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THE RULE OF LAW IN THE CONTEMPORARY WELFARE STATE

PART I

The modern state acts as a dispenser of social services and as an economic controller, thus exercising functions for which one has to invent and coin the legal expressions. With all this the *laissez-faire* State has had nothing to do, as it was left to individuals to regulate their legal transactions. Experience has now however shown that this attitude has not produced the ideal social conditions which had been anticipated. What the State has surrendered to the individual, foregoing in the process its own influence, the latter has abandoned to caprice. The toleration, or for that matter the enforcement, of legal obligations arising out of arbitrary decisions may be explained by the liberal element of the *laissez-faire* State and by the trust in the moral strength of individual behaviour. But that does not necessarily mean that this attitude of the State was just. It is indeed remarkable how the *laissez-faire* State in accordance with the principle of the separation of powers endeavoured to prevent everywhere any concentration of power by establishing different and mutually independent branches of government and at the same time had no hesitation in endowing the individual with the most comprehensive freedom of contract.[1] As a result the legal order has been increasingly compelled to interfere with private law relationships by the development of administrative law and by the enactment of compulsory provisions of private law.

In effect this development was nothing other than a successive withdrawal of powers, which had been given away all too freely before.[2]

Whoever was concerned with the Rule of Law had to look to

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[1] For the importance of freedom of contract as a legal and law-creating factor see W. Burckhardt, *Organisation der Rechtsgemeinschaft* (Zürich: Polygraphischer Verlag A.G., 1927), pp. 156 and 190 ff.; K. Otlinger, "Die Vertragsfreiheit." *Festgabe der schweizerischen Juristischen Fakulltäten zur Hundertjahrfeier der Bundesverfassung* (Zürich: Polygraphischer Verlag A.G., 1948), p. 322; Z. Giacometti, *Allgemeine Lehren des rechtsstaatlichen Verwaltungsrechts* (Zürich: Polygraphischer Verlag A.G., 1906), p. 31, note 7.

[2] K. Spiro, "Können übermässige Verpflichtungen und Verfügungen in reduziertem Umfange aufrechterhalten werden?", *Zeitschrift des bernischen Juristenvereins* (hereafter *ZbJV*), 88, p. 530 ff.

the State for protection. The law itself was considered the real guardian of human freedom and dignity.

The principle of legality is designed to mark out for State and administration a field of activities as narrow as possible, clearly delimited and predetermined. The theory of Statute Law is concerned, preponderantly if not exclusively, with the nature and definitions of the legal norms pertaining to public law. Beginning with the requirements of classic liberalism, the legal norms were at first called upon to regulate the social obligations of freedom with a view to the protection of the neighbour's equal right to freedom, and to restrict the authority of the State accordingly. They were not, then, expected to go beyond this field of action. The State was led in these circumstances to seek through its authority one-sided intervention; the supposedly selfish individual was not expected to submit voluntarily to this restrictive limitation: hence unilateral administrative acts and the whole fabric of administrative intervention. As classic liberalism was in addition unwilling to allow the State either to produce goods or to regulate economic processes, legislation of a liberal character could only be concerned with the maintenance of law and order. The correctness of private business transactions was regarded by the Legislature as not calling for, nor admitting, of regulation.[3] So far as the State in actual fact dispensed services, for which there was no legal obligation, as in the case of public assistance, or for which, because of a special relationship between the administration and the individual, there was no regulation by statute, its actions were exempt from the requirements of legal form. That practice is no longer regarded today as excusable, and the principle of legality is considered to cover the entire field of administration.

The demand for the extension of the principle of legality to the discharge of services and the regulation of economic processes is in itself entirely welcome. In respect of any expectations one may entertain as to the applicability of the principle of legality in the context of the Welfare State one has to bear in mind at the same time the fundamental differences that arise beween the demands to be met by social control through law on the one hand and legislation for the sole purpose of the maintenance of law and order on the other.[4]

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[3] F. Gygi, *Interventionsrecht und Interventionsverwaltung* (Bern: Stämpfli and Cie., 1958), p. 74ff.

[4] See on the point F. Gygi, *ibid.*, pp. 33ff. and 44ff. and the references there given; H. W. Kopp, *Inhalt und Form der Gesetze* (Zürich: Polygraphischer Verlag A.G., 1958), pp. 591ff., 596ff., 719ff. and especially 607ff., where however his dissenting comment on p. 449 with regard to the doctrinal origins of the concept of Statute Law in the *laissez-faire* Society are not altogether correct.

Making the discharge of social services and the regulation of economic processes the object of the law has distorted the original form of the law in the *laissez-faire* society. The legal norm has suffered a loss of intelligibility, reliability, durability and precision, since the Legislature has found itself compelled to deal with questions of regulatory and service functions. When trying to master such matters, the law-maker is compelled to resort to the granting of discretionary power and to the use of indefinite concepts, general clauses and formulae indicating the legislative purpose.[5] The law-maker either legislates on specific matters, or delegates the legislative power to the Executive. All these symptoms of sickness in welfare and regulatory laws have repeatedly been criticized and on occasion accurately analyzed.[6] To enumerate them one by one is unnecessary, for all observations are confirmed by the knowledge, that the concept of Statute Law in the *laissez-faire* society was faced with an entirely different sociological situation. If the modern Welfare State wished to bring its own range of functions under the principle of legality so that administrative action would conform to precise legal standards appropriate legislation would first have to be made. Only in this way, and not by condemnatory and deprecatory comments on the legislative technique in the period of liberalism, may dogmatic jurisprudence make contributions of lasting value by equipping he present-day society with Rule of Law principles. To give an example: where a model quota system is drafted, it should correspond to the classic conception of legality, and at the same time uphold the principle of equality and respect fundamental rights.

The attempt to do so will end – as shown by the initial experiences in the case of the Swiss decree regulating cheese marketing – with the reluctant admission that there should be no quotas. Yet there is no question of undermining the necessity for State intervention, but rather of harmonizing it with the requirements of the Rule of Law.

In economic matters when it comes to the fixing of pro-

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[5] On this point K. Eichenberger, *Die richterliche Unabhängigkeit als staatsrechtliches Problem* (Bern: Stämpfli & Cie., 1960), p. 180, very properly observes: "An Administration called upon to intervene in social legislation, especially in an economic connection, has a discretionary power different from that of the traditional intervening Administration. It is working on a different plane, a plane of greater extent, calling for increased freedom and speed of movement, with extended prospects and such matter, which the old intervening Administration left untouched, but which now determine the nature of the intervention." So too *Amtliche sammlung der Entscheidungen des Schweizerischen Bundesgerichtes* (hereafter *BGE*), vol. 86, part I, p. 319; see also on the point Gygi, *op. cit.*, p. 59, on the division of discretionary power into formulae indicating the legislative purpose.

[6] H. W. Kopp, *op. cit.*, pp. 572ff., 660ff. and 714ff.

duction, import and export quotas, there is no way of giving equal satisfaction to all the interests involved.[7] A wider equality of treatment between individuals, general and uniform in operation, had been so to say the life and soul of legislation in the period of classic liberalism.[8] The Welfare State on the other hand is based on a quite different conception of equality from that of the *laissez-faire* State, the former incidentally displaying hostility to precise legal standards. It is an equality closer to the human strength and weakness, calling for differentiation between individuals and not therefore lending itself to generalization.[9]

The law in the Welfare State, with its regulatory and service functions, has to meet other demands and expectations – as these suggestions will already have indicated. The law in the period of liberalism was relieved of the burden of determining beforehand the course of future developments, and calculating their probable effects; nor was it called upon to express views on the ethics of commercial intercourse, on the fairness of prices or on the just distribution of social product. The law-maker was not expected to anticipate future risks. How was the Legislature to be far-sighted, when man was not, or to be a reliable authority, setting up rules and standards for the guidance of officials in such a way as to ensure uniform action by one and all of them in any given circumstances? For Ernst Forsthoff, amongst others, it was an established fact that neither the law of *justitia distributiva* nor social control as a whole was susceptible of legal standards; and his apprehensions in this connection were not wholly imaginary, though possibly too pessimistic in this absolute form.[10] The legislative technique of intervention by the liberal State was no better than the school of Dirigism in respect of its use of vague legal concepts and discre-

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[7] F. Gygi, *op. cit.*, p. 78ff.

[8] I. Darbellay, "L'action du pouvoir sur l'évolution du droit," *Zeitschrift für schweizerisches Recht* (hereafter *ZSR*), 1955, p. 144. M. Imboden, "Der verwaltungsrechtlige Vertrag," *ZSR*, 1958, p. 82a.

[9] Gustav Radbruch, "Vom individualistischen Recht zum sozialen Recht," *Der Mensch im Recht* (Göttingen: Ausgewählte Vorträge, 1957), p. 37, impressively remarks: "Social law is based rather on a change in the structure of all legal thinking, on a new idea of humanity: social law is a law cut not to the shape of the individual in isolation, but to the individual as a member of society. It is not until the law adopts such a view of man that the differences between social strength and weakness come within the range of law at all. The traditional individualist legal system on the other hand was framed with the individual, conceived in isolation."

[10] E. Forsthoff, *Lehrbuch des Verwaltungsrechts* (7th ed., Munich, 1959), pp. 65ff. and 69ff.; cf. also Max Weber, *Rechtssoziologie* (Neuwied, 1960), p. 81; J. Darbellay, *ZSR*, 1955, p. 125ff.; H. W. Kopp, *op. cit.*, p. 572ff.; F. Gygi, *op. cit.*, pp. 31ff. and 43ff.; further "Aufgabe und Grenzen der Verwaltunggerichtsbarkeit beim Uhrenstatut," *Wirtschaft und Recht*, 1956, p. 136ff.; and H. Barth, "Normen als Ordnungsformen der Weltorientierung," *Kultur und Norm*, p. 19ff.

tionary power, as also in the matter of political and economic problems left outstanding.[11] But what is so remarkable is the fact that State action aimed at stimulating competition has the same appearance as its social intervention. It is obviously one thing for the State in its relations with the individual to refrain from intervening in the process of competition and another to create opportunities of competition for the benefit of the individual. There is in fact quite a difference between the constitutional guarantees of freedom representing a pledge by the State to abstain from action interfering with the competitive process, and the law itself clarifying competitive atmosphere of relations between individuals.[12]

The guarantee of freedom in the *laissez-faire* State which was designed to compel the State to abstain from economic activities, was one of a different kind from that of intervention by the liberal State. The demand for safeguarding competitive relations between individuals and for fair commercial intercourse within the meaning of social intervention, implies a demand for State action. The division effected by the economists into conforming and non-conforming measures – where conformity means compliance with the free market economy – led the jurists to overlook the fact that encouragement by the State of competition is for the economist undoubtedly economic policy, and consequently to be treated as regulatory activity by the State. The resulting anti-trust legislation has the same features as the provisions of Welfare State legislations. Being an economic policy statement it suffers from a lack of precise legal standards and is thus disliked by the Judiciary.

As for the law regulating the social relationship between individuals, it would almost seem as though the State has reclaimed, and is now itself exercising, a certain amount of freedom of action. The reason for this is that individuals, who had enjoyed a large area of decision in proprietary and contractual matters, did not use their rights responsibly. The State has at any rate in this field been given far-reaching powers of indefinite and variable character.[13] Judged by constitutional standards, this legislation appears by its very nature to be in conflict with the Rule of Law. There is further an intermingling of private and public law in the activities of the State. The regulation of economic power relations by anti-trust legislation shows that freedom of contract and freedom of

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[11] E. Hirsch, *Kontrolle wirtschaftlicher Macht* (Bern: Stämpfli & Cie., 1958), p. 67; E. Huber, "Gewerbefreiheit und Eigentumsgarantie," *Festgabe zum 70. Geburtstag von Max Gutzwiller* (Basel: Helbing und Lichtenhahn, 1959), p. 553ff.; H. Merz, "Der schweizerische Entwurf zu einem Bundesgesetz über Kartelle und ähnliche Organisationen," Zeitschrift für ausländisches und internationales Privatrecht, 1960, pp. 14 and 22.

[12] *BGE*, 80 II 42; J. Darbellay, *ZSR*, 1955, pp. 134ff and 137.

[13] K. Spiro, *ZbJV*, 88, p. 529ff.

association are no longer to be regarded as a purely private matter.

What is happening in the field of State intervention in social matters has its counterpart in constitutional law. The Welfare State can no longer be explained as simply an attempt to include in its programme social and economic security in addition to the traditional freedom. Economic freedom itself, undetermined by forces other than the State, has become an object of the demand and struggle for security.

There is more to it than this. The very best measure of individual freedom and development is on the whole based on a variety of collective props and supports, which themselves exact their tribute from the individual. The dynamics of economic development may be said in this way to have acquired in place of a liberal character a social one.[14]

Even the fundamental rights of liberalism are beginning for the same reason to expand into social rights,[15] insofar as they no longer protect the individual only against the force of the State, but lend him also assistance against oppression by social forces. The shift of constitutional rights from a liberal to a social basis is again clearly apparant in the principle of equality before the law. Claude du Pasquier,[16] Georges Ripert,[17] and Otto Bachhof [18] have explained that the social legislation in favour of the economically weaker elements really amounts at bottom to a policy on the part of the State to create formal inequality in order to establish economic equality. Justice at least is done in this way in the shape of equalization, the breach in the idea of abstract and uniform equality serving to level the sharp points of social differences.[19]

By social legislation in favour of workers, tenants and lodgers, as also of agriculture, the legislator is doing a work of equalization, which is to improve the lot and prospects of the less fortunate classes.[20] But that is exactly what constitutes the essence of the

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[14] See also the later observations on the encouragement of the usefulness of competition (Part II).

[15] See also J. Darbellay, *ZSR,* 1955, p. 124f.

[16] Claude du Pasquier, "La notion de justice sociale," *ZSR,* 1952, p. 93f.

[17] Georges Ripert, *Les forces créatrices du droit* (Paris, 1955), p. 265; see also J. Darbellay, *ZSR,* 1955, p. 144 and R. Savatier, *Les Métamorphoses économiques et sociales du Droit civil d'aujourd'hui* (2nd ed.; Paris, 1955), p. 286ff.

[18] Otto Bachhof, "Der Begriff und das Wesen des sozialen Rechtsstaates," *Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer* (hereafter *VVDStRL),* 12 (1954), p. 41.

[19] Gustav Radbruch, *op. cit.,* p. 39; see also F. Gygi, *Interventionsrecht . . . , op. cit.,* p. 65, and *Verwaltungsrecht und Privatrecht* (Bern: Stämpfli & Cie, 1956, p. 12ff.

[20] J. Darbellay, *ZSR, 1955,* pp. 134f. and 137f., 144f.

so-called social freedom.[21] Constitutional rights can no longer remain mere landmarks between the State and the individual.[22] According to the long unchallenged and (it was supposed) unchallengeable legal view, constitutional rights like equality before the law and personal freedom, offered nothing more than protection of the citizen *vis-à-vis* the State.[23] They are now to protect the subjects of private law in their relations with one another.[24] But legal theory is beginning, in view of the danger, which was bound to arise for personal freedom and for that freedom of contract which is the central institution of private law, to turn the wheel once again in the opposite direction, for the trend towards the Welfare State, it is felt, threatens the foundations of the private law system.[25]

The modification of the legal system is nowhere more apparent than in the fact that the traditional and supposedly fundamental division of the law into two branches, private and public, can now be characterized only by many different criteria.

The division was mainly a product of the "theory of interests" and the "subjection theory". Neither theory can disavow its close connexion with the legal thinking in the *laissez-faire* State. The "theory of interests" is based on the distinction between private advantage and public interest. The "subjection theory" uses the idea of the State as an organization in a position of superiority, from which it intervenes unilaterally as opposed to individuals who are subordinate to the State, but on the same footing among themselves.[26] The State, which dispenses services and which exercises discretionary power in implementing licensing and enabling legislation for the lawful pursuit of certain activities, and public authorities, which have now become the principal source of orders for the private sector of the economy, do not have to resort any longer exclusively to administrative acts in order to perform their new functions. The exercise of administrative power is often quite un-

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[21] Georges Ripert, *op. cit.*, p. 291f.
[22] See H. Huber, "Die Koalitionsfreiheit," *ZbJV*, 83, p. 11ff.
[23] Z. Giacometti, *Allgemeine Lehren des rechtsstaatlichen Verwaltungsrechts*, p. 3f., note 8.
[24] *BGE* 86 II 376, 82 II 302, 81 II 127.
[25] Z. Giacometti, *op. cit.*, p. 3, note 8; W. Burckhardt, *Organisation der Rechtsgemeinschaft*, p. 19f. and *Methode und System des Rechts* (Zürich: Polygraphischer Verlag A.G., 1936), p. 202ff. See also the reservations put forward by H. Huber in regard to the influence of ground rents on the economic organization, *ZSR*, 1935, pp. 182 ff. and 205. Similarly Mallmann and Zeidler, *VVDStRL* 19, (1961), pp. 102 and 228, Deschenaux, H., *Wirtschaft und Recht* 1961, p. 137ff. and p. 143f., on private law justification in its attitude in regard to competition.
[26] Z. Giacometti, *op. cit.*, pp. 97ff and 105.

suitable for the legal performance of distributive functions. In the exchange or distribution of goods, contract is the usual instrument, since the mutual interest in the economic object brings the parties together without either side having, or needing to have, superior powers. This does not however exclude the possibility of social factors exercising a decisive influence on the contents of the contract. What would be more normal for the administration than to rely for the economic functions taken over by the State on the features of private law, which has for so long controlled these proceedings?

The administration however in its capacity as distributing and regulating agent and also as employer has a background of authority behind it, which makes itself felt through the outward forms of the law applied so that conclusions can no longer be drawn from the legal appearance of the relationship between State and individual.

The "subjection theory" is accordingly no longer a reliable guide as to the field in which the power of the State (which according to the requirements of the Rule of Law should be exercised in conformity with legal provisions) will make itself felt.[27]

The outward draping of civil law has enabled not only the State, posing as a private law subject, to appear as a wolf in sheep's clothing. Law pertaining to economic activity is still aware of numerous cases of private dominance or monopoly, where one party to a contract determines its contents and imposes his own will.[28] The contracts with standard terms arising out of these conditions look like uniform regulations and are often more rigid than government decrees, though ranking as free contracts. Private contract relations, in which dominant social factors have so modified the power-relations of the contracting parties that domination by one of them has in practice taken the place of equality of bargaining power, are often permeated by compulsory provisions of private law. Alternatively, the State takes care of the public interest or the interest of the weaker party by means of administrative measures having the force of private law.[29]

Where the State discharges services or regulates business in private law form, it cannot at the same time act at its discretion, but is subject according to the more modern view to the obligation

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[27] See also on the point H. Zwahlen, *ZSR*, 1959, pp. 477af., 508af.

[28] So Georges Ripert, *Les forces créatrices du droit*, p. 271ff., speaking of the "contrat forcé ou imposé" and meaning thereby "contrats d'adhésions".

[29] J. Darbellay, *ZSR*, 1955, pp. 122, 130f., Gustav Radbruch, *op. cit.*, p. 39; F. Gygi, *Interventionsrecht ..., op. cit.*, p. 75f. and *Privatrecht ..., op. cit.*, p. 12ff.

to observe binding principles of action.[30] This form of law is therefore known as administrative private law.[31]

The former clear-cut distinction between legal relationships according to the principles of subordination or co-ordination, i.e., as to whether they are regulated by statute or by contract, has lost its significance and a multitude of confusing forms is gradually taking its place.[32]

The defect on the other hand, which is found in the theory of interests is its polarizing trend. It believes there is a rigid division to be made between the interests of the individual and the demands of the state and assumes that it will succeed in establishing this separation between the two. But the relation between individual interest and public utility is a highly complicated one, deriving from the social nature of man – *sa destinée à la fois individuelle et sociale* [33] – which is so difficult to understand.

The interests of the individual in a free society under the Rule of Law are necessarily bound up with the prosperity of the community.[34] Accordingly unlike the jurist's usual way of thinking, social ethics interpret individual and communal welfare not merely as opposing features but dwell with increasing success on the function of the one as a part of the other,[35] just as the individual man *qua* individual is a part of society. But the grasp of such subtle connexions makes strenuous and difficult demands on the powers of thought and the possibilities of differentiation. The position is much the same with a number of other legal ideas and institutions, especially all such as seek to establish individual justice and equality while having regard to existing differences between individuals. In this connexion it has to be borne in mind that the human race appears to have a certain predilection for uniform and arithmetical standards of measurement, and regards all discrimination between particular needs of different people with distrust. It is in addition extremely difficult for legal ideas and institutions to keep pace with the fullness and variety of human life and at the same time to provide rational administration and legislation – and these are

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[30] See on the point H. Huber, *ZSR*, 1955, p. 181f.; Otto Bachhof, *VVDStRL* 12 (1954), p. 61f. and *DVBl*, 1959, p. 268; H. U. Evers, "Verfassungsrechtliche Bindungen fiskalischer Regierungs- und Verwaltungstätigkeit," *Neue Juristische Wochenschrift* (hereafter *NJW*), 1960, p. 2073ff.; Z. Giacometti, *op. cit.*, p. 107, n. 23.

[31] H. J. Wolff, *Verwaltungsrecht*, (3rd ed.; Munich, 1959), I, p. 84f.

[32] P. Lerche, "Rechtsprobleme der leistenden Verwaltung," *Die Öffentliche Verwaltung*, (hereafter *DÖV*), 1961, p. 486ff., esp. 491.

