out topics suitable for unification; some branches of law lend themselves to unification better than others (examples are the law of sea and air transport,

regulations on foreign-exchange, copyrights and patents, labour and contract). Mr. Ake Malmström deals precisely with one of these less intractable fields, that of copyright; he analyzes the Universal Copyright Convention prepared by UNESCO, and signed at Geneva in 1952, which entered into force in 1956, and shows the progress that this document constitutes on the road towards the unification of law. Mr. Niceto Alcalá-Zamora studies the important question of the enforcement of arbitral awards in private international law, a question with which the United Nations Economic and Social Council has been concerned, stresses the need to achieve a standard set of regulations, and mentions the drafts prepared to that end. Mr. Giangastone Bella shows that the European Economic Community, instituted by the Treaty of Rome in 1957, will lead to a harmonization and unification of national legislation on real property, on contracts concerning the exploitation of rural property, on the system of taxation and succession, and on land reform. Mr. Ludwik Ehrlich analyzes the work undertaken under the auspices of the United Nations to codify the law of the sea, in particular that governing territorial and inland waters, the high seas, contiguous zones and the continental shelf.

Other reports (besides that by Professor Ganshof van der Meersch) deal with questions directly concerned with the protection of the rights of the individual. Mr. Marcel Vauthier studies one important aspect of the situation of private individuals in their relations with administrative authorities: the right of distraint against the property of public bodies. Mr. Oliver Schroeder, Jr., presents the general report on a question of very topical interest in criminal procedure: the use of modern scientific methods in interrogation and the protection of the rights of the accused. His study is a consolidation of seventeen separate reports whose conclusions converge to a remarkable extent on certain fundamental principles: the right of criminal justice to resort to methods of scientific interrogation in its search for the truth; the limitation on that right by the obligation to respect the dignity of the person; the recognition, beyond the diversity of legal systems, of the guarantees protecting the rights of the accused person (due process of law). Mr. Marc Ancel deals with sanctions in the very special field of economic criminal law – the “penal projection of modern planning policy” – and appeals for administrative sanctions alongside the classic penal sanctions; while acknowledging the legitimacy of a softening of the traditional rules, especially as regards the liability of corporate bodies, the author stresses the danger that might arise if economic criminal legislation departed from the rules of ordinary criminal law.

Sécurité de l'Etat et Liberté individuelle en Droit comparé. By W. J. Ganshof van der Meersch. [Brussels: Emile Bruylant, 1960.]

Professor Ganshof van der Meersch's general report on *la Sécurité de l'Etat et la Liberté individuelle en Droit comparé* was, as we have already said, by far the most significant communication presented to the Fifth International Congress on Comparative Law held at Brussels in August 1958. It has therefore been published as a separate volume. It was prepared on the basis of national reports received from sixteen countries of Europe, Asia and America. The author has supplemented that documentation with an analysis of the legislation of such countries, as the Federal Republic of Germany, Italy, the Netherlands and Switzerland, for which no separate report was prepared. The field of enquiry is thus as broad as the subject itself. No reference is made, however, to the legislation of the socialist countries or the people's democracies, so that the study is limited to legislative systems based on written traditional law and those derived from British Common Law.

The title of the book brings to mind the theme of the Lagos Conference; the topics considered were selected for the common purpose of finding a balance between the protection of fundamental rights and the need to ensure the stability and efficacy of governmental institutions. The principle of traditional democracy, writes the author, is that "those who are governed can do anything that is not forbidden by law, while those who govern can do only what the law authorises them to do". The person in authority naturally tends to abuse his powers, and so there is permanent conflict between the individual and the State. The principal feature of the Rule of Law is that the public authorities enact legislation limiting their own action so as to safeguard the freedom of the individual. On the other hand, in a traditional democracy those who are governed are associated with those govern in the exercise of authority. Thus legislators, having been appointed by nation-wide ballot, whether direct or indirect, may be considered as the people's delegated representatives.

The writer rightly begins by describing the supra-national guarantees of personal liberties. Although the Universal Declaration adopted by the United Nations General Assembly in 1948 unfortunately lacks mandatory effect in law, the European Convention on Human Rights signed at Rome in 1950 is binding on those European States which have ratified it. At the national level, a balance between the security of the State and the freedom of the individual must be sought in the constitutional provisions governing the powers of the State and the rules relating to judicial organization and procedure. The Rule of Law stems from two concepts: "1. All power derives from law and is subject to law. 2. Law itself is based

on the principle of respect for the human person." It might have been thought that the identification of power with law would be ensured by the sovereignty of the legislation enacted by a Parliament representative of the nation; today, however, no one still believes that the law is the expression of the public will, and there is an increasing tendency for parliamentary assemblies to leave the government to introduce and draw up new legislation. The guarantee of freedoms depends essentially on the existence of judicial remedies, by which the legality of action by the Executive may be challenged and the responsibility of the public authorities impugned. If such remedies are to be effective, the judge must be independent of those who govern.