[33] L. Bagi, *La garantie constitutionnelle de la propriété (Lausanne*, 1956), p. 9.

[34] Z. Giacometti, *op. cit.*, p. 100; H. Huber, *Staat und Privateigentum* (Cologne-Berlin: Carl Heymanns Verlag, 1960), p. 82; F. Gygi, *Interventionsrecht . . . , op. cit.*, p. 63.

[35] F. Utz, *Sozialethik, I*, p. 129ff., 144ff., 150ff., and 168ff. and 289.

only a small part of the legal problems inherent in the expressions "justice" and "legal security".

This discussion began with the distinction between public and private law, which in the period of liberalism could be satisfactorily drawn in the light of easily recognized landmarks in accordance with the "subjection theory". Today enquiry must be based on a different distinction: a distinction of substance rather than of form, for the difference itself has by no means ceased to exist. Any assessment based on conclusions drawn from the pure forms of law has lost its value in the Welfare State; and the same is true in general of the formulation of laws other than those relating to external security and the preservation of domestic order partly because of the difficulty of providing precise legal standards for the Welfare and regulatory functions of the State and partly through lack of experience with the new law.[36]

The picture of the modern Welfare State is bound up with the idea that it is the community itself which is directly concerned with the vital supplies and services. This is indicated in the theory of administrative law contrasting the two aspects of an administration the one of discharging services and the other of maintaining law and order. The first impression made by this theory is however a misleading or inadequate reflection of the actual conditions. The Welfare State obviously does not admit of division into sharply differentiated sectors of activity. Services for instance need not necessarily proceed directly from, or be delegated directly by, the State, but may be discharged through the imposition of compulsory duties on private relationships which saves the State from having to provide the expenditure involved.[37] For example tenants and lodgers are two groups of parties in receipt of favourable treatment at the expense of other groups; also in the war economy of States there have been numerous examples of the same thing, e.g., price control legislation. Anti-trust legislation in Switzerland is in the process of creating an actual, or even a legal, obligation to supply all customers at equal prices and on equal terms.[38] Professors Hans Merz and Max Kummer as advocates of a not easily explicable absolute right to competition, have very wisely refrained from extending it so as to create a corresponding obligation to take on bussiness relations with a competitor, as this would have the paradoxical effect of sacrificing the freedom of contract of the one

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[36] Z. Giacometti, *op. cit.*, p. 203f.
[37] K. Spiro, *ZBJV*, 88, p. 530f.; Dr. M. Petermann, *Die Grenzen der Mitwirkung der privaten Verbände bei der Durchführung öffentlicher Aufgaben.* p. 99f.
[38] E. Hirsch, *op. cit.*, p. 44f.

to the freedom of contract of the other. In the meanwhile however this same cuckoo's egg has been hatched out.[39]

In legislation regulating private business the liability to take over home products at fixed prices is widely applicable, and is backed by import restrictions. In relation to private business the State conducts its operations of social and economic control on lines very different from classic liberal practice, namely no longer by repressive prohibitions but by offers of supplies and services.[40] That once again involves fundamental changes in the nature of the legal position of the individual.

PART II

The demand for legality in administration contains basically the most salient principles of the Rule of Law.[41] The Law, which has to guarantee the legality of administrative proceedings, is founded now on mainly democratic, now on predominantly liberal conceptions.[42]

The idea of legality as such in many quarters provokes such enthusiasm that anyone who takes the trouble to look into the origin and present day effectiveness of the principle is at once exposed to the suspicion of not being a firm believer in the idea of the Rule of Law. But without going back to the foundations one will hardly master the contrasts, which can no longer be concealed when considering the attitude of the administration to legal norms. The theory and practice of public and administrative law will not much longer be able to put up with impunity with the great uncertainty which prevails in regard to a fundamental problem, namely the question as to the range of application of the principle of Legality. For some persons administration is not merely strict implementation of law but the conscious or unconscious application of legal rules.[43] For others the action of administrative officials only

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[39] H. Merz, *Schweizerische Juristenzeitung (hereafter SJZ)*, 1956, p. 322; M. Kummer, *Anwendungsbereich und Schutzgut der privatrechtlichen Rechtssätze gegen unlauteren und freiheitsbeschränkenden Wettbewerb* (Bern: Stämpfli & Cie., 1960), pp. 88 and 121, and in further detail *BGE* 86 II 373; H. Deschenaux, *Wirtschaft und Recht*, 1961, p. 161ff.

[40] K. Spiro, *op. cit.*, p. 530f.; M. Petermann, *op. cit.*, p. 99f.

[41] See on the point Z. Giacomtti, *op. cit.*, p. 226ff.; G. Roos, "Der Grundsatz der gesetzmässigen Verwaltung und seine Bedeutung für die Anwendung des Verwaltungsrechts," *Berner Festgabe* (Bern, 1955), p. 117ff.; Werner Kägi, "Zur Entwicklung des schweizerischen Rechtsstaates seit 1848, *ZSR*, 1912, p. 173ff.

[42] See on the point E. Höhn, *Gewohnheitsrecht und Verwaltungsrecht* (Bern: Stämpfli & Cie., 1960), p. 19ff.

[43] Z. Giacometti, *op. cit.*, pp. 46ff. and 53ff.

amounts in borderline-cases to application of the law.[44] In between these views is a wide field of experiment for every variant of opinion.[45]

For the purpose of our argument, and at the risk of arousing further hostility, we here propose to limit the field of enquiry by putting a perhaps somewhat pungent question.

Is it really due simply and solely to the failure of the legislative bodies that the Rule of Law principles are widely disregarded in the field of State intervention in social matters? Is the law-maker no longer able to base legislation on the principle of legality?

Is not also another explanation possible? Does the present day situation make it impossible to enact laws that achieve the standard attained under the circumstances of the *laissez-faire* society? That the early years of liberalism were favourable to law-making is as certain as the fact that irreversibly compelling forces have replaced the conditions of the *laissez-faire* period with new ones making State intervention necessary.

What now is the position in regard to the principle of legality in the new situation? The law is regarded as the regulator of social processes; this is the new characteristic of modern legislation.[46] These social processes, which the law undertakes to shape, now inevitably determine the form and substance of the law itself, the end necessarily conditioning the means. It is only if the law adapts itself to the object, which it sets itself to regulate, that the former can become a serviceable instrument. Law should not therefore be regarded as a figment of theory, the nature and structure of which can be defined by social science. The form and substance of the law are at no time definitely fixed.[47] There may indeed be social tasks, the regulation of which escapes legal draftmanship so that the efforts of the Legislature are all illusory. The liberal order was based on the hope that ideal condition would be created, if the State merely held out a protective hand to individuals engaged in legal transactions with one another, whereas under present circumstances the administration is expected to improve social processes, which are unsatisfactory. Hence the impression, unfortunately a correct one, that the present day Legislature, on account

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[44] Horst Ehmke, 'Ermessen' und 'unbestimmter Rechtsbegriff,' *Recht und Staat Geschichte und Gegenwart,* (Tübingen, 1960) No. 230/31, p. 40ff. and esp. 45ff.: see also K. Eichenberger, *Die richterliche Unabhängigkeit als staatsrechtliches Problem,* p. 197f.

[45] Helpful references in K. Eichenberger, *op. cit.,* p. 174ff.

[46] *BGE* 86 I 316; Z. Giacometti, *op. cit.,* p. 5ff.; Ch. F. Menger, *Verwaltungsarchiv,* 1961, p. 197.

[47] H. W. Kopp, *op. cit.,* p. 660f.

of the unhelpful nature of the new concepts created by it, is unable to grasp the functions of the Welfare State.[48]

But the Rule of Law as enjoyed by us, is built up on the efficient working of established law.

The legality postulate has been formulated by Fritz Kleiner in the striking phrase "administration put in motion within the limits of the law". The supremacy of the law idea, which has recently been brought into play with the use of democratic arguments in the effort to help the principle of legality to a more comprehensive sphere of operations beyond the scope of the liberal formula of intervention, is based on the conformity of the law applying function to the law creating function.[49] Whether the determination of particular controversies is essentially deductive reasoning from fixed principles or whether the execution of the law is not rather the genuine act of a State authority, may be left for the moment undecided. The matter does not end with the implementation of the law by the administration; any action of the administration should be capable of being tested in a court of law.[50] It is only through administrative justice, which is also a law applying process, that the demands of a free society under the Rule of Law are met. It is essential that legal remedies are placed at the disposal of such a society.[51] The principle of legality, as manifested in administrative justice, demands review of the acts of the administration.[52]

The totally or partially lacking justiciability of many Welfare State laws first drew the attention of theoretical lawyers to the peculiar character of this sort of legislation, and shortly afterwards gave rise to doubts as to the practicability of the traditional principle of legality. At first however attention was mainly confined to the symptoms of crisis apparent in the system, and no further enquiry was made into what was behind the unwelcome circumstances.

The content of the law, to be justiciable, must have certain characteristics. Judicial control is dependent on the Legislature having produced justiciable legal provisions. The formulation of

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[48] See also on the point K. Eichenberger, *op. cit.*, p. 176ff.

[49] F. Gygi, *op. cit., Wirtschaft und Recht,* 1956, p. 134f. and further references there; D. Jesch, "Unbestimmter Rechtsbegriff und Ermessen in rechtstheoretischer und verfassungsrechtlicher Sicht," *Archiv des öffentlichen Rechts,* Bd. 82, p. 240ff.; Z. Giacometti, *op. cit.*, p. 5ff.; *BGE* 86, 316.

[50] Walther Burckhardt notoriously took a different view as to this and purely from the standpoint of the application of the law his view was more logical. For him adjudication and administration are the two forms of application of the law, each of which guarantees correct execution of the law, for which reason administrative justice was at least an unnecessary institution.

[51] Z. Giacometti, *op. cit.*, p. 461; Fritz Kleiner, *Institutionen des Deutschen Verwaltungsrechts* (8th ed.; Tübingen, 1928), p. 247.

[52] E. R. Huber, *Wirtschaftsverwaltungsrecht* (2nd ed.; Tübingen, 1953-1954), II, p. 663; Z. Giacometti, *op. cit.*, pp. 217 and 274f.

the law must show a certain standard of draftmanship to be justiciable which does not mean that the application of the law is nothing else but a logical operation [53] choosing the legal norm fitting a particular controversy.[54] The legislator must at least have given form to the content of the legislation – which it will be for the judge to put into final shape – or must abdicate his function. Hans Huber gave expression to this connection between the quality of the law and judicial control, when he wrote: "A provision in the law does not become justiciable by being referred to the courts for clarification. It must be justiciable before it can be referred to the courts." [55]

What distinguishes the justiciable from non-justiciable provisions in the law is obviously to be sought in the nature of two State functions, legislating on the one hand and adjudicating on the other, the text of the law being the link between the two. In legislation relating to State intervention in social matters, the distinction appears to be that legislation by the law-making organs of the State is treated as policy making and adjudication as an activity not involving policy decisions.[56] In practice a demand for a review of legislation, and indeed new legislation should be transformed into intelligible and definable rules of conduct.[57] Where there is no such transformation, it means that the law contains but a policy objective. Justice is accordingly charged with a task of consummating a political decision. In this connection the description of the laws relating to State intervention in social matters as "economic policy legislation" illustrates accurately enough the inherent contradiction, from which these enactments suffer. Disguised as laws, they are really statements of economic policy, to which the Legislature has not given the true form, by which alone they would become justiciable.[58] Laws of this kind are not fit as such to be construed by a judge in the absence of clear guidance either as to their purpose or as to the means of achieving that purpose.[59] The Swiss Federal Court moreover when asked to give its advice in connection with economic policy Bills has fre-

[53] F. A. Freiherr von der Heydte, "Richterfunktion und Richtergesetz," *Gedächtnisschrift Jellinek,* p. 498.
[54] K. Eichenberger, *op. cit.,* pp. 178ff., 204ff.
[55] H. Huber, *op. cit.,* p. 552; K. Eichenberger, *op. cit.,* p. 179ff.
[56] H. Huber, *op. cit.,* p. 552f.
[57] F. A. Freiherr von der Heydte, *Gedächtnisschrift Jellinek,* p. 498f.; H. Huber, "Das Staatsrecht des Interventionismus," *ZSR,* 1951, p. 192ff.
[58] F. Gygi, *op. cit., Wirtschaft und Recht,* 1956, p. 134f.; K. Eichenberger, *op. cit.,* pp. 179ff and 184f.
[59] See on the point K. Eichenberger, *op. cit.,* pp. 93ff., 123ff., 129ff.

quently refused to accept jurisdiction though not always with success.[60]

This affords an opportunity to consider more closely the structure of economic policy legislation. We take for the purpose the actual text of certain provision of Laws or Bills as convenient examples.

Certain examples lead to the astonishing conclusion that the mandate given to the administration for intervention is aimed at results, which according to the conceptions of liberalism should have automatically occurred. Thus the Swiss Agricultural Law says:[61]

> Article 18. The provisions of this section (Articles 19 to 31) are to be construed, having regard to the condition as produced by nature in such a way that agricultural production supplies as far as possible the national demand, corresponds to the absorption capacity of the homemarket, and satisfies the export potentialities.

Other provisions are aimed at the establishment of a balanced relation between home production and import requirements and demand. Thus it is stipulated in one of the fundamental economic policy provisions of the Agricultural Law (Article 23, Section 1 and the first sentence of Section 2), which has had many imitations in export regulations:

> 1) In so far as the marketing of agricultural products at priced fixed in accordance with the principles of this law are threatened by imports, the Federal Council is empowered, having regard to other branches of industry,
> a) to limit by quantity the importation of similar products,
> b) to levy increased customs duties on imports in excess of a certain quantity,
> c) to require the importers to take over a reasonable proportion of similar products of home origin and of the quality customary in the trade, and to take the necessary steps and issue the necessary instructions for the purpose.
> 2) If in the marketing of home-grown agricultural products competition of an intolerable character is created by the import of non-similar products derogations from the principle of similarity laid down in paragraph 1 may be admitted temporarily.

In all these cases the administration is really being required to carry out economic planning. But the planning function has never

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[60] See W. Schaumann, *ZSR*, 1957, p. 456f.; *Bundesblatt* (hereafter BBL), 1950, III, p. 95f.; *Bericht der Expertenkommission zum Kartellgezetz*, p. 32f. Also the observation of F. A. Freiherr von der Heydte in the *Gedächtnisschrift Jellinek*, p. 504f. to the effect that the politicians think of applying an emergency brake by seeking an outlet in the shape of recourse to the court, when they cannot get what they want by way of legislation.

[61] Article 18 of the Swiss Agricultural Law of October 3, 1931.

been successfully incorporated in the institutions of the Rule of Law, although in the attempt to comprehend the theoretical aspects of it, attention was at first confined to the simpler economic plans excluding the more complicated varieties.[62] According to present day knowledge, planning is aimed at creating an ordered system, which co-ordinates a variety of measures and a large number of interests with a single uniform purpose. Emphasis is laid on the interdependence and the indissoluble interlacing of the single elements combined in such a system. Nothing can be given to one without being taken from another of the interested parties. That is a form of dependence, which was unknown to the liberal legislation. It suggests the further impression that legal protection should be invoked before planning is completed, since owing to the ominous interlacing of its constituent elements any subsequent modification is fraught with unsurmountable complications. The execution of the mandate for intervention involves therefore – from the legal point of view – planning or measures of general application (e.g., price-fixing), which can neither be assimilated to a generally applicable norm nor to a concrete administrative decision because it falls outside the liberal concept of law-making and law-applying.[63]

Another point in connection with economic planning is that neither persons nor things can be considered by themselves in isolation from the rest.

The essential fact is that in economic planning the observance of legality in the traditional sense depends on whether the Legislature is able to make an accurate forecast of the future development of this or that branch of the national economy and of the measures indicated in the case of such development, and the extent to which they should be applied. The Legislature must also be in a position to forecast the disturbing factors and the incidental influences to which any particular branch of the economy will be exposed, in order to be ready with adequate corrective action, inasmuch as it is desirable. It is indeed imperative, that the principle of legality should enable the administration and its subordinate officials to model the principles of their conduct on the foregoing finding of the Legislature.

It will be realised however in this connection that legality in economic control will be conditioned by the extent of scientific

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[62] M. Imboden and K. Obermayer, "Der Plan als verwaltungsrechtliches Institut," *VVDStRL* 18 (1960), p. 113ff.

[63] E. Forsthoff, *op. cit.*, p. 70; Z. Giacometti, *op cit.*, p. 343, noto 47.

perfection in formulating the provisions of the relevant legislation.[64] It will at the same time be remembered that the legislation of the *laissez-faire* society no less than the economic policy legislation, was meant to apply to the future;[65] however, the requirements as to the forecasting of future social and economic processes can be seen to be quite different in the two cases. The liberal legislation relied to a considerable extent on justice derived from sources other than law. State intervention affecting the social order, on the other hand, has only the materialistic and mechanical view of history, on which to base its pretentions to influence the future [66] or to shape the course of economic developments.[67] Herein are to be found the reasons why legislation regulating social and economic processes is lacking the traditional standard of legal norms. There is an all too serious absence in this legislation of formal equality of treatment, because the actual inequalities are increasingly treated with consideration in the effort to get rid of marked social contrasts.[68] This is the only explanation of the fact that generally applicable legal norms are giving way to regulations relating to special groups and situations. The impossibility of forecasting changes in the situation rules out any anticipatory legislation of a lasting character except at the cost of vague general clauses, which do not effectively bind the administration.[69]

Other economic policy measures have a direct influence on prices, e.g., price control and price stabilization, or are directed against unsocial price movements, e.g., prevention of speculation. Two instances may be quoted in this connection: Article 3 of the Swiss draft Federal Law on the control of agricultural rents and Article 45 of the Swiss General Agricultural Ordinance.

> Article 3. Rent assessment. The rent shall as a rule amount to 4½ % of the income value. A supplement not exceeding 20 per cent may be accorded, if the legitimate interests of the landlord or other weighty grounds justify the same, in which connection reasonable regard shall be had to the position of the tenant.
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> Article 45. General Agricultural Ordinance.
> 1) The measures provided for in this Ordinance shall be implemented

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[64] Cf. F. Gygi, *op. cit., Wirtschaft und Recht,* 1956, p. 164f.; Friedrich Lenz, "Politische Oekonomie in unserer Zeit," *Recht und Staat* No. 215/216, p. 17ff., comments: "The nature of the object requires for its comprehension and treatment neither an absolutely accurate and exactly calculable statement of the facts nor does it necessarily involve indefinite information."

[65] M. Imboden, *VVDStRL* 18 (1960), p. 116f., K. Obermayer, *VVDStRL* 13 (1955), p. 154.

[66] H. W. Kopp, *Inhalt und Form der Gesetze,* p. 578.

[67] K. Obermayer, *VVDStRL* 18 (1960), p. 148.

[68] H. W. Kopp, *op. cit.,* pp. 572ff. and 611.

[69] H. W. Kopp, *op. cit.,* pp. 375ff., 579ff. and 583ff.

in such a way that the producers can obtain prices for good quality agricultural products, which, taken over a number of successive years which number shall as a rule be three years, cover the average costs of production, provided that the agricultural enterprises have been acquired on normal terms and rationally managed.
2) Approximately the same economic results within the meaning of paragraph 1 shall be achieved in important branches of agricultural activity over an average of a number of years, if the producers, having regard to the natural conditions, take account of the needs of the national food supply and of the marketing possibilities within the meaning of Articles 18 and 19 of the law.

Meanwhile the "fair price" *(pretium justum)* is a quantity, which cannot be calculated by provision of law. This was proclaimed by Max Weber as an unquestionable truth; and a similar conclusion was reached by the Swiss Federal Price Formation Commission in connection with its Report on Cartels.[70] In particular, any reference to remuneration or price, such as might have developed in certain hypothetical market conditions (e.g., in cases of restrictions of competition) represent a purely arbitrary assessment, which does not allow of any sort of control.[71]

The price regulations accordingly bring prominently to light the problems in connection with the *justitia distributiva.* Where the modern legislation proceeds to deal with speculation, any attempt at definition of the expression is for the most part abandoned altogether.[72] But a Swiss Federal Council Commission of Experts has recently had occasion to deal with a definition of speculation in land and measures to combat it. The Experts agreed to the following definition:[73] "Purchase or sale of land or the rights conferring the property thereof, with a view to profit resulting from the increase between the acquisition and alienation of the land, or with a view to the profit-earning use of the same, provided always the profit is not merely the normal commercial difference or compensation for loss of purchasing power of the currency." In this respect

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[70] Max Weber, *Wirtschaft und Gesellschaft,* (Tübingen: Mohr, 1956), p. 384f.; M. U. Rapold, *Demokratie und Wirtschaftsordnung,* (Zürich: Polygraphischer Verlag A.G., 1959), p. 47, no. 102 and p. 150, no. 15; "Kartell und Wettbewerb in der Schweiz," *31. Veröffentlichung der Eidgenossischen Preisbildungs-Kommission* (hereafter *EPK)* p. 159.

[71] *Ibid.* In the same way any attempt to apportion quotas in accordance with what the market might have been with fictitious releases of imports or exports is open to discussion. One cannot well endorse the need for restriction of free market conditions, and at the same time be for making the restrictive measures depend on the rejected free market.

[72] Article 19, paragraph 1, letter a, *Bundesgesetz für die Erhaltung bäuerlichen Grundbesitzes;* Vorlagen zu einem Bundesbeschluss über die Genehmigungspflicht für die Übertragung von Boden an Personen im Ausland, Article 6, paragraph 2 *(BBL,* 1960, II, p. 1291).