Underlying all judicial supervision is the principle of the hierarchy of judicial action and in particular of the supremacy of the constitution vis-à-vis the law, and that of the law vis-à-vis regulations or individual acts of the Executive; it implies that the State must be subject to the law, and is therefore one of the fundamental safeguards of personal freedom. The author devotes a lengthy chapter to *the law*, as it applies to the protection of the individual. He describes the various systems applied for ensuring that legislation is in conformity with the constitution, and lays particular emphasis on the importance of supervision by the Judiciary in the United States of America, the decisive role played by the Supreme Court in the fight against racial discrimination, and the scope of the constitutional guarantee of "due process of law". Likewise, in many Asian countries which have recently become independent, whose judicial system derives from British Common Law, the Judiciary plays a very important part in the protection of freedoms. Constitutional supervision is unknown in England itself; the sovereignty of Parliament is not limited by any set constitution, but is counterbalanced by the great authority of the Judiciary, as reflected in particular in the *habeas corpus* procedure and by the operation of the Common Law. Since the Legislature is the body directly representative of those who are governed, the law alone must be empowered, within the limits set by the constitution, to impose restrictions on individual rights; the book gives a broad outline of the restrictions imposed by most legislative systems, in the interests of the maintenance of the public peace, on personal liberty and on freedom of opinion, expression, association and assembly; the reader will note the delicate problems which in some countries are caused by the prohibition of certain political parties.

The two final chapters are devoted to questions which were discussed at length at the New Delhi Congress and at the Lagos Conference – namely, delegated legislation and the state of emergency. The author stresses the desirability of linking the two questions; legislation by the Executive constitutes a much graver threat to per-

sonal liberty than law enacted by a parliamentary assembly; any such shift of authority should be permissible only if warranted by the existence of a "state of emergency". In practice, in certain countries – including France and the Netherlands – legislation by decree is tending to become the ordinary legislative process. The problem is of a special nature in England, where the delegation of legislative power is based on a long-standing tradition and is subject to close supervision by Parliament and the Courts. On the other hand, considerations of State security and the national interest may, in certain circumstances, require the suspension or restriction of personal freedoms; even then, however, a state of emergency may be declared only on certain conditions; the competence of the Executive and Parliament might better be laid down in the constitution, if a time-limit were set for the suspension of freedoms and if the circumstances warranting such a step were assessed according to objective criteria.

The author concludes by stating that the system of traditional democracy "acknowledges and guarantees an area of individual sovereignty as distinct from the sovereignty of the nation which is expressed in the sovereignty of the law." He has endeavoured to trace the limits of that individual sovereignty, in the light of a comparative study of several systems of law. This interesting and valuable work shows that throughout the wide variety of juridical systems, the fundamental principles of the rule of law are remarkably constant and consistent.

P. C.

Le code pénal de l'Empire d'Ethiopie du 23 juillet 1957 with an introduction by Prof. Jean Graven [Paris : Centre français de droit comparé, 1959, 273 pp.]

Until recently, the Ethiopian Empire lacked a written and unified legal system. The main sources of both civil and criminal law were the *Fetha Nagast* (the Laws of Kings), a compilation of religious and civil precepts. The first attempt at codification concerned criminal law; an initial criminal code was promulgated in 1930, at the Coronation of H.M. Haile Selassie I. The Emperor revised the Constitution in 1955, decided to embark on a sweeping reform and a codification of the civil, commercial, criminal and procedural laws, and summoned European jurists of renown to draft them. Professor Jean Graven, the Dean of the Geneva Law Faculty and President of the High Appeals Court, was asked to draft a new Criminal Code. He had to fill the gaps in the former Code and to draft a completely new criminal legislation suited to recent developments in Ethiopia, basing it on modern developments in that country, while conserving traditions of Ethiopian law. The first of

the new Codes, the Criminal Code of the Ethiopian Empire, was promulgated on 23 July 1957 and came into force the next year. This outstanding feat of legal drafting has been given the circulation in French it deserved by the *Centre français de droit comparé*.