[73] Hugo Sieber, "Die Diskussion über den Expertenbericht betreffend die Bekämpfung der Spekulation," *Wirtschaft und Recht,* 1960, p. 267ff.

reference may be had to a recent decision of the Swiss Supreme Court to the following effect: Whoever buys agricultural land which is cleared and ready for building, is speculating even if the Supreme Court on the strength of the evidence offered guarantees and accepts his assurance that he is not selling the houses, but intends to keep them.[74] This instance shows the range of discretion which the judge or the administration can exercise by relying on indefinite legal concepts and expressions. As to the prevention of speculation the experts were convinced that all possible measures against land speculation are of purely limited effect. The only really sovereign action they propose is the institution of a specific term of three years for the further alienation of land designated for building.[75] There is surprisingly no proposal for a right of veto enabling the administration to exclude the speculative acquisition of land which goes far to confirm the belief that there are no sufficiently precise legal standards to allow of a distinction between speculative and non-speculative intentions on the part of the purchaser.

For this reason it is impossible to prevent such purchases with the result that it is necessary to be content with prolonging the term for further alienation of the land.[76] In another passage of the Report we have an assertion that the facts of socially undesirable conduct, if they relate to intentions, of which their critics disapprove, are not capable of being the object of legal prohibition and sanction.[77]

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[74] *BGE,* 87 I 239 E. 4.

[75] All the other proposals of the Experts – with the exception of a suggestion put forward by a minority for a limit to the charge – contain bare recommendations of a significant character about voluntary and indirect resistance, addressed to the Authorities (far-sighted land policy) or to private parties not directly involved (cautious land policy of the banks).

[76] See also on the point *BGE,* 83 I 313.

[77] F. Gygi, *Interventionsrecht . . . , op. cit.,* p. 56f. The movement of land prices and the inclusion of agriculturally exploited ground in zones designated for building are proceeding in a violent and a persistent fashion in the near or more-distant neighbourhoods of cities and large centres, as also in holiday and health resorts. Therefore even the ancient and venerable peasant inheritance system is becoming more and more of a contributor to the process by which the heir in the land, favoured as he is on social grounds in respect of the value of the land which is accredited to him at the time the inheritance is divided, sees the cheap value of the property change within a few years to the hundred or more times higher value of the land designated for building, while the displaced co-heirs are the sufferers. Even if by way of exception a sale takes place within the 16 years as under Article 619 of the Civil Code the share of the co-heirs in the profit is limited to a share in the difference between the income value and the estimated commercial value at the time of changing hands, which commonly amounts to a supplement of about 30 % of the income value. Whose profit is more tainted with the stigma of unearned income? The speculative purchaser's (who has after all taken on certain risks) or the heir of the lands' (who had none of the risk of the first purchase price)?

In addition to the difficulties of giving an accurate definition of State intervention in social matters there are the obstacles in the way of obtaining cogent information and proof of the facts in the cases under review. Regulation of economic processes is frequently concerned with the entire position of whole branches of industry, and has, besides, to take into account other economic interests or even the total economic situation. Matter on such a scale is not as a rule within the compass of ordinary legal proceedings.[78]

Whenever a position of distress makes itself felt in part of the economy or in the professions, a cry goes up for protection in the form of what is known to economists as the preservation of the economic structure. The aims of such intervention are to shield the employers in the particular part of the economy concerned from the eliminating effects of competition, or to hold up processes of merger. If the causes of the difficulties encountered by part of the economy are not due to a temporary crisis but constitute a permanent threat, the intervention of the State has for the most part a delaying effect. State intervention aiming at the preservation of the economic structure is particularly popular in Switzerland. Defence, social and demographic considerations all have a hand in this policy. The Swiss Grain Law of 1959, for example, says (Articles 25 and 27):

> Article 25
> 1) In order to ensure the supply of baking flour to different parts of the country in time of war, the Federal Council may promote in accordance with the provisions of this article the appropriate distribution of soft wheat mills throughout the whole country.
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> 2) The small and medium-sized wheat mills are entitled according to the extent of their baking flour output to State subsidies, and, to determine the amount of the subsidy, the difference in operating costs according to the size of the business is to be taken into account. The subsidies will be met out of the proceeds of a tax with a uniform rate. The tax will be calculated according to the baking flour output of each mill, the rate not to exceed one franc per 100 kilograms. Soft wheat mills, whose baking flour output does not exceed 500 tons a year, may be exempted in whole or in part from the levy of this tax. Measures taken in accordance with this subsection are subject to the approval of the Federal Assembly.
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> Article 27
> The Confederation may support the efforts made for the maintenance of a sufficient number of commercial mills, and for the pro-

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For speculation is only one factor, and not even the primary factor, in the rise of land prices, as the Commission for the Study of the Combatting of Speculation in Land found in its Report of December 11, 1958, to the Federal Department of Justice and Police. See also H. Siebert in *Wirtschaft und Recht,* 1960, p. 269.

[78] F. Gygi, *Interventionsrecht . . . , op. cit.,* p. 92; E. Steindorf, *Zweckmässigkeit im Wettbewerbsrecht,* (Frankfurt a.M.: Institut für auslsändisches und internationales Wirtschaftsrecht, 1959), pp. 27ff. and 47ff.

> motion of their appropriate distribution throughout the country. To this end the administration may require commercial mills to make suitable restrictions in their grinding output for local producers.

Intervention aimed at the preservation of the existing structure was the object of the demands put forward in the case of legislation regulating the watch industry [79] and the agricultural land laws,[80] though the object does not appear so clear from the wording of this legislation as it does in the Grain Law. In both cases moreover a notable change of tendency set in quite recently. The policy designed at preserving the existing structure from increased competition was often felt in its later stages to be unmeaningful, a new trend turned increasingly to a new line of action. Prominence was given to the promotion of efficiency and ability to compete.[81] Thus we find the Report of the Federal Council on the state of Swiss agriculture, in clear opposition to the current land law, no longer advocating protection of the most irrationally conducted small enterprises, but emphasizing instead the promotion of medium-sized family concerns.[82] The recent Statute of the watch industry, instead of making the establishment of new firms dependent on the issue of licences introduces control of quality as a condition for the grant of export permits.[83]

From a theoretical point of view the essential element in the preservation of the existing economic structure is the State's intervention to screen off a particular part of the economy from new competitors as a result of which quotas and licences for the lawful pursuit of certain activities are never based on the general application of the principle of equality,[84] but constitute privileges granted by virtue of discretionary powers or vague legal concepts. These privileges differ in no respect from those which Article 4 of the Federal Constitution thought to eliminate. As only those laws, which had their origin in the concept of equality in the early liberal period, establish rules which are justiciable, the traditional principle of equality before the law must be said to have been necessarily abandoned.

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[79] *BGE,* 86 II 204, 84 I 258; F. Gygi, *op. cit., Wirtschaft und Recht,* 1956, pp. 118ff. and 128ff.; "Botschaft des Bundesrates zum Entwurf eines neuen Uhrenstatutes," *BBI,* II, p. 1489ff., esp. 1504f.

[80] *BGE,* 81 I 107, 80 I 95, 80 I 412.

[81] *BBL,* 1960, II, p. 1516f.; BBI, 1960, I, pp. 220ff. and 335ff.

[82] *BBL,* 1960, I, pp. 285f. and 335f.

[83] *BBL,* 1960, II, pp. 1529f. and 1545 ff. Arrangements for the control of quality of export products are already contained in the Agricultural Law, Article 24, paragraph 3.

[84] Article 4 B. V. (Federal Constitution) speaks in the spirit of the liberal view properly of privileges, which were incompatible with the liberal conception of legal equality.

Finally the characteristic features of liberal intervention may be illustrated [85] from the Swiss Anti-Trust Bill, Article 21, Sections 1 and 2, of which read as follows:

> 1) For the protection of the public interest the Federal Department of Public Economy, acting in pursuance of a Report of a special enquiry, may lodge an application with the Supreme Court within one year of the submission of the Report, if a cartel or similar organization eliminates or seriously affects competition in a branch of industry or profession in a manner incompatible with the general interest and especially to the detriment of consumers and clients respectively.
>
> 2) If the Supreme Court grants the application, it may order any necessary measures to be taken: in particular it may suspend or alter provisions of the cartel or similar organisation or may prohibit restrictive practices on the part of the same.

"Invasion by administrative law of the freedom of contract which is a fundamental feature of private law", so one may, with Ernst Hirsch describe the situation thereby created.[86] Here we have a typical example of interference with legal transactions between individuals which confirms the theoretical legal description, already cited, of the real position. Classic liberalism presupposed approximately equal strength of all contracting parties, so that there was an interchange of goods and services, in which each party could look after its own interests.[87] Experience has now shown that, instead of a balance of powers between them, marked difference and contrasts of superiors and inferiors are the rule and freedom of contract and competition have tended rather to strenghten than to lessen these inequalities.[88] Individual freedom of contract is distorted, where acts of a contracting party are collectively agreed upon or otherwise determined by a group.[89] The law reacts against the undermining of the hopes founded in the idea of freedom of contract in the manner described, usually through administrative law regulating private law relationships. Hence the legal theory refers to the invasion by administrative law of the freedom of contract by means of a State-controlled contract.[90] Such theory starts by pointing out that the State in its capacity as protector of the public interest as well as the weaker party to a contract has a voice in legal transactions.[91] That however is an appreciation only of the

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[85] Draft as published with the Federal Council Message of September 18, 1961. See also Article 11 of the said Message.
[86] E. Hirsch, *op. cit.*, p. 46f.
[87] *EPK*, pp. 27ff. and 112f.
[88] *EPK*, pp. 27ff. and 112f.
[89] E. Hirsch, *op. cit.*, p. 48; see also M. Kummer, *op. cit.*, p. 129ff.
[90] E. Hirsch, *op. cit.*, p. 46f.
[91] J. Darbellay, *op. cit.*, p. 122, and F. Gygi, *Interventionsrecht ..., op. cit.*, p. 75f.

superficial aspects of the phenomenon of the regulation of private law transaction by administrative law. It is of course a feature of the changed situation that, in contrast to the classic concept of public law, the new regulatory legislation is dealing less with the vertical relationship between the State and the citizen than with the horizontal relationship between citizen and citizen. In this connection also the distinction between public law vertical and private law horizontal legislation has been replaced by a mixture of the two.

A more fundamental contradiction is that which is inherent in the intermingling of public and private law as in the case of the Anti-Trust-Bill. According to this Bill, the judge cannot only suspend but also *alter* the agreements between the parties to a cartel, just as by the compulsory contract principle private parties can be compelled to conclude a contract or to determine the content of a contract.[92] The various forms of compulsion exercised by private business resorting to restrictive practices are thus countered by the legal order with compulsory measures of its own. In order to put an end to a boycott situation the legal order compels the parties to do business with one another, creating thereby the paradoxical institution of the imposed contract; alternatively the administration dictates what is to apply between the parties to a contract relying on binding rules and ignoring altogether the existing agreements between them.[93]

Intervention in favour of competition is the process of interaction, a process fraught with tension, of two conflicting elements of law, the public and the private respectively. Viewing it as a whole, one finds once more, a legislative development, which is diametrically opposed to the early liberal idea. The sphere of competition is no longer regarded as a matter for private initiative, in which the State is not concerned; rather opportunity for competition must be kept alive by legislative action. The protection of freedom of competition against social forces other than those of the State entails regulations of social processes by compulsory private and administrative law based on considerations of economic policy.[94] The economic policy background is shown, not only in indefinite legal concepts and provisions granting discretionary power, but also in the attribution to the judge of the decision as to the permissible extent of self-protection against the attacks of fellow-competitors and as to the priority of claims between public, group or

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[92] E. Hirsch, *op. cit.*, p. 45.
[93] So now already *BGE*, 86 II 373, 80 II 57. See also M. Kummer, *op. cit.*, p. 129f. and E. Hirsch, *op. cit.*, p. 43f.
[94] H. Merz, *op. cit.*, p. 14; M. Kummer, *op. cit.*, pp. 121f., 123 and 138ff.; H. Huber, *op. cit.*, p. 522ff.

individual, interests without providing him with any precise legal standards.[95]

Determination of the conflict arising between competition among private businesses requires a further knowledge of the business conditions and earning capacity of the particular branch of industry concerned;[96] it is thus once more exposed to the difficulties of grasping a general situation, to which it is almost impossible to set limits either of time or fact. In addition restrictive practices do not necessarily consist in the organized boycott of fellow-members of an industry declining to do business, or putting a stop to existing business relations with them,[97] but may take the form of unfavourable treatment in the matter of prices or terms in deliberate undercutting of prices.[98]

The judge is accordingly compelled to concern himself with questions of price formation and calculation, or – to put it more generally – to rule on the appropriateness of the performance of the parties. Soon we may see him actually required to decide whether a general lowering of prices is an unmixed blessing due to the beneficial effects of competion or a reprehensible machination of some would-be monopolist.[99] The judge is thus forced to undertake a task from which he was exempt under the Rule of Law in the *laissez-faire* society, because the Legislature could give him no binding rules for his guidance.[100]

Our wish to see the regulatory and welfare functions imposed on the administration defined by legal norms and concepts of a liberal type cannot be fulfilled. We should cease to indulge in the hope for a system of law based on early liberal ideas ever forming the substructure to the very different realities of the present day. Our purpose cannot be to mourn for a past which is gone and cannot be brought back, but to adapt and extend the Rule of Law to the social circumstances of our own time.

PART III

Can an administration, exercising wide discretionary powers in respect of the regulation of economic processes, meet the requirements of the Rule of Law? Or is it a contradiction in terms and

[95] See on the point M. Kummer, *op. cit.*, pp. 104, 110, 119ff., 123f., 126f., 137f., 138f.; *EPK* p. 158f.
[96] *BGE*, 85 Ii 497f.
[97] *BGE*, 82 II 297f.
[98] Cf. the reference of *EPK* to the fact that price undercutting cannot be met by a policy of competition, because the reduction of the price is one of the characteristic features of the competition (*EPK*, p. 166).
[99] *EPK*, p. 166f.
[100] W. Burckhardt, *Die Organisation der Rechtsgemeinschaft*, p. 23f.

a legal heresy even to let the question be raised? Yet every principle of social science ought to allow of doubts and sceptical questions and, if it cannot face them, lays itself open to the suspicion of having its own week points to hide. It is a fundamental feature of the social sciences that circumstances may change, and that the correctness of social scientific doctrines must always be open to revision in the light of changing conditions.[101]

If one is content that every administrative activity is ultimately attributable somehow or somewhere to some legal provision at least in the last analysis – so that schoolteachers, road sweepers and postmen are all, perhaps without knowing it, performing law-applying functions [102] – one may accept that administrative activities meet the requirements of the Rule of Law. But how on these assumptions the law can be regarded as guaranteeing an exemplary administration is difficult to see. It is not the fact that administration acts are remotely related to some legal provisions which makes the legality principle an important feature of the Rule of Law, but the inclusion in the law of clear and unmistakeable provisions as to what the duties of the administration are, and how and within what limits it is to go about them. That it had been given by law the mere authority to act [103] might suffice for the purposes of intervention by the liberal State but it is by no means sufficient for the administrative activity in the regulatory and welfare areas. It is here that the law should make provisions so drafted as to make administrative activity in unforeseeable situations predictable and define and adapt the rights of the particular individual to his need. For a State respecting the Rule of Law is not content with legality alone, but the correct implementation of legislation is secured by additional institutions, amongst which the judicial review of administration is the most effective.[104]

The first demand to be made in this last connection is for *legal control* of the administration; and this can only be effective if the legality principle has first committed the administration in judicially controllable form to the observance of fixed rules of conduct.[105] The day to day operation of the law – whether in accordance with, or in opposition to, its intention – is in the hands of the administration; and judicial review is needed to establish a

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[101] M. U. Rapold, *Demokratie und Wirtschaftsordnung*, p. 8ff., which contains a number of references to observations of Max Weber.
[102] See Z. Giacometti, *op. cit.*, p. 46f.
[103] F. Gygi, *Interventionsrecht . . . , op. cit.*, p. 43f.
[104] Z. Giacometti, *op. cit.*, pp. 21, 274f.
[105] Max Imboden, *Gestalt und Zukunft des schweizerischen Rechtsstaates*, p. 14, says that, where laws lay down no rules, the formal protection of the law is to a considerable extent inoperative.

Rule of Law regime in practice.[106] At any rate the concept of "government of laws and not of men" is based on the view that administration is a law-applying function.[107] According to this view, the law-applying authorities control the implementation of the law and the administration would thus be – in the absence of controlling institutions of any kind, judicial or other – more powerful than the law.[108] The legality principle in this case would be a highly problematical proposition.

General abstract concepts of a legal or ethical nature can be construed in a particular case in several ways. Such construction is already suspect by Rule of Law standards, at any rate where the implementation of a law points to a law-creating function capable of judicial review. Recent regulatory laws even go a step further than the already widely criticized change in emphasis from Statute Law to administrative regulations, which reveal only the practical scope of the laws. Under the Swiss Cheese Market Ordinance (Article 12 e, paragraph 3), and under some other laws, the administration has not to make rules and regulations thereby creating binding legal provisions; it has only to lay down *directives*. These state clearly that neither is the administration bound nor is the citizen given rights under these directives. They serve only as a primer for guidance in dealing with situations, of which it is not possible to make a reliable forecast. The practical value of the legality principle suffers hereby inasmuch as the Legislature departs, whether under pressure or from its own weakness, from the sound practice of the *"règle précise"*,[109] and is not far from complete eclipse, when the legal provisions on which administrative action is based merely establish jurisdiction.

But such is the inevitable accompaniment of regulatory and welfare administration. It is less susceptible of judicial control than any other sort of administrative action, not only because laws of this kind owing to the way in which they are drafted, are less suited to this form of control. There are other reasons too which make it difficult for the judge to apply laws aimed at the promotion of justice and fair competition. Intervention is performed in order to bring about different conditions in the general situation of a branch of industry or in the social situation as a whole. It is inevitably confronted with the fact – so often pointed out – that the current social situation with its ill-defined and continually changing conditions is not susceptible of clarification, as a situation of past history would be through documentary or other evidence. We have also seen

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[106] E. Becker, "Verwaltungsrechtssprechung," *VVDStRL* 14 (1956), p. 110.
[107] Horst Ehmke, *op. cit.*, p. 44ff.
[108] K. Eichenberger, *op. cit.*, p. 109.
[109] See on this H. Huber, "Das Staatsrechts des Interventionismus," *ZSR*, 1951, p. 186 with reference to Michel Debré.

in the case of planning and similar phenomena that owing to the interrelation between planning projects review by an administrative tribunal can not bring about any redress. When it comes to deciding whether the home production of agricultural products is sufficient to cover the home demand, or whether importation must be permitted, it is at most an academic question, or no longer a question of current interest, whether the courts will find months or years later – if at all – that the amount of imports actually allowed at the time was too small or too big.[110] It will further be clear from this example that the provisions concerning the State's liability in tort which is a subsidiary guarantee under the Rule of Law cannot in most cases be applied. Every intervention will inevitably mean a privileged position for one group involving prejudice to another.[111] Wherever the State seeks in discharge of its regulatory functions to alter the mutual relations of supply and demand, in order to improve the position of those sectors of the economy or to minimize economic inequalities in the effort to lessen social contrasts, this prejudice must continue to exist. But, even where the intervention is shown by subsequent enquiry to have been at fault owing to defective forecasting of the situation in other branches of the economy and the necessity of taking immediate decision, there can as a rule be no question of State liability in tort. Regulation of economic processes would otherwise be an intolerable burden on the State and its finances, since the parties would be able to benefit from the intervention where it was in their favour, and shift the bad effects of defective forecasting onto the community.[112] The conclusion, which inevitably suggests itself in the matter of the inadequacy of the legislation and of the administration by Rule of Law standards is that the adaption of Rule of Law principles to the functions of the regulatory and Welfare State has still to be developed. Attention will have in future to be focussed on those institutions, which serve to some extent to compensate and make up for the lack of precise legal standards and for the absence of timely and effective protection by judicial review.

Practice has evolved appropriate remedies of a logical and very serviceable character. It has done so without either support or guidance from legal theory.

The outcome of these developments is not so much new legal concepts, new rights and duties, as new instruments for the work

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110 F. Gygi, *Interventionsrecht . . . , op cit.*, p. 90ff.

111 F. Gygi, *ibid.*, p. 64ff.

112 Cf. for instance the Wine Law, Article 20 in the text of June 6, 1958. On the problems of State liability in connection with interventions see Claus-Dieter Ehlermann, *Wirtschaftslenkung und Entschädigung*, pp. 42ff. and 53ff. who advocates the Rule of Law view, but exaggerates somewhat the claim for compensation.

of mitigating and equalizing social contrasts and tensions, or for eliminating social discords, in a world whose new problem cannot be mastered by traditional methods of law-creating and law-applying.

Many and various are the arrangements to enable the authorities to have a reliable knowledge of the market such as statistical data, market analyses and the study of price rings and production quotas. This official knowledge – in no way based on the belief in mechanical and predetermined economic processes – is not acquired only by way of forms: recourse is had more and more for these purposes to experts in production and consumer matters. Consultative bodies of these experts meet periodically to help the authorities to a general survey of the situation, on which they base their current decisions and issue their official recommendations, warnings and instructions to producers and consumers alike.

A group may be advised to adopt a different form of production. Harvest estimates are made known to prospective purchasers, in order that the volume of imports may be adjusted accordingly.