The Code is straightforward, complete, concise and in logical sequence. The authors established at the outset the principle that the written law is the sole source of criminal law, and drew up a complete system, covering all the guiding principles and the definitions of offences. The arrangement of the main sections is a model of balance; general considerations, schematically setting out the basic rules for offences and penalties, a special section defining major offences and setting the appropriate penalties; and a further section making a distinction under the criminal law between minor offences and misdemeanours. Part I, subdivided into two Books ("breaches of criminal law and the offender" and "the penalty and its imposition") is a general digest of the basic concepts of the general criminal law, throwing light into its every corner. Title I is devoted to the scope (when and where) the criminal law applies – an aspect neglected in most European codes. Title II covers the offence as such, while Title III (liability to penalties for offences) treats of the offender, all matters of criminal responsibility and the subjective elements likely to diminish or remove such responsibility. Book II, which treats of penalties, is based mainly on the most recent recommendations of criminologists with regard to the prevention of crime and the rehabilitation of offenders and measures of social defence. It is stipulated that in every case the penalty is to be determined by the extent of the offender's culpability, his danger to society and his personal circumstances, background, motives and intent. The penalty thus fits the person rather than the offence. The Code draws a distinction between the penalty for the crime as such and "general measures for the defence and protection of society"; this applies equally to adults and minors. A further chapter treats of ways to apply suspended sentences, such as "*sursis*", conditional release and probation. Section III, which defines offences in detail, is drafted in a similar orderly and logical fashion. It is noteworthy that the Code fixes only a maximum penalty for offences which attract a sentence of deprivation of liberty. The judge may freely impose any other sentence but no minimum term of imprisonment is prescribed.

The Ethiopian Code covers all criminal cases, but excludes many matters which are regulated in several countries by special provisions, such as offences committed by members of the armed forces, by civil servants or by the police, as likewise fiscal offences and offences relating to trade by land or sea.

A further, and equally noteworthy, innovation, is the title devoted to "breaches of international law", such as genocide, violation of the international humanitarian conventions and hostile acts

against international organisations engaged in relief work. The very stringent provisions relating to the enforcement of the laws, the probity of elections, the maintenance of the peace and the inviolability of the mails and other means of communication, the public health regulations, the protection of family life, the protection of economic and commercial affairs all testify to the earnest desire to protect the interests of the community at large.

It is a remarkable fact that a country in the course of development has made a point of giving priority to a legal system inbred with the concept of the Rule of Law.

The Ethiopian Criminal Code is, technically, an outstanding achievement, due in no small measure to Professor Jean Graven, who was mainly responsible for drafting it.

P. C.

Les Pays du Benelux. By André Mast. [Paris: Pichon et Durand-Auzias, 1960. 368 pages. Series "Comment ils sont gouvernés". 20.70 New Francs.]

In an earlier issue of the *Journal* we published an article on the first two volumes in the series "Comment ils sont gouvernés", published under the direction of Professor Georges Burdeau, namely a study by Professor André Tunc on *the United States of America*, and by Henri Chambre on *Le Pouvoir Soviétique* (Vol. II, No. 2, pp. 234 and 233). The author of the recent volume on *the Benelux countries* is Mr. André Mast, Professor in the Faculty of Law, Ghent University, whose brilliant speeches in Committee II at the New Delhi Congress will be recalled by many of our readers. No one is better qualified than Professor Mast to give a comprehensive description, in summary form, of the political institutions of those three countries. In accordance with the pattern followed in all the volumes of this series, before examining the constitutional and legislative texts, the author outlines the sociological framework of the Benelux institutions and recalls the geographical, demographic and economic elements which go to make up the political life of each of the countries concerned. This is supplemented by an introduction of some twenty pages, in which the author summarises the history of the three countries which emerged from the Union of the seventeen provinces. The first section of the book, which is also the longest, is devoted to Belgium. The second section relates to the Netherlands and its overseas territories. The third section, some thirty pages in length, gives a brief description of Luxembourg's institutions.

For the past 130 years, Belgium has lived under the régime established by the Constitution of February 7 1831, which has been revised only twice, and to a very limited extent. The Constitution

instituted a system of parliamentary monarchy of the most classical kind, whose main features were the separation of the constitutional authorities, and the responsibility of the Government to Parliament. The authors show how, within this rigid framework, the balance of power has shifted under the pressure of factual developments, and in particular under the ever-growing burden of responsibility assumed by the State in economic and social matters. The system of relationships between the constitutional authorities has been upset by the need to increase the means of action of the authorities and to provide the State with the powers appropriate to its new functions. In the first place, with the coming of universal suffrage, the juridical primacy of the Legislature was strengthened; the full authority and constitutional precedence of the nation's representative bodies was acknowledged, together with their right to fill any existing gaps in the Constitution. At the same time, however, the *de facto* predominance of the Executive was strengthened; at the outset, in accordance with the logic of parliamentary democracy, the King has no powers other than those expressly assigned to him by the Constitution. A century later, in response to the demands of social democracy, the tasks which the Government had to assume became so broad that the use of "special and extraordinary powers" and "general regulatory laws" became necessary. Today, the essence of economic and social legislation is embodied in regulations. At the same time, the concept of ministerial responsibility has been profoundly modified by party discipline and the *de facto* unity of the government and the parliamentary majority. Lastly, the government is taking an increasingly active part in the direction of parliamentary and legislative work; it has become "the body which provides the impetus and most often lays down the law".