Price directives and plans of agricultural production are worked out, and their observance or non-observance is associated with rewards or penalties, e.g., with restriction of imports, if the home production is not taken up at proper prices (Article 5 of the Beasts for Slaughter Ordinance of Switzerland dated December 30, 1953) or with the lapse of guarantees of purchases by the State. The excess of home-grown wines is offered to importers for voluntary purchases in fixed minimum quantities and within fixed time-limits. Failure to act entails compulsory purchase by the importers. Professional associations and organizations of specific interests are brought into play in connection with these efforts of State economic policy. Private enterprise is not as reluctant as commonly supposed to give consideration to the interest of the national economy. This collaboration between the authorities and private associations results neither in a liberal economy nor in a State-run economy. At any rate it is something very remote from the picture of the administration limited to its law-applying function.

Mediation by the administration, already a feature of the existing labour legislation, is becoming more frequent in the new field of anti-trust legislation (e.g., in the Watch Industry Statute and the Anti-Trust-Bill) and rent control. The idea underlying these trends is for the parties to conclude agreements with one another. As however no rules or models can be adduced in regard to the content of the agreements, the introduction of an independent

expert third party into the negotiations is well fitted to bring the parties together on a fair basis. The decision of the judge is preempted by the action of the mediator, and it is only when this fails to produce a settlement that recourse is had to State authority. Simple recommendations are often more fruitful of results than measures of compulsion.

Article 51 of the Swiss Wine Law serves as a model example:

> In the interest of the marketing of the products on the vineyard the Federal Council, or on its instructions the Federal Department of Public Economy, may promote agreements between the interested organizations concerning the prices valid for the producers, and for the wholesale and the retail trades, whereby the legitimate interests of the consumers shall be taken into account.

Similarly in the case of the anti-trust Commission an independent export body is to be set up, which, on the basis of enquiries, can make recommendations to competitors as to how they can reconcile their interests with the aims of the law, before the judge is requested to intervene.

A word about the special Appeal Commissions. They are not, or not in all cases, a mere whim or symbol of parliamentary mistrust of the courts, or again a pretext for additional daily allowances. The Federal Court, when invited to comment on regulatory draft legislation has often on its own initiative taken a negative attitude in regard to the powers of jurisdiction which this draft legislation proposed confering on it. The court knew no doubt, or suspected, that such legislation is up to a point open to be construed in a traditional way and requires more often than not an economic policy decision from the judge. The special Appeal Commissions are an attempt to deal with this mixed task of partly legal and partly economic policy decision-making by means of a body of mixed composition, part jurists and part businessmen, with power to take decisions, which (though taken in the course of legal proceedings and in accordance with legal directives) are at any rate extremely like acts of an economic policy-making character. It is hoped in this way to evolve something, which is a combination of judicial decision and expert opinion.

The direct confrontation of the economic antagonists in proceedings conducted by representatives of the authorities of neutrals is a new procedural development of modern regulatory administrative law.

In the Beasts for Slaughter Ordinance of Switzerland producers, importers, retail traders and consumers may engage in direct discussions with a view to advise the competent authorities on the fixing of the import quotas and the scheduled dates.

Objections may be raised against such loose procedures.

There may be good grounds for the belief that a Rule of Law concept based on broad and substantive principles of law would be preferable to a merely procedural concept. But it is as well at the same time to bear in mind what conflicting solution of social problems in legal theory and practice could and did take place under cover of the fundamental principle of equality. There is little difference between this broad scope of the equality principle, and the concept of equity or the doctrine of equal balancing of interests. This in any case is the view of those who believe that it is a function of the law, to indicate an intelligible line to be followed in concrete applications of the law, within which a certain margin may indeed be left for variations but in such a way that the range of variations is always clearly demarcated. Why moreover should not the approved legal principles of reasonable development and human dignity serve as guiding directives of the new methods and proceedings described? The Rule of Law on these lines is however – as Mallmann has put it – a *desideratum* rather than a fact.[113] The proposal in the last draft of the Anti-Trust Bill to substitute for the Restrictive Practices Court the Federal Court may well suggest the final conclusion that a reverse trend is in the making. The power of judicial review by an ordinary court would thus be extended to regulatory legislation, a field in which the narrow confines of judicial review become particularly apparent.

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[113] *VVDStRL*, Vol. 19 (1961) p. 193.

THE LAWYER IN COMMUNIST CHINA*

The institution of legal counsel is still a novelty in the Chinese People's Republic. It is as much in a fluid state as are some other components of the legal system of Communist China. A study of the Chinese lawyer at this point, however, will shed some light on the nature of the "people's justice" and the direction in which it is evolving.

In the pages that follow, an attempt will be made to examine the question of the Chinese lawyer along two major lines. One is the development of the Communist attitude toward the bar in terms of proclaimed policy as well as practice. The other is the organization and activity of the Chinese lawyers and the problems that they are confronted with in performing their duties.

Absence of Lawyers in the Early Years of the Communist Rule

Even prior to the advent of the Communist regime, the Chinese have never held the bar in the same esteem as the people in the West. The underlying reason would seem to be the combination of their time-honored tradition of subordinating law to morality with the unethical practices of some lawyers in China.[1] While paying lip service to the right of defense for the accused, the Chinese Communists in the past frequently maintained such a hostile and suspicious attitude toward the legal profession that there was no place for the lawyer in the new order they were building. This can be traced back to the early days of the Communist revolutionary movement.

Dominated by the Communists, the First Peasant Congress of Hunan Province adopted a number of resolutions in late 1926. In a resolution on the judicial problem, the Congress attacked the complexity of the legal procedure and the treachery of the *"sung-kur"* (pettifoggers) in the old system. Among other things, it resolved

* The research on which this paper is based was made possible by a grant from the Social Science Research Council.

[1] For a discussion of the Chinese concept of law, see Jean Escarra, *Le Droit Chinois,* Peking, 1936, pp. 3–84. For comments on Chinese Lawyers, see Ch'ien Tuan-sheng, *The Government and Politics of China,* Cambridge, 1950, pp. 260–261.

to place the *"sung-kun"* under a strict ban and to grant the Peasant Associations the right to represent their members in litigation.[2]

In the Provisional Regulations on the Organization of Courts and Court Procedures, promulgated in 1932 by the Central Executive Committee of the Chinese Soviet Republic in Kiangsi, it was stipulated that "the accused may be represented at the trial by someone to defend his interest." [3] According to a Russian lawyer, justice in the Chinese Soviet area took the form of mass trials, which were conducted by the revolutionary courts or tribunals and joined by thousands of workers, peasants, and Red Army soldiers who came forward with charges against the criminals. The accused were "free" to speak and argue against the accusations, and anyone present could also act to defend the accused.[4] But there is little evidence that any meaningful defense actually took place. Still less can we find any instance in which lawyers had a role to play.

During the period of the National United Front against Japan, the Communist regime in Yenan seemed to be more tolerant of the idea of defense counsel. As described by a leading Communist Chinese jurist, the people's courts in the Shensi-Kansu-Ninghsia Border Region permitted parties in litigation to ask relatives or persons with legal knowledge to serve as defense counsel or legal representatives. Furthermore, people's organizations were allowed to designate certain people as legal counsel or representatives in suits involving their members.[5] Despite all this, it is said the situation then did not warrant the instituting of a system of lawyers in the Border Region.[6]

In February 1949, shortly before its complete victory over the Kuomintang, the Central Committee of the Chinese Communist Party issued a directive abolishing the six codes of law of the Nationalists and prescribing the principle of the judicial system for the "liberated" areas.[7] On the eve of the establishment of the new People's Republic of China in the fall of the same year, the Common Program of the Chinese People's Political Consultative Con-

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[2] *Ti-i-tz'u kuo-nei ko-ming chan-cheng shih-ch'i ti mung-min yün-tung* (The peasant movement in the period of the first revolutionary civil war), Peking, 1953, pp. 355–356.

[3] Ch'u Huai-chih & Chang Min-fu, "Toward an Understanding of the System of Defense in Criminal Proceedings in Our Country," *Hsin chien-she* (New Construction), Peking, No. 5, 1956, p. 14.

[4] L. M. Gudoshnikov, *Legal Organs of the People's Republic of China,* New York, 1959 (JPRS: 1698-N), p. 9.

[5] Ma Hsi-wu, "The work of the People's Judiciary in the Shensi-Kansu-Ninghisa Border Region in the Stage of the New Democratic Revolution," *Cheng-fa yen-chiu* (Political and Legal Research), Peking, No. 1, 1955, p. 10.

[6] Masao Fukushima, Naokichi Ubukata, and Ryōichi Hasegawa, *Chūgoku no saiban* (Justice of China), Tokyo, 1957, p. 167.

[7] Tung Pi-wu, "The Legal System of China," *New China News Agency,* Peking, Sept. 20, 1956.

ference again declared the abolition of all Nationalist laws and courts: "All laws, decrees and judicial systems of the Kuomintang reactionary government oppressing the people are abolished and laws and decrees protecting the people shall be enacted and the people's judicial system shall be set up." (Article 17) [8]

Along with other institutions of the Kuomintang regime, the bar was swept away by this drastic change of the country's legal structure. Law offices were closed and private lawyers were prohibited from practicing. Reports ranging from Harbin to Shanghai all stressed the accessibility of the people's courts to the common man, the simplicity of the new judicial procedure, and the disappearance of old-style lawyers in litigation.[9] In Communist minds, these lawyers only served the interest of the privileged few and were too wedded to the old forms of law and procedures to be fitted to act as people's attorneys.[10]

On the other hand, the Communist regime continued to recognize officially the defendant's right to defense in a lawsuit. Reference also was made to the preparation of the introduction of a system of people's lawyers. All seemed to be a part of the regime's efforts to stabilize its rule and to institute a new legal order in place of the one abolished. For instance, Article 12 of the "Provisional Regulations of the Shanghai People's Court Governing the Disposal of Civil and Criminal Cases" (promulgated on August 11, 1949) provided that the accused in a criminal case might ask either the presiding judge to assign a public defender or the people's organization concerned to send a representative as defense counsel. In a civil action, the litigants might, with the permission of the presiding judge, designate their closest relatives as agents to appear in court.[11] A similar provision on the right of defense was contained in the "Organic Regulations of People's Tribunals" promulgated on July 20, 1950. An *ad hoc* institution, the people's tribunals (jen-min fa-t'ing) were instruments used to enforce agrarian reform and later the "3-anti" and "5-anti" campaigns; but Article 6 of their Organic Regulations read: "When a *hsien* (municipal) people's tribunal and its branches conduct a trial, they shall guarantee the right of the ac-

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[8] For the English Translation of the Common Program by *NCNA,* see *Ch'na Digest,* Hong Kong, October 5, 1949, pp. 3–4.

[9] *China Weekly Review,* Shanghai, August 20, 1949, p. 218; January 14, 1950, p. 113; *China Monthly Review,* Shanghai, November 1950, pp. 78–79. The Ministry of Justice further ordered in 1950 the suppression of the activity op private lawyers. Lin Ch'eng, "Strictly prohibit the illegal activities of the underground lawyers," *Jen-min jih-pao* (People's Daily), Peking, Sept. 14, 1952.

[10] Shih Liang, "The Judicial System in New China," *People's China,* Peking, No. 12, 1957, p. 16.

[11] For the text of these Regulations see *Shang-hai chieh-fang i-nien* (One year after Shanghai's liberation), Shanghai, 1950, Part III, pp. 13–16.

cused to defend himself and to have defense counsel. The counsel must be approved by the Tribunal before he can argue the case." [12]

Although no stipulation concerning the right of defense was included in the "Provisional Organic Regulations of the People's Courts of the Chinese People's Republic" (promulgated on September 3, 1951), the Acting Chairman of the Law Codification Committee made the following statement in his explanatory report on the people's courts (jen-min fa-yüan): "In an open trial, the litigants and their approved counsel should be given full rights of voice and defense." [13] Reviewing the judicial work between 1949 and 1951, one Communist writer also stated that progress had been made in the direction of introducing people's attorneys to China. "To manifest the democratic spirit of our judicial work and to protect the right of defense of the accused as well as the legitimate interest of the civil litigants," said Chen Chi-yü, "we have instituted public defenders to perform for the accused or one of the litigant parties such tasks as gathering evidence, examining the circumstances of the case, studying problems, and taking part in the trial in order that experience can be accumulated to establish a new system of people's lawyers." [14]

The above regulations and pronouncements notwithstanding, there was no evidence that the defendant ever exercised the right of defense in the first few years of the People's Republic. This conspicuous discrepancy between the regime's proclaimed policy and its actual practice reflected the fact that the pull toward arbitrary and repressive methods of control was much stronger than the attempt to establish a more orderly rule at a time of intensive struggles against landlords, counterrevolutionaries, foreign imperialists, and the others. Contrary to what was legally guaranteed, the common practice was for the accused to yield and to confess his guilt. Neither in the trials reported by Communist publications, nor in the testimonies given by Chinese as well as foreign witnesses, was there a single case in the pre-constitutional period where the accused was defended by himself of by a defense attorney.[15]

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[12] The text of these Regulations is in *Jen-min shou-ts'e,1951* (The People's Handbook, 1951), Shanghai, 1951, section 6, pp. 46–48.

[13] Hsu Te-heng, "Explanatory Report on 'Provisional Organic Regulations of the People's Courts of the Chinese People's Republic'," *Jen-min jih-pao,* Sept. 5, 1951.

[14] "People's Judicial Reconstruction in the Past Two Years," *Hsin Chung-hua pan-yüeh-k'an* (The New China Fortnightly), Shanghai, No. 19, Vol. 14, Oct. 1, 1951, p. 10.

[15] Consult Henry Wei, *Courts and Police in Communist China to 1952,* Lackland Air Force Base, 1955, chaps. III-V, and Commission Internationale Contre Le Regime Concentrationnaire, *White Book on Forced Labour and Concentration Camps in the People's Republic of China,* Paris, 1957, Vol. II, pp. 44–48.

Speaking from personal experience, a former Dean of the Faculty of Law at the University "l'Aurore" of Shanghai pointed out that in the Communist court procedure

> not only is the accused presumed guilty, but he is forbidden to prove the contrary: to try, is to revolt... In the presence of such a conception of procedure, can we be astonished at the complete suppression of lawyers? The conception is rooted in the logic of the system, and the services of a lawyer before such tribunals becomes not only superfluous but absolutely unthinkable. *Defense amounts to revolt.* Who would dare, even as a lawyer appointed by law, to oppose the "government" in the defense of an accused. The words of the lawyer would die in his throat and he would feel equally as guilty as his client. The absence of defense counsel in the criminal process is not, therefore, accidental, but, on the contrary, imperatively solicited by the fundamental conceptions of communist penal law.[16]

Purge of "Underground Lawyers" during the Judicial Reform

Former private lawyers in China, already banned from practice of law, received a further blow when the Communist regime launched a drive against their "illegal, underground activities" during the Judicial Reform Movement of 1952–1953. It should be noted that although the regime abolished the whole legal system of the Kuomintang from the outset, it was forced to retain many of the old judicial personnel because of the shortage of cadres trained in law. Having had only a brief experience of Communist indoctrination, these former Kuomintang personnel understandably still kept much of their traditional judicial concepts and practices. The existence of such "serious political and organizational defects" in the people's courts was revealed during the Three-Anti and Five-Anti Movements. In a report to the State Council on August 13, 1952, Miss Shih Liang, Minister of Justice, pointed out: "There are twenty-eight thousand judicial cadres in the country, of whom six thousand, or approximately 22 per cent, had worked under the old regime. In large and medium-sized cities particularly, these people make up the majority of judges in the people's courts." [17] Of these old judicial personnel, it was estimated, sixty to eighty per cent were anti-Party and depraved elements, many having been members of the Kuomintang and its secret police. Their corrupting influence was found to be considerable even on the old Party cadres.[18]

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[16] André Bonnichon, *Law in Communist China,* The Hague, 1956, pp. 8–11.
[17] Shih Liang, "Report Concerning the Thorough Reform and Reorganization of the People's Courts at All Levels," *Ch'ang-chiang jih-pao* (Yantze Daily), Hankow, August 24, 1952.
[18] *Ibid.* See also T'ao Hsi-chin, "On the Judicial Reform," *Cheng-fa yen-chiu,* No. 5, 1957, p. 12.

Against such a background, the Chinese Communist government decided to launch a nation-wide Judicial Reform Movement, which lasted from August 1952 to April 1953.[19] The objective of this Movement was to combat the old legal concepts, to purge the old judicial personnel, and to liquidate the "underground lawyers". All the familiar procedures of "criticism and self-criticism" and "accusation and redress meetings" were brought into play in this thought-remoulding and guilt-exposing campaign. Just how many were actually punished is a matter of conjecture, but the official admission was that only twenty per cent of the judicial personnel who had worked under the old regime were retained in their posts after the Reform.[20] The significance of this Movement as a means of consolidating the Communist rule and removing obstacles to the new order is best illustrated by the following statement of Miss Shih Liang:

> Through this movement, not only a number of depraved elements given to evil habits and violating laws have been purged and elite worker, peasant and women elements emerging from the various mass movements have been selected to consolidate the judicial organs of all levels, all judicial cadres have been educated to further recognize the harmful nature of the old judicial viewpoint and style of work of the reactionary Kuomintang and to begin to establish the national and judicial outlook based on Marxism-Leninism and Mao Tse-tung teachings. Their viewpoint for whole-hearted service to the people has been strengthened and the demarcation line between the new and the old judicial concepts drawn. At the same time, through the movement, the rule of law as the spirit of the people's tribunals has been brought into full play and the new style of work and system of making the people take part in judicial work has been introduced. All this has laid a solid foundation for the consolidation of the people's democratic dictatorship and the people's judicial work of New China.[21]

One of the primary targets of the Judicial Reform was *"hei lü-shih"* (underground lawyers). Since the "liberation" members of the bar had been compelled to give up their law practice. Many of them had set up offices to handle accounting, to do translation, or to draw up documents for people in urban areas. Others had become trustees, managers, secretaries, or clerks in privately-owned enterprises. However, during the Judicial Reform the Communists charged that former lawyers had been using their new positions as a screen to carry on "underground" activities to the injury of the

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[19] The public had been prepared for the Movement since June 1952. Two opposing interpretations of the Judicial Reform are represented by T'ao Hsi-chin, pp. 12–16, and Ch'en Shu-fang, *Chung-kung ti ssu-fa kai-ko* (The Judicial Reform of the Chinese Communists), Hong Kong, 1953.

[20] *Kuang-ming jih-pao* (Kuang-ming Daily), Peking, August 31, 1957.

[21] "Achievements in the People's Judicial Work in the Past Three Years," *New China News Agency,* Sept. 23, 1952.

people and the state. Through ties with relatives, friends, old schoolmates, and former colleagues, the *"hei lü-shih"* and the *"sung-kun"* (pettifoggers) were said to have organized themselves in groups and to have worked closely with the old judicial officials in a conspiracy against New China's legal system. Their illegal acts, according to official reports, included bribery and corruption, fraud and blackmail, perversion of justice, monopoly of lawsuits, incitement to strifes and disputes, and confounding of right with wrong.[22]

As a part of the Reform campaign, the Communist press played up the stories of the "anti-people" activities of the "underground lawyers". For instance, in a case reported in Wuhsi, Kiangsu, a lawyer (father) and a judge (son) were accused of having teamed together to commit between 1949 and 1951 over one hundred criminal acts, ranging from selling confidential information to harbouring counterrevolutionaries.[23] In another case, an "underground lawyer" in Canton was found to have extorted from a litigant in one lawsuit alone some 120 million yuan.[24] "The underground lawyers," commented a writer in the *People's Daily,* "are the loyal 'body-guards' of the criminal elements and, at the same time, the accomplices of the corrupt personnel in the people's courts. They have treated the working people as an object of exploitation and government property as a target for attack. Many criminals, even the counterrevolutionary elements, have escaped legal punishment with the help of the underground lawyers, who are indeed the destroyers of the social order and one of the obstacles to our national construction. People's governments at all levels must, in line with the current judicial reform, be stringent in prohibiting the illegal activities of the underground lawyers." [25]

To enforce its policy of purging the "underground lawyers", the Communist regime first required all former members of the bar to register with the people's courts and to make their "confessions". It promised leniency to those who would "voluntarily confess, sincerely repent, and actively expose the other underground lawyers as well as the depraved elements in the courts." In the meantime it also threatened those who would dare to resist with severe punishment. After the lawyers had registered and confessed their errors, the Communists proceeded to mobilize the masses to attack them at accusation and struggle meetings, where they were punished according to the seriousness of their "crimes".[26]

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[22] Lin Ch'eng, *Jen-min jih-pao,* September 14, 1952; *Ch'ang-chiang jih-pao,* Sept. 9, 1952.
[23] *Chieh-fang jih-pao* (Liberation Daily), Shanghai, Sept. 13, 1952.
[24] *Ch'ang-chiang jih-pao,* Sept. 9, 1952
[25] Lin Ch'eng, *Jen-min jih-pao,* Sept. 14, 1952.
[26] Ch'en Shu-fang, pp. 47–48. See also Chow Ching-wen, *Ten Years of Storm,* New York, 1960, p. 141.

There is no way for us to determine the accurate number of the lawyers purged in the Judicial Reform. But the intensity of the purge was clearly indicated by some official reports. Just within the first month of the campaign, seven hundred and eighty "underground lawyers" had registered and "confessed" in Shanghai, and eighty-six in Canton.[27]

Development of the People's Lawyer System

The Constitution of the People's Republic of China, adopted in September 1954, marked the beginning of a more orderly development in the legal life of the country. China had passed the initial phase of turmoil and repression and now entered into a new stage of political stability and economic construction. The right to defense was among those democratic legal guarantees clearly defined by the Constitution and the Organic Law of the People's Courts (adopted in the same month). Article 76 of the Constitution states: "The accused has the right to defense." To elaborate on this point, Article 7 of the Organic Law of the People's Courts provides: "The accused, besides personally defending his case, may designate a lawyer to defend it, or have it defended by a citizen recommended by a people's organization or approved by the people's courts, or defended by a near relative or guardian. The people's court may also, when it deems it necessary, appoint a counsel for the accused." [28]

The first indication that new lawyers were already at work in Communist China was the official announcement on November 23, 1954 of the judgment of the Military Tribunal of the Supreme People's Court on thirteen American nationals involved in two alleged espionage cases. In the announcement two professors of law of the China People's University were listed as defense attorneys for the accused.[29] At the beginning of the year 1955, thirty-three people's courts were reportedly experimenting with the introduction of lawyers.[30] On July 29, 1955, in a speech before the National People's Congress, Miss Shih Liang said: "We are enforcing the system of people's lawyers on trial in Peking, Shanghai, Wuhan and other major and middle cities and will gradually introduce the system as soon as we have acquired the necessary experience." [31]

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[27] *Jen-min jih-pao*, Sept. 14, 1952.
[28] Texts of the Constitution and the Organic Law are in *Documents of the First Session of the First National Congress of the People's Congress of the People's Republic of China*, Peking, 1955.
[29] *Jen-min jih-pao*, Nov. 24, 1954.
[30] *Kuang-ming jih-pao*, March 24, 1955.
[31] American Consulate General, Hong Kong, *Current Background*, No. 349, August 25, 1955.

Early in 1956, a meeting was held in Peking to examine the experience already gained in the work of the lawyers and to discuss the drafts of the "Regulations for Lawyers" and of the "Provisional Rules for Lawyers' Fees". A spokesman for the Ministry of Justice announced at the meeting that a number of new lawyers would soon start practice in different provinces and municipalities.[32] By 1957 Shih Liang reported that there were lawyers in most cities of China to act as people's legal advisers.[33] On the basis of the evidence available, there appear to be some 2,000 full-time lawyers and 700 legal advisory offices throughout the country.[34] Undoubtedly, the number of lawyers is still too small and they are mainly concentrated in large and medium-sized cities. Nevertheless, the fact that the Communist regime now permits lawyers to operate is an important change from its previous policies.

As has happened in the Soviet Union, the changed attitude of the Chinese Communists toward the bar has resulted from their efforts to regularize the judicial system. They have told the pubiic that the various democratic systems embodied in the people's courts, such as the system of public trial, the defense system, the jury system, and the others, are designed to "strike decisive blows at the enemy and rationally settle conflicts among the people, so that no innocent may be wronged and no black sheep left at large." [35] They have also stressed the difference between the old and new lawyers and the desirability of having the people's bar. One Communist writer, for example, lists five distinct merits of the institution of people's lawyers.[36] First, the new system guarantees the implementation of the principle of defense in criminal proceedings as well as helps the people's courts to exercise correctly the judicial power of the state. Second, the existence of legal advisory offices is not only convenient for the masses but also advantageous to the development of the adjudication work of the people's courts. Third, people's lawyers extend aid to the broad masses, support their fight against crimes and criminals, and protect the legitimate interests of the parties concerned. Fourth, through their routine work of answering inquiries and participating in law suits, the new lawyers also perform a useful propaganda service for the policies, laws, and regulations of the state. Fifth, their participation in trials has a supervisory effect on the administration of justice, making the

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[32] *New China News Agency*, April 6, 1956.
[33] *People's China*, No. 12, 1957, p. 16.
[34] *Kuang-ming jih-pao*, Jan. 1, 1957; China Research Institute, *Chugoku Nenkan, 1960* (China Yearbook, 1960), Tokyo, 1960, p. 143; Felix Greene, *Awakened China*, New York, 1961, p. 194.
[35] *Jen-min jih-pao*, Dec. 11, 1954.
[36] Huang Yüan, *Wo-kuo jen-min lü-shih chih-tu* (Our people's lawyer system), Canton, 1956, pp. 2—9.

judicial organs more conscious of raising the quality of their work.

In spite of the new line, there are not enough lawyers in Communist China to meet the demand. The old-style lawyers have been forced out of existence, first by the Judicial Reform Movement and later by the Anti-Rightist Campaign of 1957–1958. At the same time, the new educational system is not producing a sufficient number of qualified legal practioners. Although there are four Colleges for Politics and Law, six law faculties in the Comprehensive Universities, and a number of legal training schools,[37] statistics indicate that the percentage of Chinese students engaged in the study of law is quite small. In 1957–58 law and political science students constituted only 2.1 per cent of the total enrollment in higher education, while graduates in the same field were less than 4 per cent of the total number of graduates from colleges and universities.[38] This situation may be compensated in part by Article 7 of the Organic Law of the People's Courts, cited above, which allows a number of people, beside lawyers, to serve as defense counsel – (1) citizens recommended by people's organizations, (2) persons approved by the courts, and (3) close relatives and guardians of the accused.

Organization and Activity of People's Lawyers

The organization and activity of the people's bar are governed by the "Draft Regulations for Lawyers," effective since 1956. A more detailed document, the "Provisional Rules for Lawyers," was drafted in 1957 by the Ministry of Justice, but nothing has been said publicly about this document since that year.[39]

Attorneys in Communist China are organized into Lawyers' Associations, which operate in provinces, autonomous regions, and municipalities directly under the central authority. Technically, the Lawyers' Association is a voluntary organization of persons engaged in the legal profession, formed on the basis of the principle of democratic centralism. Neither a state organ nor a private group, the Association is a social body within the broad framework of China's judicial system and accepts the guidance and control of the judicial organs of the state. Its functions consist of supervising the work of Legal Advisory Offices, helping raise the standards of law practice, admitting new members, and disciplining the delinquent

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[37] Leo A. Orleans, *Professional Manpower and Education in Communist China*, Washington, 1960, Appendix C, pp. 176–203; "Recent Legal Developments in the People's Republic of China," *Bulletin of the International Commission of Jurists*, No. 8, December 1958, p. 10.

[38] Orleans, Table 4, p. 71, and Table 5, pp. 74–75.

[39] For some descriptions of the Provisional Rules, see *Kuang-ming jih-pao*, June 17, 1957.

ones. Under the Lawyers' Associations, there are Legal Advisory Offices set up in counties and municipalities to carry on the organizational and routine work of legal practitioners.[40]

The requirements for admission to the people's bar are rather irregular, which reflects both the Communist concept of lawyers and the acute shortage of trained personnel in China. Nowhere is the subject of bar examinations ever mentioned. According to the regulations, a citizen who has the right to elect and be elected [41] and who meets one of the following three conditions can apply for membership to a Lawyers' Association. After the board of directors of the Association has approved his membership application, he is then assigned to a Legal Advisory Office to serve as a lawyer. The three conditions referred to are: (1) a graduate from a university law school or a secondary law school of Communist China with experience in judicial work of at least one year; (2) a person with previous experience as a judge or a procurator for at least one year in a people's court or a people's procuratorate; and (3) a person of a certain cultural standard, legal knowledge, and social experience suitable to the practice of law.

It is further provided that anyone who has received legal education in the Chinese People's Republic but who has had no practical experience in judicial work may also apply for admission to a Lawyers' Association. In this case, he will be assigned to a Legal Advisory Office to serve his apprenticeship for some length of time before the Lawyers' Association accepts him as a member. There is also a provision for part-time lawyers. Social science professors, instructors, or researchers in universities, colleges, professional schools, or research institutes, deputies of the People's Congresses who have no administrative duties, or officials of various people's organizations can concurrently serve as part-time lawyers if admitted to a Lawyers' Association.[42]

People's lawyers are public servants and not private practitioners. They all work in Legal Advisory Offices, each of which is under the supervision of a director chosen by the Lawyers' Association. To a Legal Advisory Office, citizens, state agencies, enterprises, and social groups can come for assistance of varying kinds.

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[40] Huang Yüan, p. 11; "Concerning the Question of the People's Lawyer System," *Kuang-ming jih-pao,* July 7, 1956.

[41] This may be noted together with a resolution adopted in May 1956 by the Standing Committee of the National People's Congress stating that a person who is currently deprived of political rights may not serve as defense counsel to anyone but his close kin. *Jen-min shou-ts'e 1957* (The People's Handbook), Tientsin, 1957, p. 337.

[42] Huang Yüan, pp. 10–11; *Kuang-ming jih-pao,* July 7, 1956. By way of comparison, see the description of the Soviet bar in V. Gsovski and K. Grzybowski, *Government, Law and Courts in the Soviet Union and Eastern Europe,* New York, Vol. 1, pp. 559–564.

Fees are paid by clients to the Legal Advisory Office rather than individual lawyers. The amount, usually small, is determined by agreement between the clients and the director of the Office in accordance with the cost of living and the type of work done. At times, free service must be rendered if the client proves too poor to pay, or is involved in pension or alimony claims, or has other justifiable reasons.[43] Lawyers receive their salaries from the Legal Advisory Offices where they practice collectively. The scale is set by the board of directors of the bar according to the ability and the amount of work of each individual.[44]

There are three major functions that the people's lawyer generally performs. First, he answers the inquiries of the people and furnishes them with opinions on matters relating to the law and legal processes. Secondly, he prepares petitions, contracts, agreements, and other legal documents for individuals as well as groups. Thirdly, he acts as defense counsel for the accused in a criminal action or as a representative for the plaintiff, defendant, or other interested parties in a civil action.[45]

The daily routine of people's lawyers is a busy one, as people now come to the Legal Advisory Offices for many services that were performed by the public reception centers of the people's courts in the past. Just after one and a half months of operation, five Legal Advisory Offices in Shanghai were reported in 1956 to have answered 3,584 legal inquiries, drafted 879 legal papers for callers, and represented or defended clients in 281 cases.[46] A woman lawyer, at one of these Offices, in a single day managed to handle 12 cases concerning questions of marriage, debt, and housing tenancy.[47] Early in 1957, Legal Advisory Offices in some large cities and provinces began to assign lawyers to serve as regular counsellors for certain agencies, enterprises, organizations, and co-operatives.[48] Since the start of the "Big Leap," more stress has been placed on the lawyers' work to explain questions relating to law and to publicize the socialist legal system. Like judicial workers in Communist China, people's lawyers have gone to factories and farms to bring their services to the masses and to conduct propaganda and education on the observance of the laws.[49]

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[43] The text of the "Provisional Rules for Lawyers' fees," promulgated on July 20, 1956, is in *Chuang-hua jen-min kung-ho-kuo fa-kuei hui-pien* (Classified collection of laws and regulations of the Chinese People's Republic), Peking, 1957, Vol. 4, pp. 235–238.

[44] *Kuang-ming jih-pao,* July 7, 1956.

[45] Huang Yüan, pp. 9–10.

[46] *Kuang-ming jih-pao,* July 6, 1956.

[47] *New China News Agency,* July 12, 1956.

[48] This development was reported in cities like Peking and Shanghai and in provinces like Shantung and Kiangsu, *Kuang-ming jih-pao,* Febr. 18. 1957.

[49] *Ch'angchow jih-jao* (Ch'angchow Daily), Ch'angchow, May 14, 1958.

Participation in lawsuits is one of the lawyer's functions that deserves special attention. In civil disputes, the first thing that the people's lawyer frequently does is to try to effect some form of compromise or informal settlement through his mediation and persuasion. A number of instances have been reported in which lawyers helped their clients to resolve family, marriage, debt, and property disputes without recourse to court litigation.[50] On occasions, however, the people's lawyer does attend the court to act for litigants in civil suits. The "General Evaluation of the Judicial Process of Civil Suits in the People's Courts at Various Levels" states that if a party is a minor, a person of vital physical defect, or a person with a mental illness who is unable to act in a litigation, he should ask an attorney or his close kin to be his agent in the suit.[51] People who have little legal knowledge or who are tied up by work or other matters may also have themselves represented by lawyers in civil proceedings. When a party commissions an attorney to act for him in a civil suit, he is allowed in Communist China to make the mandate (delegation of power) in either a written or an oral form. As maintained by Communist writers, the mandate must define clearly the range of authority delegated to the lawyer. They dismiss as improper and confusing the so-called plenipotentiary mandate, which confers authority with a sweeping statement such as "to take charge of all affairs." [52]

In a criminal action, a lawyer in new China can serve as the defense counsel when entrusted by the accused or designated by the court. His task is said to consist in defending the rights and lawful interests of the accused on the one hand and helping the court in the exercise of correct judgment on the other.[53] As in the Soviet Union, the attorney for the defense is excluded from the pre-trial investigation in China. To conduct the defense, he is nevertheless permitted to take the following measures under the established procedure: studying the files and case materials, talking with the accused, questioning witnesses, experts, and the accused at the trial, summoning and questioning new witnesses, introducing new evidence, and participating in courtroom debates. If necessary, he

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[50] Huang Yüan, pp. 5–6; *Honan jih-pao,* Nov. 11, 1958; *Wen-hui pao* (Wen-hui News), Hong Kong, May 12, 1957; *Anhwei jih-pao,* May 22, 1956.
[51] *Basic Problems in the Civil Law of the People's Republic of China,* New York, 1961 (JPRS: 4879), p. 94; checked with the original text in Chinese, *Chung-hua jen-min kung-ho-kuo min fa chi-pen wen-t'i,* Peking, 1958, pp. 90–91.
[52] *Basic Problems in the Civil Law of the People's Republic of China,* p. 99; Kuo k'o-hung, "Questions Concerning the Lawyer's Authority as an agent in civil suits," *Kuang-ming jih-pao,* Jan. 15, 1957.
[53] Wang Hou-li, "An Important Democratic System – System of Defense," *Kuang-ming jih-pao,* January 14, 1955.

also can, with the consent of the defendant, lodge an appeal from the judgment and present his version of the case to the court of the second instance.[54]

According to the Chinese Communists, the defense counsel is not an agent of the accused in a criminal proceeding. He is an independent party in the trial and is not bound by the will of the defendant. He must carry out his tasks within a legal framework, and under no circumstances should he fabricate evidence, distort facts, or use deceptions to help his client. If the evidence presented by the prosecution is incorrect in whole or in part, the attorney should conduct the defense proceeding with a view to prove the innocence of the accused or to mitigate his guilt. If, on the other hand, the crime has been established beyond any doubt, then the counsel should defend the accused from the standpoint of certain extenuating circumstances, such as the motives and means of the crime, the age of the defendant, the degree of his repentance, the objective reasons for the crime, etc.[55]

To show the "democratic procedure" at work, the Chinese press has reported from time to time cases in which the accused were defended by people's lawyers. But most of these cases were routine and non-political in nature. Only on rare occasions were there any exceptions. The presence of defense attorneys was reported at the trials of "espionage" cases in 1954 and 1960, one involving thirteen Americans and the other Bishops James Walsh and Kung P'in-mei.[56] However, no details beyond the sentences were given by the press. It is doubtful whether the lawyers in both trials did more than serve the window-dressing purpose of the regime.

In the routine, non-political cases reported by Chinese papers, defense attorneys did make more serious efforts to defend their clients. We have read, for example, a case tried in Shanghai in which an assistant manager of a store was accused of stabbing the manager with a knife. Among the reasons advanced by the counsel in support of the defendant's innocence were that the stabbing was an act of self-defense and that the defendant was arrested against the Regulations Governing Arrest and Detention of the People's Republic of China.[57] In a negligence case tried in Tsingtao, a chemist was charged with the responsibility of having caused the state a direct loss of 400,000 yuan and an indirect loss of 1,670,000. His attorney pleaded the mediocre technical level of the accused

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[54] Huang Yün, p. 13; Chao Hsu-lun and Ma Jung-chieh, "What We Understand about the System of Defense," *Kuang-ming jih-pao,* March 24, 1955.
[55] Ch'u Huai-chih & Chang Min-fu, "Toward an Understanding of the System of Defense in Criminal Proceedings in Our Country," *Hsin chien-she* (New Construction), No. 5, 1956, p. 15.
[56] *New China News Agency,* Nov. 23, 1954, Sept. 17, 1960, & Sept. 18, 1960.
[57] *Hsin-wen jih-pao* (News Daily), Shanghai, June 4, 1957.

and the poor condition of the factory equipment as extenuating circumstances to mitigate the charges.[58] In a fraud case tried in Peking, a man was accused of having tried to obtain honor and position with faked papers. The defense counsel first pointed out that the defendant, in perpetrating his criminal activities, was prompted by material and personal considerations which were different from political motives and counterrevolutionary activities detrimental to the political interests of the state. Then he listed a few objective factors as grounds for a plea that the defendant not be held solely responsible for the harm done to the society.[59]

Problems and Difficulties

In examining the system of people's lawyers of China, one must bear in mind that it is still in an experimental stage and is being tried in a new evolving Communist society. The irregularities and handicaps under which Chinese lawyers have to operate, in fact, reflect the unsettled status of the people's bar as well as that of the whole legal system of Communist China.

One of the problems confronting the people's lawyer is the existence of many gaps in Chinese law. While a few basic statutes, i.e., those on land, marriage, counterrevolutionaries, etc., have been promulgated, there is no complete criminal code, civil code, or code of procedure in the People's Republic. What is more, the existing laws are possessed of many vague and conflicting provisions. This lack of precise legislation and comprehensive codes was a subject of complaints during the "Hundred Flowers" period in the spring of 1957, when a number of prominent jurists, some of them Communist members, raised the issue of "no laws to rely on" and pleaded for the establishment of a stable and elaborate system of law.[60]

An explanation for the deficiency of China's legal system is given in Premier Chou En-lai's statement that "it is difficult to draft the civil and criminal codes before the completion in the main of

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[58] *Tsingtao jih-pao* (Tsingtao Daily), Tsingtao, March 17, 1955.

[59] *Jen-min jih-pao,* August 31, 1956.

[60] For excerpts of some of the criticisms proffered by Chinese jurists, see Roderick MacFarquhar, *The Hundred Flowers Campaign and the Chinese Intellectuals,* New York, 1960, pp. 114–116. In the Political Report of the Central Committee given to the Eighth National Congress of the Chinese Communist Party, even Liu Shao-chi had this to say: "In order to consolidate our people's democratic dictatorship, to preserve order for socialist construction and safeguard the people's democratic rights, and to punish counterrevolutionaries and other criminals, one of the urgent tasks facing our state at present is to begin the systematic codification of a fairly complete set of laws and to put the legal system of the country on a sound footing." *Eighth National Congress of the Communist Party of China,* Peking, 1956, Vol. 1, p. 81.

the socialist transformation of the private ownership of the means of production and the full establishment of socialist ownership of the means of production." [61] Other Communist spokesmen also point out that the laws of the Chinese People's Republic are "revolutionary and changing" in nature and cannot be formulated rigidly with overdetailed provisions.[62] Be that as it may, the fact remains that the practicing lawyer can find his work extremely difficult in cases where there are no definite laws and regulations to follow.

Another problem besetting the people's lawyer is the unfriendly attitude sometimes adopted by the judicial personnel. Since the system of legal defense is still in its infancy, there is a tendency on the part of many judges and procurators to treat legal counsellors with hostility and contempt. Some regard them as subordinates and even order them to help investigate cases. Others feel that the presence of an attorney at a trial is a "nuisance" and a "waste of time" and take such an attitude as "regardless of your argument I shall judge the case just the same." Still others consider legal defense as "loss of (revolutionary) stand" and "protection of crimes" and condemn the lawyer for "siding with questionable characters and losing the sense of right and wrong." [63]

Under the circumstances, the people's lawyer naturally has to perform his duties with great care. He certainly wil not want to "lose his stand" by undertaking the defense of persons accused of counterrevolutionary offences. His task can be very delicate at times as the distinction between political and ordinary crimes has never been drawn too clearly in Communist China.[64]

Finally, a more serious handicap for the Chinese lawyers appears to be the position taken by the Communist government regarding his relation to the denfendant and his role in the trial. It should be noted between 1954 and 1957 legal development in China was toward a gradual liberalization. This trend, nevertheless, was abruptly reversed in the Anti-Rightist campaign of 1957–1958. Until and unless Peking swings back in a liberal direction, the work of attorneys will continue to be hampered by the Communists' new

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[61] *New China News Agency,* June 26, 1957.

[62] "Several Problems Concerning the People's Democratic Legal System of Our Country," *Cheng fa yen-chiu,* No. 2, 1959, pp. 4–7.

[63] "A Few Words in behalf of the People's Lawyer," *Kuang-ming jih-pao,* January 27, 1957. A top Communist jurist also shows concern over some of these problems. See Ma Hsi-wu, "Several Problems Concerning the Current Adjudication Work," *Hsin-hua pan-yüeh-k'an* (New China Fortnightly), Peking, No. 9, 1956, pp. 18 & 20.

[64] Altogether six articles have appeared in *Cheng-fa yen-chiu* (Nos. 3, 4, & 5, 1958) to discuss inconclusively the following question: "Are all criminal offenses considered contradictions between the enemy and ourselves ? Are all criminals to be treated as objects of dictatorship ?"

rigidity as reflected in some important essays published in Chinese legal journals.[65]

According to the thesis advanced by these essays, the people's lawyer should put his duty to the state above his duty to the defendant. It would be "absurd" for a lawyer to be allowed to keep professional secrets confined by the defendant. Indeed, it is the duty of the attorney to persuade the accused to confess his guilt, and, if he refuses to do so, to denounce him and reveal his secrets. The role of the defense attorney is, first of all, to "safeguard the socialist legal system and consolidate the proletarian dictatorship." In carrying out the task of defending his client, he must always proceed from the interests of the state and the people. No deviation is permitted.