In the Netherlands, the Fundamental Law of 1815 left considerable scope for government by the King himself. In 1848, constitutional reforms made far-reaching changes in the regime and instituted the notion of the government's responsibility to the States-General. It was not until twenty years later, however, that the parliamentary system was established and it was still longer before the application of democratic rules to the composition and election of the two Houses. Moreover, the principle of sovereignty over the nation has never been recognised as a basic precept of Netherlands public law, and the idea of the omnipotence of the elected bodies, or even of their juridical primacy, has remained foreign to it. The Executive has never been relegated to a subordinate position. The independence, stability and authority of successive governments have been fortified by the traditional incompatibility between ministerial functions and the duties of Parliament, and also by the instability of the majority in both Houses due to party coalitions. The *de facto* predominance of the Executive was therefore a re-

cognized constitutional tradition in the Netherlands, and the government was much better prepared than that of Belgium to assume its new responsibilities for economic and social matters. The States-General seem to play the game fairly, leaving elbow-room for the government while carrying out in full their task of supervision. The author considers that this balance of powers "has made possible a remarkably coherent and progressive social and economic policy".

Luxembourg's constitutional order, which was established by the basic law of 1868, closely resembles that of Belgium, and the country has known a remarkable degree of governmental stability; between 1918 and 1958, the affairs of State were directed by three Ministers only.

The conclusion to be drawn from this work is that, although their constitutional rules may differ in form, these three countries have, through pressure of circumstances, arrived at very similar solutions: and indeed, is not the "*de facto* predominance of the Executive" an almost universal feature of the political institutions of our time?

P. C.

NOTE ON PUBLICATIONS OF THE INTERNATIONAL COMMISSION OF JURISTS

Listed below are some recent publications of the International Commission of Jurists

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. 1 (Spring-Summer 1959) :

International Congress of Jurists, New Delhi, India: The declaration of Delhi, Conclusions of the Congress, Questionnaire and Working Paper on the Rule of Law, Reflections by V. Bose and N. S. Marsh
The Layman and the Law in England, by Sir Carleton 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

Volume III, No. 1 (Spring 1961) :

The African Conference on the Rule of Law, Lagos, Nigeria: The Law of Lagos, Conclusions of the Conference, Draft Outline for National Reports, Reflections by the Hon. G. d'Arboussier and the Hon. T. O. Elias
 Preventive Detention under the Legal Systems of: Australia, Burma, Eastern Europe, India, Japan, the Philippines, Singapore, and the Soviet Union
 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, 9 and 10 are out of print.

Number 7 (October 1957): In addition to an article on the United Nations and the Council of Europe, this issue contains a number of articles dealing with aspects of the Rule of Law in Canada, China, England, Sweden, Algeria, Cyprus, Czechoslovakia, Eastern Germany, Yugoslavia, Spain and Portugal

Number 8 (December 1958): This number deals also with various aspects of the Rule of Law and legal developments with regard to the Council of Europe, China, United States, Argentina, Spain, Hungary, Ceylon, Turkey, Sweden, Ghana, Yugoslavia, Iraq, Cuba, United Kingdom, Portugal and South Africa

Number 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

Number 12 (December 1961): Contains information on Australia, Ceylon, East Germany, Ethiopia, the European Court of Human Rights, Senegal, Switzerland and the USSR

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
- Number 12 (June 1961):** A Mission to Latin America, A Farewell to the Outgoing Secretary General, The new Secretary-General, Liberia, Missions and Observers, Essay Contest, Appeal for Amnesty 1961, National Sections

**SPECIAL STUDIES AND REPORTS
OF THE INTERNATIONAL COMMISSION OF JURISTS**

- 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 of 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 Status 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.

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.

The African Conference on the Rule of Law (June 1961): Report on the first African Conference on the Rule of Law held in Lagos, Nigeria, January 1961, and attended by 194 judges, practising lawyers and teachers of law from 23 African nations as well as 9 countries of other continents. The Report contains the *Law of Lagos; Declaration of Delhi; Act of Athens; Conclusions* of the Conference; List of Participants; Programme; Draft Outline for the National Reports and Working Papers which were used as a basis for the discussions in the three Committees; extensive summary of the proceedings in the Plenary Sessions and Committees.

The Cassell Case: Contempt in Liberia (August 1961): a study of the disbarment of Counsellor Christian A. Cassell of Monrovia for critical observations on the administration of justice in Liberia.

International Commission of Jurists, Basic Facts (September 1961): A brochure on the objectives, organization and membership, history and development, activities and finances 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.

Signed contributions express the views of their authors, their publication by the Commission implies that they are thought to be of general interest by the Commission which, however, does not necessarily endorse them in their entirety. Unsigned contributions have, unless otherwise stated, been prepared by the staff of the Commission.

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