Such being the current official line, one can see easily the difficult situation in which the system of legal defense finds itself in China. Not only is the lawyer's professional activity restricted in criminal procedure but his relationship with the accused is also put on a precarious basis. This may account partly for the latest trend to have Chinese attorneys more engaged in educational and propaganda work than in lawsuits.[66] There can be little doubt that with the passage of time Communist China may abandon some of her irregular practices and adopt legal procedures more familiar to the people of the West. But among those least likely to be changed is one fundamental characteristic of the people's lawyer. Like his Soviet counterpart, the Chinese lawyer is not a champion of private rights but an auxiliary agent of the state.[67]

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[65] For some representative essays on the work of attorneys, see Ch'eng Jung-ping, "The Defense Counsel Must Work for the Socialist Legal System," *Fa-hsüeh* (Jurisprudence), No. 2, 1958, pp. 36–38; Lin Tse-chiang, "Criticize Thoroughly Bourgeois Attitudes in the Work of People's Lawyers," *ibid.*, pp. 39–43; Su I, "Should the Defense Counsel Expose the Crime or Defend It?", Cheng-fa yen-chiu, No. 2, 1958, pp. 76–77; Wu Lei, "Examination of the Essay on 'Study of the Role of the Defense Counsel in Criminal Procedure'," *ibid.*, pp. 78–81.

[66] While this trend should be viewed as a part of the "mass line" stressed in the "Big Leap," one top Chinese jurist pointed out in 1960 that lawyers and judges in China did not have enough court cases and had to perform more educational functions in the field of law. See Greene, p. 194.

[67] This is a description of the Soviet lawyer given in Gsovski and Grzybowski, Vol. 1, p. 564.

THE OMBUDSMAN IN NEW ZEALAND

New Zealand, a small country with a population only slightly in excess of two and a half millions; remote, in geographical terms, from the main centres of culture and trade, has nevertheless drawn attention to itself because of its social legislation. It was the first country in the Commonwealth – then the British Empire – to give votes to women. This it did in 1893. Its old age pension scheme preceded that of Mr Lloyd George in Britain by a dozen years. Its social security scheme – introduced by the Labour Government in 1936 – provided a "cradle to the grave" charter of well-being to its citizens when similar schemes in Britain were regarded as an almost Utopian dream.

It is not surprising therefore that New Zealand is in the forefront of British countries in its plans for the creation of the office of Ombudsman – "Grievance Man" he has been called – who is referred to, in the draft legislation which came before the House of Representatives last year, as the Parliamentary Commissioner for Investigations. Had it not been for the pressure on Parliamentary time, it is not unlikely that the legislation necessary to create the office would have been enacted during the 1961 Parliamentary session. But the National Government, which replaced the Labour Government at the general elections in November 1960, had a heavy legislative programme to get through if it was to carry into effect even a majority of its election promises. The Parliamentary session which, in 1961, began on June 22, lasted a little longer than usual – a matter of nearly five months. But this did not suffice for the enactment of all the legislation which individual ministers might have desired. Hence the Parliamentary Commissioner for Investigations Bill reached only the first reading stage, but assurances have been given publicly that it will be re-introduced next session.

The history of the Ombudsman in Scandinavian countries has been adequately traced by "Justice" – the British Section of the International Commission of Jurists – in its report recently published under the title, "The Citizen and the Administration". Its origin in New Zealand political thinking is to be found in the fact that in 1959 the Attorney-General in the Labour Government, accompanied by the Deputy-Secretary for Justice who is now the Secretary for Justice and, as such, the permanent head of the Justice Department, attended a seminar at Kandy, Ceylon, under the aegis of the United Nations. There the subject of an Ombudsman had been the subject

of considerable discussion, Professor Hurwitz, the Danish Ombudsman, having delivered a paper entitled "The Scandinavian Ombudsman". While the Attorney-General did not take any steps on his return to New Zealand to create such an office, it is quite obvious that the Secretary for Justice had been much impressed by what he had heard. When the National Party defeated the Labour Party at the polls and took office at the end of 1960, the previous Attorney-General, a highly respected but elderly lawyer, was replaced by an equally highly respected but much younger man whose ear the Secretary for Justice would appear to have gained. In any event, Government Committees got to work on the drafting of a Bill which, under the title "Parliamentary Commissioner for Investigations Bill", was introduced into the House of Representatives on August 29.

A preliminary round had been fired in the House on August 9 when one of the National Party members asked the Minister of Justice, who is also the Attorney-General, whether, "in view of the universal public interest in the appointment of the Ombudsman" – the reference to the universal public interest must be regarded as a pardonable exaggeration – "he will inform the House whether the necessary legislation will be introduced this session". The Minister's reply was in the affirmative.

It might be convenient here to mention that in the New Zealand House of Representatives questions are addresssed by members to Ministers in writing. The member's questions and the Minister's written replies appear on the Order Paper. Once a week – usually on Wednesday afternoon – a member moves the adjournment of the House in order that members may discuss Ministers' replies to questions. An opportunity is then given to members to speak on any reply given by a Minister to a question addressed to him. No supplementary questions are allowed as is the case in the British House of Commons. But frequently points made by members in the course of their speeches require a reply by the Minister concerned. Equally, the opportunity is given to a Minister to elaborate on his written reply.

In the case of the Parliamentary Commissioner, it would appear that no member beyond the original questioner was sufficiently interested in the topic to voice the matter in the House. The Minister did, however, take the opportunity of giving more details of the proposed legislation than were evident in his bald reply to the Member's question.

The Attorney-General said that at the election in 1960 the National Party's policy had stated categorically that, to ensure that members of the public in dealing with Departments of State had the right and opportunity to obtain an independent review of administrative decisions, the National Party proposed to establish a citizens' appeal authority, and that any person affected by an administrative

decision would have the opportunity of having that decision reviewed. The introduction of the legislation would be an attempt, he said, to reverse a trend that had been going on for hundreds of years – the whittling away of the individual rights of citizens and the State coming more into the picture in restricting the rights of individual citizens. As an example of a case in which the Ombudsman's influence might be exercised, the Attorney-General referred to a refusal by the Department of Education to provide school transport. It is a matter of general policy that when children attending a primary school live more than three miles from the school, transport to and from the school is provided. But its provision, in actual fact, is a question solely within the discretion of the Department. Many difficult cases have arisen in which children have been denied educational facilities, other than those provided by the correspondence school branch of the Department, solely because transport has not been provided.

Another example given by the Attorney-General was the taking of land under the Public Works Act. (In mentioning this the Attorney-General might have had in mind the Crichel Down affair.) He said that the question as to whether a particular piece of land should or should not be taken for public works was by law the decision of the Minister alone, but the Attorney-General envisaged that the Ombudsman might well look over the department's relevant reports and perhaps visit the locality to see if it was really necessary to take that piece of land or if another piece of land could be taken, and report to the Minister accordingly.

In making the reference to compulsory acquisition of land, the Attorney-General did not refer to one of the weaknesses in the proposed legislation; namely that it does not include supervisory jurisdiction over the powers of local authorities. In New Zealand nearly all local authorities – a term of wide connotation including town boards and university councils – have power to acquire land compulsorily, the compensation being determined, in the absence of agreement, by a specially constituted Compensation Court. The activities of these bodies have been a frequent cause of complaint, allegations being made that their officials, such as town clerks and engineers, exercise almost dictatorial powers, even though the formal authority of the Council of the local authority is required to implement their proposals. Harbour Boards, to give one example, have statutory powers to acquire land compulsorily; with the expansion of New Zealand's commerce they have not been slow to further their objects by acquiring compulsorily land that, being close to the centres of trade, might well have been occupied for many years by established commercial concerns. Granted that such concerns receive compensation, the compensation is rarely adequate from an economic point of view. The dispossessed owner's only – and largely ineffective –

redress is to vote the members of the Board out at the next election. Be that as it may, the proposed New Zealand Commissioner will have no authority to investigate any complaints arising from the Board's actions or from those of any local authority.

The draft legislation – the Parliamentary Commissioner for Investigations Bill – came before the House of Representatives on August 29. On that date the draft of the Bill was received by Governor-General's Message. This was necessary because the proposed legislation involved the spending of money. The Message, together with the Bill, was referred to a Committee of the whole House. This gave the Attorney-General the opportunity of outlining the provisions of the Bill and, in reply to a barrage of questions by members, to give his interpretation of some of the clauses in the Bill. While, of course, this interpretation would not be binding on the Courts, it is interesting as showing the intentions of the Minister and of his advisers.

Provision for the necessary expenditure was made in accordance with the recommendation contained in the Governor-General's Message and, the resolution having been reported to the House and agreed to, the Bill was read a first time. This is as far as the legislation has proceeded.

It will be interesting to see whether, when, as is stated to be the Government's intention, the Bill is re-introduced into the House of Representatives next session, any amendments to the Bill as it at present stands, will be made. Meantime the Bill, as presented to the House of Representatives, can be discussed.

It consists of twenty-eight clauses and a Schedule listing the Government Departments, forty-four in number, and other organizations, twenty-two, to which the legislation is intended to apply. The list is interesting and appears to embrace all branches of central government activity. New Zealand has a particular preference for creating central government organizations to administer certain activities. For example, the administration of the State Advances Corporation which controls the loans of state money for housing purposes and state rental housing, is in the hands of a Board of Management. The building of trunk roads is the concern of the National Roads Board. Both these bodies are within the purview of the proposed Commissioner. The only criticism which one can fairly make on this point is that, as mentioned above, local authorities are not included.

Clause 2 of the Bill creates the office of Parliamentary Commissioner for Investigations and provides for his appointment by the Governor-General on the recommendation of the House of Representatives, not, be it noted, on the recommendation of the Government or a Minister. He is not to be capable of being a member of Parliament and cannot, without the approval of the Prime Minister

given in each particular case, hold any office of trust or profit, other than his office as Commissioner, or engage in any occupation for reward outside the duties of his office (Cl. 3).

Clause 4 deals with the term of office of the Commissioner and, if one may say so with respect, contains provisions which would appear to deprive the office of any virtue which it might be intended to have. Subclause (1) reads: "The recommendation for the appointment of the Commissioner shall be made in the first or second session of every Parliament." In New Zealand the normal duration of Parliament is three years and normally one session – lasting between four and five months – is held each year. Hence if the words mean what they say – and the use of the word "every" is significant – the Commissioner's term of office will come up for review every three years – or possibly four years, if he is appointed in the first session of a Parliament and the question of re-appointment arises in the second session of the succeeding Parliament.

The possibility of the Commissioner not being re-appointed on a review of his position was undoubtedly in the mind of the Attorney-General, for, during the discussion on the motion introducing the Bill, the Attorney-General said:

> His position comes up for review every three years. [as has been mentioned above it might be four years], so that in effect it is easier to get rid of him than it would be to get rid of the Controller and Auditor-General or a Judge. He will be in a very powerful position to criticise Government administration, and our [the National] Government might appoint a man who was not the concept of what an Ombudsman should be for, say, a Socialist Government, which might want a quite different type of individual... It would be difficult to sustain the view that an organization should be set up with a highly responsible duty where the officer concerned could perhaps embarrass the Government of the day, or where he may satisfy one Government but embarrass another one.

The Attorney-General sought to justify his attitude by reference to the position in Denmark. New Zealand, he said, had copied as far as possible from the practice of Denmark where re-appointment was contemplated with every new Parliament. However, there had been, at the time the Attorney-General spoke, little opportunity for the Danish principle to be put into practice. The Danish Ombudsman was first appointed in 1955 and continued to hold office after the Danish elections of 1957. It is not known whether he was re-appointed after the elections of October, 1961.

But a much more serious objection to the proposal that the Commissioner should come up for re-appointment by each new Parliament lies in the fact that it might be difficult to obtain a suitable person to accept the position. The contemplated salary is £ 3,500 per annum, a sum half-way between that of a Stipendiary Magistrate and a Supreme Court Judge, and the same as that of the

Controller and Auditor-General. In terms of New Zealand salaries, this, in itself, is a good, even high, salary. But even this salary is unlikely to attract a person who might leave a secure position such as that of a University Professor – which the Danish Ombudsman was – even though he would be paid a larger salary, if there was a risk of his not being re-appointed after a General Election.

The Attorney-General was directly asked if the position of the Commissioner was to be protected in the same way as that of the Controller and Auditor-General. The Attorney General replied that the Commissioner would not have the same degree of security in office as has the Controller and Auditor-General.

By virtue of S. 12 of the Public Revenues Act 1953, the Controller and Auditor-General holds office during good behaviour and is removable therefrom only upon an address to the Governor-General from the House of Representatives. The protected position of the Controller and Auditor- General has enabled him to make salutary comments on Government expenditure, even to the embarrassment of the Government. In his report for the year ended March 31, 1960, the Controller had some adverse comments to make on the Government's actions concerning a railway in the South Island – the Nelson Railway – which for some years has been a political football. He pointed out that, in view of the definite stipulation in the Public Works Act that a special Act of Parliament is required for the construction of every railway, the announcement before the end of the financial year that work was to be started on the Nelson railway, although an authorizing Act had not been passed, caused the Audit Office to question the legality of the proposed expenditure. The then Prime Minister asked the Audit Office to pass payments out of the vote "Railway Construction" for the construction of the Nelson Railway. But the Auditor-General replied to the Prime Minister that in view of the legislation referred to above, it did not seem reasonable to ask the Audit Office to pass charges to the new vote for the construction of the line when such expenditure was so clearly at variance with the existing law. The matter was finally settled by the Auditor-General agreeing with the Minister of Works that the sum requested could, properly, be charged on account of preliminary surveys and not of construction. (It may be mentioned that the National Government has suspended work on the proposed line.)

Such outspoken comment would be expected from the Parliamentary Commissioner, but could he be expected to make it with the knowledge that his appointment would be before the House – and thus, in effect, by the use of its parliamentary majority, before the Government, for review?

It has been suggested that a person who has been used to taking a firm and independent line such as the Controller and Auditor-

General or a retired Supreme Court Judge, might properly fill the office of Commissioner, notwithstanding the objection noted above. But, as Judges retire at 72, the age at which the Commissioner must retire, there is little prospect of a retired Judge taking on the position. The Controller and Auditor-General is required by statute to retire at 65. But if at that age he is deemed to have passed the useful age in that exacting office, can it be thought that he will be suited for the equally exacting office of Commissioner?

To make the proposed legislation work effectually, it is hoped that when the Bill is re-introduced next session, it will provide for greater security of tenure than the present Bill allows.

The principal clause in the Bill (Cl. 11) sets out the functions of the Commissioner. Subclause (1) reads:

> The principal function of the Commissioner shall be to investigate, either on a complaint made to him or of his own motion, any decision or recommendation made (including any recommendation made to a Minister of the Crown), or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the Departments or organizations named in the Schedule to this Act, or by any officer, employee, or member thereof in his capacity as such officer, employee, or member.

There are certain matters relating to the armed forces which do not come within the scope of the Commissioner's authority.

Having given this wide authority to the Commissioner the Bill proceeds to restrict his powers by a subclause which poses many questions for the constitutional lawyer and which may well call for judicial determination; the latter because subclause 6 provides that if any question arises whether the Commissioner has jurisdiction to investigate any case or class of cases under the Act he may apply to the Supreme Court for a declaratory order determining the question in accordance with the Declaratory Judgments Act, 1908. This legislation provides a ready means for determining the rights of individuals, chiefly when they arise out of the provisions of an Act of Parliament.

This restrictive provision reads:

> Nothing in this Act shall authorize the Commissioner to investigate – (a) Any decision, recommendation, act or omission in respect of which there is, under the provisions of any enactment, a right of appeal or objection, or a right to apply for a review, *on the merits of the case,* to any Court, or to any tribunal constituted by or under any enactment, whether or not that right of appeal or objection or application has been exercised in the particular case, and whether or not any time prescribed for the exercise of that right has expired.

An important question arises: what do the italicized words (the italics being the writer's) mean? Constitutional lawyers unquestionably accept the proposition that the Courts have no power to review

administrative decisions on the merits. They are restricted in their functions to determining whether the appropriate administrative body or officer has carried out his functions in accordance with the statutory requirements (if any) laid down in a particular case and also in accordance with the rules of natural justice. But despite the almost universal acceptance of this proposition, there are cases in which the Courts, while paying lip service to the theory, appear to have by-passed it in practice. For example, in *Prescott* v. *Birmingham Corporation,* [1955] Ch. 210, a ratepayer succeeded in having declared illegal and *ultra vires* the corporation, a scheme whereby free travel was provided on the corporation's omnibuses for certain classes of old persons. While, strictly speaking, the Courts were interpreting the relevant statutory provisions they were, in fact, making a determination on the merits of the case. In the Court of Appeal it was said (at p. 238):

> If the case is to be regarded as turning upon the question whether the decision to adopt the scheme was a proper exercise of a discretion conferred on the defendants with respect to the differential treatment of passengers in the matter of fares, the answer... must be that it was not a proper excercise of such discretion.

The question will undoubtedly arise – how frequently time alone will show – whether review by the Courts on the merits is available in any particular case so that the Commissioner will lack jurisdiction. The question can, as mentioned above, be determined by the rather cumbrous procedure of the Commissioner applying at the Supreme Court for a declaratory order determining the extent of his powers.

By the same clause the powers of the Commissioner are not affected by any provision in any enactment to the effect that any decision, recommendation act or omission shall be final or that no appeal shall lie in respect thereof or that no proceeding or decision shall be challenged, renewed, quashed or called in question: what is popularly called the privative clause.

Only inferentially in the proposed legislation is the Commissioner precluded from investigating the activities of a Minister of the Crown. Clause 11 – dealing with the functions of the Commissioner – refers to a "decision or recommendation made (including any recommendation made *to* a Minister of the Crown)". But it does not expressly include a decision or recommendation made *by* a Minister, and on the principle of statutory interpretation contained in the maxim *expressio unius est exclusio alterius,* such a decision would be excluded. In any event that is the intention of the Government, as is evident from the remarks of the Attorney-General in the House. He said:

> I do not contemplate, that a Queen's Minister should as of right be subject to direct interrogation by the . . . Commissioner . . . or by

> anybody else. I would doubt if the House would contemplate that the Commissioner should be able as of right to go into a ministerial office and demand from the minister any files in his possession. His right to do that, I think, would be incompatible with the position of a Queen's Minister.

He added that, in actual practice, the situation would be protected by reason of the right of the Commissioner to see the departmental files touching a particular matter. He would see the recommendations that had been made to the Minister who would either have adopted or rejected those recommendations.

Succeeding clauses of the Bill deal with matters of procedure. The House of Representatives is given power to make rules for the guidance of the Commissioner. All complaints are to be made in writing. The fee payable on every complaint is the very modest sum of £ 1 and even this may be remitted if the Commissioner, "having regard to any special circumstances" – a phrase which it is assumed the Commissioner will himself have to interpret, so directs.

A comprehensive clause (Cl. 14) gives the Commissioner wide discretionary powers to discontinue an investigation. These powers cover cases where under the law or existing administrative practice there is an adequate remedy or right of appeal, other than the right to petition Parliament. In particular [Cl. 14(2)] the Commissioner may decide not to investigate or not to investigate further any complaint if it relates to any decision, recommendation, act or omission of which the complainant has had knowledge for more than twelve months before the Commissioner receives the complaint, or if, in his opinion, the subject-matter of the complaint is trivial, or the complaint is frivolous or vexatious or not made in good faith, or if the complainant has not a sufficient personal interest in the subject-matter of the complaint.

The key to the effectiveness of the Commissioner's powers is to be found in the clause entitled "Procedure after Investigation". This clause requires the Commissioner in a variety of circumstances, which are set out below, to report his opinions and his reasons for them to the appropriate Department or organization. He may also make such recommendation as he thinks fit, and he may request – he cannot compel – the Department or organization to notify him, within a specified time of the steps (if any) that it proposes to take to give effect to his recommendations. A copy of the report and recommendations must be sent to the Minister concerned.

If, within a reasonable time after the report is made, no action is taken which seems to the Commissioner to be adequate and appropriate, the Commissioner, in his discretion, after considering any comments made by or on behalf of any Department or organization affected, *may* (italics supplied) send a copy of the report and recommendations to the Prime Minister, and *may* (italics supplied)

thereafter make such report to Parliament on the matter as he thinks fit. He must attach to his report a copy of any comments made by or on behalf of the Department or organization affected. The Commissioner must not make in any report any comment that is adverse to any person unless that person has been given an opportunity to be heard. The *audi alteram partem* rule is thus preserved.

The circumstances in which the Commissioner must make a report to the Department concerned are set out in detail in the clause. They appear to be all-embracing. They cover the cases in which, to quote part of the clause,

> the Commissioner, after making his investigation, is of the opinion that the decision, recommendation, act or omission which was the subject-matter of the investigation either (a) appears to have been contrary to law; or (b) was unreasonable, unjust, oppressive or improperly discriminatory, or was in accordance with a rule of law or a provision of any enactment or a practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory; or (c) was based wholly or partly on a mistake of law or fact, or (d) was wrong;

and further,

> if the Commissioner is of opinion either (a) that the matter should be referred to the appropriate authority for further consideration; or (b) that the omission should be rectified; or (c) that the decision should be cancelled or varied; or (d) that any practice on which the decision, recommendation, act or omission was based should be altered; or (e) that any law on which the decision, recommendation, act or omission was based should be reconsidered; or (f) that reasons should have been given for the decision; or (g) that any other steps should be taken.

Another subclause covers any case where the Commissioner is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that reasons should have been given for a decision made in the exercise of any discretionary power.

A careful perusal of this clause leads one to conclusion that there are very few circumstances in which, by the widest stretch of the imagination, an 'injustice' (in the popular sense of that word) has been suffered in which the Commissioner cannot investigate and report.

This clause, despite its length and despite its importance, was the subject of little discussion when the Bill was introduced. Two points only were raised. The first was a constitutional issue. A member asked why, as the Commissioner was to be an officer of Parliament, and as most of his decisions would be against Government Departments, he was required to report to Parliament through the Prime Minister instead of through Mr Speaker. The Attorney-

General replied that he had an open mind on the question, but that the committee which was responsible for the drafting of the Bill felt that as a matter of common courtesy, the head of the Government should be first informed of what was going on. He added that the point would doubtless be considered by the Statutes Revision Committee – a standing committee of the House of Representatives – to which the Bill would be referred.

The other question, raised by the Leader of the Opposition, dealt with the times for delivery of the Commissioner's report to the Prime Minister and to the House. Would those times synchronize? The Attorney-General's only reply was to quote the terms of the relevant subclause. In response to a further observation from the Leader of the Opposition he said:

> The Commissioner does not have to report to Parliament, but if he reports to Parliament he must, prior to that, report to the Prime Minister.

Consequently the most important clause in the Bill, which deals with the effectiveness of the Commissioner's powers went without explanation. But, as the clause stands, it shows that, having made his investigation into any of the numerous situations specified in the clause which, as mentioned above, cover almost every case in which any act or omission which could be called unjust, an example of which, given during the discussion, would be the failure of the Post Office to instal a telephone within a particular suburb, the sole power of the Commissioner is to report: first – a step he must take – to the appropriate Department or organization, and then, at his discretion, to the Prime Minister and to Parliament. He is given no teeth; no power of executive action. He is a watch dog on the leash; he can bark, but is restrained from biting.

In the early days of New Zealand's history – some one hundred and thirty years ago, New Zealand was a lawless country – nominally subject to the jurisdiction of New South Wales. The Governor of that colony, unable to exercise his authority over a country 1200 miles away, demanded of the British Government that a British Resident should be appointed in New Zealand. One James Busby was sent over from Sydney. His instructions were to apprehend escaped convicts and to send them back for trial, to assist settlers, to encourage trade and to urge the Maori chiefs to keep law and order. But he was not given any magisterial powers nor the armed force to enable him to carry out his tasks. Busby has gone down to history and is known to every New Zealand school child as "the man-of-war without guns".

Granted the differences in the status of Busby and of New Zealand's proposed Ombudsman, one wonders how effective a functionary can be when his sole authority is to make reports. There is, however,

this difference. Action required as a consequence of the Commissioner's reports can be effectively taken by Parliament if it so desires. New South Wales in 1833 was too far away from New Zealand for any effective steps to be taken to enforce the Resident's authority.

Insofar as the primary purpose of the Commissioner's appointment is to prevent any acts of injustice by the central executive against the individual, the knowledge on the part of Government Departments and organizations that their actions may be the subject of investigation, will doubtless cause them to hesitate before taking any step which might be the subject of adverse comment and, at the Parliamentary level, of executive action. Moreover, it is some comfort to the individual to know that there is some person of standing charged with the duty of investigating his complaints.

The proposed New Zealand legislation cannot now be enacted until the second half of this year at the earliest. There is, consequently, ample time for the Attorney-General and his advisers to consider any improvements in the Bill. Thereafter it will be of interest to the other Parliamentary democracies in the Commonwealth – and to those outside – to see how successful the Parliamentary Commissioner's activities are.

To revert to James Busby. He is recorded as being a pompous young man who felt cut out to play some important role in life. Another person might have succeeded where Busby failed. The success or failure of the New Zealand Ombudsman will depend upon who is appointed to this novel, but highly responsible office.

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FREEDOM OF MOVEMENT: RIGHT OF EXIT

Article 13 of the Universal Declaration of Human Rights, proclaimed by the United Nations on December 10, 1948, in Paris, formulates the right of the individual to freedom of movement. Paragraph 1 of that Article deals with freedom of movement and freedom of residence within the borders of each state, while paragraph 2 deals with freedom of movement beyond the borders of each state: "Everyone has the right to leave any country, including his own, and to return to his country." The General Assembly of the United Nations thereby clearly showed that it regards free departure from a country, both exit for a short period and emigration, as well as the right of every citizen to return to his own country, as a Human Right. An examination of the subject of freedom of emigration and freedom of exit is contained in this article.

It is scarcely possible to find any generally acknowledged definition of the concept of freedom to emigrate, since various elements constituting the act of emigration are stressed to a greater or a lesser degree by different authors and accordingly regarded as either essential or of secondary importance.. The most essential element in emigration consists in the act of voluntarily leaving one's country or of relinquishing residence either in that country or abroad when such residence has had a certain degree of permanence. This reminds us that even a foreigner can emigrate. The subjective reasons which bring about this decision play an important part, but their variety makes them unsuitable as an element in the definition of freedom to emigrate. Whereas religious reasons were of predominant importance in emigration in Europe in the seventeenth and eighteenth centuries, the economic factors became important subsequently. Today it may be economic or political considerations that inspire the decision to emigrate.

The time during which an act to be denoted as emigration can take place is also of great importance. Not every crossing of a frontier can be included, but even the criterion applied in earlier days that emigration is a final exit with no intention of returning is no longer applicable in the light of the increasing volume of emigration by persons seeking temporary employment. According to Josef Soder, the author of an excellent article, "Freedom to Emigrate and Immigrate",[1] emigration may be defined as "leaving one's

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[1] See Joseph Soder, "Die Aus- und Einwanderungsfreiteit," *Handbuch des internationalen Flüchtlingsrechts,* (edited by Walter Schätzel and Theodor Veiter; Bonn: W. Braumüller, 1960), p. 1ff.

country of origin or residence with the intention of settling in the territory of another State permanently or for a certain period, with the object of fulfilling a certain purpose".

The intention of settling is the most important criterion in distinguishing between emigration and exit. However, both linguistically and practically the word "exit" has the wider scope, since it also covers the concept of emigration; the term "exit" will therefore be used to cover both kinds of leaving a country. The question of the nature and significance of freedom of exit and the reasons why it should be counted among Human Rights call for a brief survey of the historical development of this institution.

Historical Survey of the Freedom of Exit

Although history proves that there has always been emigration in the sense of migrations by individual citizens and in particular of complete groups of settlers, the emigration of earlier days is something basically distinct from enjoyment of the fundamental freedom of emigration and exit. As enjoyment of a right and formulation of a natural Human Right it was first known in the eighteenth century. The legal concepts and practice of past centuries can only be regarded as a gradual preparation for this liberal development. The Roman Empire was the first to know a document, a form of passport, that demanded free and safe passage through foreign territories for the holder. Free and safe exit from England was also guaranteed to merchants by Magna Carta in 1215, Article 42 of which stated that everyone had the right to leave the Kingdom, subject to their feudal obligations, and the right to return, except in times of war and except in the case of prisoners or outlaws. This right, which already contains the germ of very liberal thinking, does not recur in the revised versions of Magna Carta after 1216. In the following centuries a common law writ *Ne Exeat Regno* developed in England, conferring on the King the right to refuse exit to specific persons without special authorization. The consequence was that everyone else enjoyed freedom of exit, and even this royal prerogative gradually lost its importance as the belief gained ground that in accordance with Magna Carta every Englishman was free to leave the country without permission of any authority. In 1606 an Act prohibited the use of the *Ne Exeat Regno* writ for political purposes, and since then it has fallen into disuse except as a means of redress against debtors suspected of intending to flee the land.

Mediaeval Germany, with its feudal structure and its innumerable major and minor associations of feudal lords, recognized free departure as release from the association. Inhabitants of the

towns and peasants, who were freemen, were normally granted the right of departure, but they had to pay a tribute known as *gabella emigrationis*. Serfs could not claim this right until they had bought themselves free of their bondage. Free departure of this nature is obviously based on a quite different concept of freedom from the modern basic right of freedom to emigrate. In the Middle Ages freedom denoted a particular privilege within a given legal community, whether it was feudal or a town community or based on some other territorial unit; such freedom was always granted within the framework of a single and specific legal relationship. The Edict of Augsburg in 1555 brought recognition of the *jus reformandi* of the feudal lords and at the same time granted the right of departure to subjects of the Emperor and of the feudal hierarchy who wished to leave a territory for religious reasons. This *beneficium emigrandi* was also written into the provisions of the Peace of Westphalia of 1648, but the subsequent period was marked by a period of absolutism in the national life of several countries in Europe. Emigration as a whole was prohibited, and was permitted only in exceptional cases. In France there was the special prohibition to emigrate declared against the Huguenots. This tendency of the eighteenth century in the absolutist countries increased and endeavoured to use the increasing importance of passports and the consequent closer police control of subjects in order to prevent emigration from the national territory. Moreover, many countries attempted to attract foreign settlers in order to increase the population.

The source of the modern freedom to emigrate as a Human Right and a right of citizenship is to be found in the breakthrough of liberal thought at the end of the eighteenth century. The American declarations of Human Rights (e.g., Virginia in 1776) and the French *Déclaration des Droits de l'Homme et du Citoyen* of 1789 do not lay down the right of exit in so many words, but they create the basis for this by stressing the general freedom of man as an inborn right, from which freedom to emigrate can be directly derived. The French Constitution of 1791 was the first to proclaim freedom of movement and residence. The impulse stemming from the French Revolution led to enumeration of Human Rights in many countries, and liberal ideas in the late eighteenth century, as Ulrich Scheuner puts it so strikingly,[2] placed freedom to emigrate among the natural Human Rights. It became regarded as a general natural right of citizens to decide their place of residence and their citizenship as they thought fit. By the middle of the 19th century

[2] Ulrich Scheuner, "Die Auswanderungsfreiheit in der Verfassungsgeschrifte und im Verfassungsrecht Deutschlands," *Festschrift für Richard Thoma.* (Tübingen: P. Siebeck, 1950), p. 65ff.

the liberal conception of this right as a general individual freedom had become accepted by most countries of Europe. It was no longer regarded on a footing with religious freedom and tolerance, but was ranged with the new right of freedom of movement and freedom of residence. Under the impact of this freedom-seeking development and the population pressure of many European countries caused by liberal-minded capitalism at its zenith, as well as the enormous need for manpower in America, the second half of the 19th century witnessed veritable migrations.[3]

Between 1820 and 1900 over 65 million people emigrated from European countries, 65 % of them to the United States alone. The First World War brought a general tightening-up of passport requirements and the prohibition to emigrate, although these were relaxed after the end of the war. In the 1930's emigration from Europe to the New World again ebbed, since the two "main suppliers", Germany and Italy, tried to prevent loss of manpower in view of their feverish rearmament, as part of their nationalist policy. The historical development of freedom of exit entered a new phase with the Second World War. Although the basic freedoms including freedom of exit had become a part of international law by the beginning of the twentieth century, the final breakthrough came with the Charter of the United Nations and the Universal Declaration of Human Rights, which was drafted in the spirit of that Charter in 1948.

Nature and Significance of Freedom of Exit

The inclusion of freedom of exit in the Universal Declaration of Human Rights and its enumeration in national documents listing the basic freedoms give freedom of exit the character of Human Right from the point of view of formal law. Closer examination of the nature and significance of freedom of exit gives the far more important material foundation.

Definition of freedom of exit as a basic right finds its strongest arguments in the fact that freedom of exit is but one aspect of the general sphere of human freedom and represents an inalienable complement to various other basic rights and freedoms. The existence of a basically free sphere for man, resulting from the nature and dignity of the human being as the bearer of the highest spiritual and moral values, may be regarded as undisputed. This basic freedom of the human being is expressed at various levels and is reflected in the various basic rights pledged or guaranteed in

[3] Paul A. Ladame, *Le rôle des migrations dans le monde libre* (Geneva: E. Droz and Minard, 1958), p. 87ff.

documents setting out basic freedoms and Human Rights at the national or international level.

Freedom of movement in the broader sense is one of these rights, for the nature of man as a free agent must also lead to the possibility of his free movement and choice of residence. This applies not only to the national territory in which the individual lives, for a free man must also have the opportunity to go to the territory of another State by his own free decision, and take up residence there.[4] This is clearly expressed by René Brunet, when he says: "The freedom to come and go, the freedom to change one's place of residence – not only within the country of which one is a citizen, but also from one country to another – is nothing but an essential component of personal freedom . . ." [5]

The view is sometimes stated that the principle of individual freedom includes only freedom of movement in its narrow sense, in other words only free movement within a given territory and freedom of residence, but not any claim by the individual against the State of which he is a citizen for permission to leave national territory. The question is whether the ties binding the citizen to the State, seen as an association of persons, is greater than the principle of individual freedom. The answer to this question will depend mainly on how we judge the nature of the State. If the role of the State is exaggerated in a one-sided way and the thus misunderstood ties of citizenship – as was frequently the case in the Middle Ages and in the more recent absolutist period, and also in the totalitarian States of the twentieth century – it will be denied that freedom of exit is a basic right conferring a subjective and public right on the individual against the State. However, if one sees the purpose and the sense of the State as protecting personality and its development – and any liberal and democratic State may here be taken as an example – freedom of exit must be given its due place among the basic rights.

It is often correctly stressed that the right of exit is no less "natural" a right than is freedom of movement within a country, freedom of expression or freedom of religion. In common with the other Human Rights, it nourishes the independent and self-determining creative character of the individual, not only by extending his freedom of action but also by extending the scope of his ex-

[4] Cf. Joseph Soder, *op. cit.*, p. 15ff. See also Karl Strupp, *Wörterbuch des Völkerrechts* (edited by H. J. Schlochauer, Berlin: W. de Gruyter, 1960), Vol. II, p. 505ff.: "The world being divided into States men must normally belong to the personal association of a particular State and move in the territory of a particular State. The basic freedom of the human being leads to the right to relinquish this tie, namely to renounce citizenship and leave the national territory . . ."

[5] René Brunet, *La Garantie internationale des Droits de l'Homme, d'après la Charte de San Francisco* (Geneva: C. Grasset, 1947), p. 218ff.

perience. Thus it is a right which gives intellectual creative workers in particular the opportunity of extending their spiritual horizon through study at foreign universities, through contact with foreign colleagues and through participation in conferences and congresses. The right also extends to private life: marriage, family and friendship are human ties which can be sorely affected through refusal of freedom of exit and therefore offer clear evidence that freedom of exit is a genuine Human Right. However, freedom of exit is such a right in the most elementary form where man finds himself obliged to flee (a) because he is unable to serve his God as he wished at his previous place of residence, (b) because his personal freedom is threatened for reasons which do not constitute a "crime" in the usual meaning of the word, (c) because his life is threatened either for religious or political reasons or through the threat to the maintenance of a minimum standard of living compatible with human dignity (e.g., through dispossession or natural disaster).[6] The above-mentioned reasons listed under (a), (b) and (c) show that freedom of exit, when preservation of life in a manner compatible with human dignity is imperilled, is not only a matter of the general freedom of action of the human being but also represents an essential element in the general right of self-preservation. It also shows, however, that freedom of exit incorporates the important function of an *ultimum refugium libertatis* when other basic freedoms are refused.

The individual Human Rights do not exist in isolation and the granting or refusal of one basic right may decisively affect enjoyment of one or more other basic rights. This is particularly so in the case of freedom of exit, for it is an important prerequisite or at least an important additional factor in the enjoyment of several other basic rights. In specific cases, for instance, the absence of freedom of exit may eliminate either wholly or partially the practical possibility of enjoying the right to life, freedom and inviolability of the human being, the right of religious freedom, the right of free expression and formation of opinion, and the right to work and a decent standard of living, to name only a few.

In conclusion it may be said that freedom of exit is by nature one of those basic freedoms which result logically from the principle of individual freedom and that it is of outstanding importance in view of its relationship to the other human rights and of its vital contents with regard to human existence and development potentialities. Freedom of exit, is, for these various reasons, essential to a free and democratic society. Although it cannot be claimed that democracy cannot exist without freedom of exit, – but there can

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[6] Cf. Günther Dürig, "Freizügigkeit", *Die Grundrechte* (edited by Betterman-Nipperdey-Scheuner; Berlin: Duncker and Humblot), Vol. II, p. 507ff.

be no liberal democracy without it – it can nevertheless be said that one of the first actions on the part of any dictatorship or police State is very often to deny the population freedom of movement in the broadest sense. However, where a regime limits freedom of movement and free exit as a general rule, there is the danger that it wishes to keep cheap labour within the country or cover over political and social shortcomings. From refusal of the right to leave the country the road may lead easily to a system of forced labour, social oppression and denial of basic Human Rights.

Restrictions on Freedom of Exit

The concept of freedom of exit as such points to an unrestricted freedom to leave a particular State. This would be the conclusion if the matter were regarded purely from the viewpoint of the individual. However, since man lives always in a particular society, the community and its well-being must also be taken into account. The limits of enjoyment of basic rights by the individuals and the general welfare of the State as a unit. Article 29, paragraph 1, of the Universal Declaration of Human Rights states: "Everyone has duties to the community in which alone the free and full development of his personality is possible." Security and other legitimate interests of the State can therefore require the individual citizen to observe behaviour that implies restriction of his personal freedom. Consequently there are inevitable and justifiable restrictions on freedom of exit. In comparison to the other basic freedoms these restrictions are more frequent and extensive. This is due to the very nature of freedom of exit. For example, if a State grants its citizens domestic freedom of movement, freedom of speech or freedom of assembly, it may also at the same time take effective action against harmful use of these freedoms to the detriment of the State. Action by citizens abroad against the security of the State can only with difficulty be controlled or combatted by the State concerned, if at all. The State must therefore have a power of control over the exercise of freedom of exit and must have the authority to restrict it: in particular for reasons of State security and in the interests of emigrants,[7] but also in the interests of other States, this right of the State can also become a duty. As a general rule it may be said that the individual possesses the right of free exit in principle but

[7] Measures to protect emigrants include more stringent conditions for girls under 21 wishing to emigrate (to combat the white slave trade) and the requirement of a contract for workers travelling overseas (for protection against exploitation and poverty).

that there are several valid reasons for which a State may if necessary restrict or even suspend such freedom.[8]

The reasons that entitle a State to restrict or temporarily to suspend freedom of exit, depending on the number and variety of objects to be defended (e.g., the security of the State, the economy, emigrants), the sources of danger (e.g., terrorist groups, epidemics, white slave trade) and for other essential reasons, are equally varied and numerous. Therefore it is not possible either to give a complete list of these reasons or to lay down hard and fast rules as to why a State may be entitled to use any particular measures. Any attempt to define such reasons will come up against the complexity of the subject, and the only possibility would be a very general description. The wording of Article 29, paragraph 2, of the Universal Declaration of Human Rights and of Article 12, paragraph 3, of the United Nations draft Covenant on Civil and Political Rights are examples of a very general definition of reasons justifying restrictions.[9] A decision whether there are sufficient grounds to restrict or withdraw a basic right is within the exclusive competence of each individual State. At least, this exclusive character exists so long as a State does not assume any undertakings for the observance of basic rights by means of international agreements or concede to an international authority the right to decide *a posteriori* whether a particular restriction was lawful or not. This is the case of the basic rights laid down in the European Convention on Human Rights. However, there is no such obligation on States at present as regards freedom of exit.[10] Thus, where there are no international undertakings it is the task of the individual State to decide whether it (a) recognizes the right of freedom of exit at all and (b) is prepared to act *bona fide* when such freedom is recognized in principle. This *bona fide* attitude of the individual State is particularly necessary owing to the fact that concealment

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[8] Cf. Soder, *op. cit.*, p. 10ff.; see also G. Scelle, *Précis de Droit des Gens, principes et systématique* (Paris: Librairie du Recueil Sirey, 1932), Vol. II, p. 73ff.

[9] Article 29, paragraph 2, of the United Nations Universal Declaration of Human Rights states: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Article 12 of the draft Covenant on Civil and Political Rights, approved by the Third Committee of the General Assembly on November 17, 1959, deals with freedom of movement. Paragraph 3 states: "The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order *(ordre public)*, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in this Covenant."

[10] See p. 92 of this issue of the *Journal*.

of the true grounds is fairly simple, owing to the complexity of the matter as described above, and the devices open to a State wishing to restrict freedom of exit are exceptionally numerous and varied.

The preceding remarks show the clear and essential demand made of every State and its responsible authorities to grant the basic right of freedom of exit to every person in its national territory and to restrict that freedom only where the exercise of this right is believed *bona fide* to be incompatible with the just interests of all citizens or their rights.

As will be explained in detail below, freedom of exit and the other basic rights are laid down in one form or another in many national Constitutions. Numerous countries do not grant freedom of exit, nor do they include it among the basic freedoms passed down through customary law. The mere presence or absence of constitutional or legislative guarantees of freedom of exit gives no indication, however, of whether freedom of movement and freedom of emigration are a component element in the enumeration of basic rights under the Constitution and no one is allowed to emigrate, temporary exit being permitted only for a small number of reliable party officials. There are other countries which include no provisions regarding freedom of exit in their Constitutions and whose citizens do not even need a passport in order to cross the national frontiers for good or for a certain time. In between these extremes there are many variations formed by constitutional provisions, Acts, ordinances, regulations, customary law, application of laws by executive authorities and so on. The relative nature of these existing provisions inevitably leads to the question as to what is the value of constitutional guarantees of basic rights.

Domestic Arrangements

Guarantees of freedom of exit contained in codes of law and customary law

The most numerous of such guarantees are constitutional ones. Therefore first their character should be briefly outlined. Hans Kelsen writes in this connection: "Only when the individual has the legal power to cause a law to be suspended, either individually or generally, where such law is of a nature to violate the constitutional guarantee of equality or freedom, is the so-called basic right a subjective right of the individual." [11] These words applied to freedom of exit have the following meaning: the individual enjoys a subjective right in view of the constitutional guarantee of freedom of exit, taken in the meaning of legal power, only in a State whose legal

[11] Cf. Hans Kelsen, *Reine Rechtslehre* (2nd ed.; Vienna: Franz Deuticke, 1960) p. 145ff.

system grants him an opportunity of review against a decision, administrative or judicial, which violates freedom of exit, and where the allowance of this review leads to the individual or general suspension of the law underlying the decision. We here see clearly the weakness as well as the strength of constitutional guarantees of basic rights and freedoms. By this is meant the absolute dependence of constitutional guarantees on a hierarchy of norms corresponding to the principle of the Rule of Law, as well as on an independent Judiciary and an effective system of judicial and non-judicial review. Where these conditions do not exist, constitutional guarantees of freedom of exit, as of any other basic right, remain purely theoretical.

The earlier historical survey shows that freedom of exit first came to be included among enumerations of basic rights towards the end of the eighteenth century, and that it thereafter became a regular element in various Constitutions, particularly from the second half of the nineteenth century. At present there is scarcely a single Constitution that does not contain an enumeration of human rights and the rights of citizens. Yet only a relatively small number of them contain freedom of exit *expressis verbis*. Out of ninety-nine Constitutions examined, only eighteen guarantee freedom of exit. In addition, five of the new African States refer in their constitutions to the Universal Declaration of Human Rights. The very nature of freedom of exit means that the Article covering the subject is generally provided with a clause containing a general legal reservation or special exceptions. Very few States have no such exceptions and proclaim unlimited freedom of movement out of the country; examples are the Japanese Constitution [12] and the 1950 Constitution of Indonesia.[13] Examples of constitutional guarantees of freedom of exit subject to legal reservations are found in Article 10 of the Constitution of the German Democratic Republic,[14] Article 16 of the Italian Constitution [15] and Article 26 of the Constitution of Argentina of 1949.[16]

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[12] Japanese Constitution of 1946, Article 22, paragraph 2: "Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate."

[13] Indonesian Constitution of 1950, Article 9, paragraph 2: "Everyone has the right to leave the country and – being citizen or resident – to return thereto."

[14] G.D.R. Constitution of 1949, Article 10, paragraph 3: "Every citizen has the right to emigrate. This right may be restricted only by a law of the Republic."

[15] Italian Constitution of 1948, Article 16, paragraph 2: "Every citizen has the right to leave the territory of the Republic and to re-enter it, provided the obligations of law are respected."

[16] Argentine Constitution of 1949, Article 26: "All inhabitants of the Nation enjoy the following rights, in accordance with the laws which regulate the exercise thereof... of entering, staying in, traveling over and leaving the Argentine territory..."

Obviously, a legal reservation expressed in general terms places a severe limit on the value of the constitutional guarantee affected, and it may even obliterate this altogether.[17] This is in contradiction to the principle undisputed in democratic and liberal-minded States that a constitutional right may not be affected in its essential nature by legal restrictions.[18]

In practice, however, every State, and in particular the totalitarian State, that has included in its Constitution the right to free exit subject to legal reservations may rule out freedom of exit by means of stringent requirements as to passports, currency and so on. But it can also happen in a liberal country that the Legislature, or on the basis of legal provisions the Executive, may overreach itself in its endeavours to safeguard the security of the country, or for some other compelling reason. In such instances it is the responsibility of the supreme judicial authorities in the country concerned to ensure that the constitutional guarantee of freedom of exit is robbed of its effect neither through legislation nor through the practical activities of the administrative authorities.

From the point of view of the institution of freedom of movement in particular and the legal certainty in general it is therefore preferable to follow the frequent legislative method of including in any reservation the reasons of the basis of which a law may limit freedom of exit. The Austrian Basic Law of December 21, 1867, concerning the basic rights of citizens may be quoted as an example of specific restriction of the right of exit. Article 4, paragraph 3 restricts freedom of emigration with regard to the interests of the State only on the grounds of military service. In the nineteenth century in particular, the obligations of military service were a frequent reason for restriction of freedom of exit, but in modern times the significance of this provision has almost entirely gone. In Austria, for instance, the 1955 Military Service Act merely provides that, if military considerations so require, an ordinance may be issued whereby persons of ages subject to military service are required to obtain authorization from the competent authority if they wish to leave the country.[19]

Constitutional provisions guaranteeing freedom of exit subject to specific exceptions may be legally restricted only by other constitutional provisions. With regard to the legal situation in Austria, this is clearly expressed in a verdict by the Austrian Constitutional Court, as follows:

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[17] Kelsen refers in this connection to sham guarantees; *op. cit.*, p. 197.

[18] The Constitution of the Federal Republic of Germany, the Bonn Basic Law of 1949, states this expressly in its Article 19, paragraph 2.

[19] L. Adamovitsch and H. Spanner, *Handbuch des Österreichischen Verfassungsrechts* (5th ed.; Vienna: Springer Verlag, 1957), p. 444ff.

> In addition to considerations of military service, the basic right of freedom of emigration may be restricted only through powers drawn from the Act of October 27, 1862, for the protection of personal freedom. Paragraph 5 of this Act, which was declared by Article 8 of the State Basic Law of 1867 to be a part of the latter provides that no person may be required to reside in a specific place or area without legal authority. It was thus deduced by the court in decision No. 1818 that if a person can be required to reside in a specific place or area within Austrian national territory on the basis of a legal order, that person can be refused authority to leave national territory, in this way ruling out any appeal under Article 4, paragraph 3 of the State Basic law.[20]

The above-mentioned fact that only a small number of national Constitutions specifically lay down freedom of exit seems to be in contradiction to the optimistic observations in the historical survey above that free departure from national territory had become a recognized basic right in most countries of Europe and some other countries by the middle of the nineteenth century. Closer investigation reveals, however, that although Constitutions in many cases contain no provision *expressis verbis,* freedom of exit has some basis in constitutional or national law in all liberal and democratic-minded States. In many cases the right of exit appears as part of some other basic right, particularly that of freedom of movement within the country or liberty of the person. Broad interpretation of these two basic rights in connection with freedom of emigration and exit is frequently reflected in commentaries and decisions of the supreme judicial authorities in the country concerned. It is essential to examine in detail the individual cases arising before it may be said why constitutional legislation in those countries has omitted any specific enumeration of the right of exit.

In general terms there may be two fundamental reasons for this omission. Liberal legal thinking, which had a vital effect on many Constitutions adopted after the French Revolution, resulted in freedom of exit being frequently regarded as an integral part of liberty of the person or freedom of movement. It had simply become natural and general practice that there was a right to cross national frontiers, so that there was so to speak no further need to postulate this right in specific terms. It remained the prerogative of the dictators of the twentieth century to give new impulses to the significance of this basic right and to the need to formulate it clearly, by the manner in which they denied it. It is therefore not surprising that it is the more recent Constitutions which have included in a

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[20] Cf. L. Werner and H. Klecatsky, *Das Österreichische Bundesverfassungsrecht* (Vienna: Mainz Verlag, 1961), p. 360. See also the Verdict by the Austrian Constitutional Court of October 1, 1953 (decision No. G 8/53), declaring Section 7, paragraph 1 (b) of the Passport Act of 1951 unconstitutional.

special Article the right of exit among the basic freedoms frequently on account of the favourable influence of the Universal Declaration of Human Rights. If there remain other recent Constitutions in democratic and liberal countries that contain no specific reference to freedom of exit it is not because the authors of these Constitutions have failed to recognize the importance of this basic right arising from the serious violations to which it has been exposed in the recent past and is still exposed now, but owing to the view that freedom of exit is sufficiently well founded in other articles concerned with basic rights, and that for some important reasons, often of a domestic nature, specific coverage is not indicated. From the viewpoint of clarity and of consolidation in the field of Human Rights this attitude may be regrettable, but in cases where broad interpretation of a related basic right provides sufficient guarantee for freedom of exit there is no cause for serious misgivings. The Constitution of the Federal Republic of Germany, the 1949 Bonn Basic Law, is a good example both of the above-mentioned preference on the part of its architects to avoid any specific provisions as well as of interpretation of freedom of exit through another basic right. The Bonn Basic Law contains no provisions relating specifically to freedom of emigration or of exit, and merely guarantees freedom of movement within the whole national territory for all Germans.[21]

In the discussions that preceded the drafting of the Basic Law, the question of freedom to emigrate was also discussed in detail.[22] A draft Article 6 guaranteeing freedom to emigrate was finally deleted.[23] There were various reasons for this decision. One was the decimation of the age groups from which emigrants normally come, and in view of the social position in present-day Germany it was regarded as dangerous for the integrity of the State to stress freedom to emigrate in particular. It was also considered wrong to give further encouragement to persons wishing to separate them-

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[21] Article 11: (1) All Germans shall enjoy freedom of movement throughout federal territory. (2) This right may be restricted only by legislation and only for the cases in which an adequate basis of existence is absent and, as a result, particular burdens would arise for the general public or in which it is necessary for the protection of juveniles from neglect, for combatting the danger of epidemics or in order to prevent criminal acts.

[22] Minutes of September 29, 1948, of the Fifth Sitting of a Committee of the Parliamentary Council (this latter body was entrusted with drafting the Constitution).

[23] Decision of he Parliamentary Council: "The Committee: a) agrees that the right to emigrate must remain guaranteed in the Constitution but that in view of existing circumstances this right should not be vested with the moral force of a basic right; and b) decides by overwhelming majority to delete Article 6."

selves from the communal future of Germany.[24] Ulrich Scheuner follows the same line when he writes:

> In this brief enumeration [of basic rights] the fear that inclusion of this basic right might have undesirable consequences in the existing urge towards emigration led to exclusion of freedom to emigrate. It was regarded as sufficient to include mention of emigration among the subjects covered by exclusive authority of the Federal Government in Article 73, paragraph 3 of the Bonn Basic Law, in the assumption that this freedom would remain legally acknowledged.[25]

Mere enumeration of emigration among subjects under federal competence was held by many commentators to be insufficient, and they therefore sought to read a constitutional guarantee into the provision regarding domestic freedom of movement. According to Günther Dürig,[26] there are several reasons for broad interpretation of Article 11 of the Bonn Basic Law. In contrast to other authors (e.g., Wernicke, *Bonner Kommentar*), Dürig does not see any obstacle to broad interpretation in the legislative method hitherto followed in Germany of treating freedom to emigrate generally as a special case. (The Weimar Constitution devotes a special Article, No. 112, to this freedom, and it appears in German *Land* Constitutions, if at all, in the form either of a paragraph distinct from freedom of movement within the State, e.g., Constitution of the Land of Bavaria, Article 109 II or as a single situation, as in the case of Article 18 of the Constitution of Bremen; moreover, the organizational standard laid down in Article 73, paragraph 3 of the Bonn Basic Law also separates it from freedom of movement). Since there is no definition of the concept of freedom of movement in the Bonn Basic Law, Dürig therefore suggests that this concept may be regarded as quite unaffected by the traditional and technical wording in legislation, so that its purely philosophical connotation need only be considered, since it corresponds to the sociological and historical meaning of the word, in order to recognize its juridical content.

> Free movement means free passage, but free passage is a process covering both entry and departure. This conception was subsequently broken down for technical reasons into two different parts on the one hand entry (immigration) and movement within the country, and on the other departure (emigration). If a Constitution omits and fails to state that it intends deliberately to exclude such a freedom (in the case of the Bonn Basic Law, Article 73, paragraph 3 is sufficient evidence in itself that this is not intended), then emigration is considered under the heading free movement in its broadest sense. Free movement in this

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[24] Hermann von Mangoldt, *Das Bonner Grundgesetz, Kommentar* (Berlin: Verlag für Rechtswissenschaft, 1950), p. 40ff.
[25] Ulrich Scheuner, *op. cit.*, p. 60ff.
[26] See fn. 6.

> sense is then a vital process protected by the Constitutional provisions on freedom of movement. In agreement with H. von Mangoldt, U. Scheuner and E. Giese one therefore arrives at the conclusion that Article 11 also covers freedom to emigrate.[27]

However persuasive this line of argument sounds and although different advocates of this trend warn against interpreting the right to emigrate as laid down in Article 2 of the Bonn Basic Law concerning personal freedom, since the Article in question would lose its strength if it were referred to excessively, the Federal Constitutional Court did not adhere to this opinion.[28] What it did was to state clearly that Article 11 of the Basic Law does not concern freedom of exit, which emanates far more from the general freedom of action guaranteed under Article 2, paragraph 1 of the Bonn Basic Law, within the limits of constitutional provisions.[29] In its verdict the First Division of the above Court included among its reasons the fact that Article 11, paragraph 1 of the Basic Law guarantees freedom of movement "throughout the federal territory".[30] This wording itself does not make it seem likely that a basic right to free exit from the federal territory should be granted. Nor does the background to the drafting of the Basic Law give any grounds to support this belief. In the Parliamentary Council (the body entrusted with drafting the Constitution) it was debated whether freedom to emigrate should be listed together with other basic rights, and it was finally decided that it should not. Nothing was said about freedom of exit. The Court further refers to the fact that the conditions stated in Article 11, paragraph 2 of the Bonn Basic Law with regard to restriction by law of freedom of movement contain no threat to national security. Freedom to leave the national territory has for long past been restricted for reasons of national security both in Germany and in many other countries by refusal to issue passports. Thus, it is argued, it is not to be supposed that the Legislature would have overlooked the important and long-standing grounds for restriction in the form of national security if it had wanted to grant the basic right of freedom of exit in Article 11 of the Bonn Basic Law. The verdict continues:

> Even though freedom of exit is not a part of freedom of movement within Germany as protected by Article 11, paragraph 1 of the Basic

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[27] Günther Dürig, *op. cit.*, p. 507ff.

[28] Verdict by the First Division of the Federal Constitutional Court of January 16, 1957 (decision no. 1 BvR 253/56), *Entscheidungen des Bundesverfassungsgerichtes,* [an official series of law reports], (Tübingen, 1957), Vol. VI, p. 32ff.

[29] Article 2, paragraph 1 of the Bonn Basic Law states: "Everyone shall have the right to the free development of his personality, insofar as he does not infringe the rights of others or offend against the constitutional order or the moral code."

[30] See fn. 21.

> Law, as an emanation of individual freedom of action it is nevertheless granted by Article 2, paragraph 1 of the Basic Law within the limits of the constitutional system of law.

The Swiss Federal Constitution of 1874 is another that contains no formal provision guaranteeing freedom of exit, but it is agreed by both legal doctrine and court decisions that this basic right is derived from the provision regarding freedom of residence. Article 45 of the Swiss Constitution guarantees every Swiss subject the right "to settle at any place in Swiss territory, subject to the production of a certificate of origin or similar document." Under pronouncements of the Swiss Federal Court, such freedom of residence includes freedom to emigrate:

> Freedom of residence as guaranteed by Article 45 of the Federal Constitution also includes the obligation of the canton of origin and the canton of previous residence not to impede or prevent a Swiss citizen from moving his place of residence by refusing to provide the necessary identification papers. This shall apply irrespective of whether a request is made for such documents to be issued or prepared for the purpose of settlement in another part of Switzerland or for residence abroad: in so far as it is the obligation of Switzerland to enable its citizens to enjoy freedom of movement, such freedom must also be regarded as guaranteed in the broader sense by the Constitution.[31]

The view of the Federal Court is sustained by commentators of the Swiss Federal Constitution. Giacometti writes in his work, *Schweizerisches Bundesstaatrechts*:[32]

> However, if freedom of residence is the right of the Swiss citizen to live either temporarily or for a long period in any canton or municipality, this must also contain the power of changing the place of residence once it has been chosen and therefore also the right to emigrate. Nevertheless, freedom to emigrate results, like the freedom of the citizen of a canton to settle in his home canton, not from federal provisions but from the individualistic source of freedom of residence.[33]

A further example for broad interpretation of the basic right of personal freedom in the form of freedom of movement and of exit is provided by the United States. A short historical review is needed

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[31] The quotation is from *BGE*, 53 (1927) I, 434, and other related decisions are to be found in *BGE*, 36 I, 221 E 4 and 51 I 392 E 2; *BGE* is the official collection of the verdicts by the Swiss Federal Court.

[32] Giacometti and Fleiner, *Schweizerisches Bundessstaatsrecht* (Zurich: polygraphischer Verlag, 1949), p. 251ff.; similarly, W. Burckhardt, *Kommentar der Schweizerischen Bundesverfassung* (Bern: Stämpfli and Co., 3rd ed., 1931), p. 391ff., and E. Ruegg, *Niederlassungsfreiheit und Beschränkung der Freizügigkeit* (Zurich: Schulthess, 1948) p. 60.

[33] Also, Article 7 of the Belgian Constitution concerning personal freedom is broadly interpreted to provide freedom of exit; see Pierre Wigny, *Droit Constitutionnel, principes et droit positif*, (Brussels: E. Bruylant, 1952), p. 309ff.

in order to understand in their proper perspective the legal decisions described below. The right of free emigration and exit is not specifically stipulated anywhere in the Constitution of the United States of 1788 or the amendments of 1791, 1865 and 1870, which codified the rights of citizens and Human Rights. Apart from restrictions in time of war American citizens were able to travel throughout the world freely and without passports until the First World War. Passports could be obtained upon application, but were not necessary in order for the person to leave the country. As political tension grew, many countries demanded that American citizens should produce passports upon entry, and the American Government also decided that in a state of emergency or other special circumstances no American could leave the country without a passport. The 1952 Immigration and Nationality Act made it an offence to leave the country without a passport. Congress had long since decreed in 1926 that the State Department should be responsible for issuing passports in accordance with the President's instructions. These enabled the Secretary of State to issue, to refuse or to cancel passports at his discretion. This theory of unlimited discretionary powers of the Executive in issuing passports undoubtedly derives from the doctrine of unlimited Government authority in the field of foreign affairs. However that may be, the State Department willingly took up the idea of having full discretionary powers in regard to passports and the fact that it was freed from any necessity of procedural investigation or the obligation to explain why it had refused or withdrawn a passport in a specific case. The 1950 Internal Security Act prohibited the issue of passports to members of Communist organizations, and in 1952 the State Department issued provisions intended to strengthen this Act by beginning to refuse passports also to persons who were suspected of "furthering the Communist cause". This relatively arbitrary action caused a general storm of protest, which reached a climax in February 1952 when a passport was refused to the world-famous chemist and Nobel Prize Winner, Dr. Pauling.

In order to meet the increasing volume of criticism, the State Department set up in 1952 an appeal authority on decisions concerning passports. This authority had to draw up its own rules of procedure, but was required to include among them the right of hearing and of being represented by counsel. Persons who were not prepared to swear on oath that they neither were nor had been members of the Communist Party were still unable to apply even to this appeal authority.[34] Subsequently, various American courts of law found that passports had been unlawfully refused and

[34] Cf. Robert E. Cushman, *Civil Liberties in the United States* (Ithaca, New York: Cornell University Press, 1956), p. 113ff.

ordered passports to be issued to those concerned.[35] Thus, the Appeal Court of the District of Columbia on several occasions rejected the Government's claim to absolute and indisputable powers to refuse a passport. Judge Faly stated that the right to travel is a "natural right" and that any restrictions imposed by the Government on this freedom must be in conformity with the provisions of the Fifth Amendment to the Constitution.[36]

This view was upheld in 1958 by the Supreme Court in the case of *Kent et al.* v. *Dulles.*[37] In this case also American citizens had been refused a passport and thereby authority to leave the country, since the authorities held that they either belonged to or were close to the Communist Party. The verdict of the Supreme Court stated: "The Act of July 3, 1926 . . . and . . . the Immigration and Nationality Act of 1952 . . . do not delegate to the Secretary authority to withhold passports to citizens because of their beliefs or associations . . ." [38] In its findings the Supreme Court pointed out that the right of exit is a part of personal freedom, of which, in accordance with the Fifth Amendment to the Constitution, no citizen may be deprived without due process of law.

In addition to the view clearly revealed by these verdicts that freedom of exit is a part of personal freedom as guaranteed by the Constitution, there is a further argument for the existence of a natural right to travel, that may occur either in combination with other points or on its own: namely that freedom of exit is guaranteed under customary law, as in England.[39]

In the English legal system most basic rights are not secured by inclusion in a code of law but by the fact that restrictions on individual freedoms may only be based on Common Law or a Statute. These basic rights are in fact negatively defined by way of the clearly delineated and specified character of the restrictions to which they may lawfully be subjected. The right to freedom of movement and unhindered exit is a basic right of this nature. As mentioned above Magna Carta of 1215 already provided freedom of exit. This provision was not included in Henry III's Great Charter, but it is generally argued that, since the Magna Carta was only codifying existing law, this omission in the later edition of Magna Carta did not extinguish the right. The Royal writ *ne exeat regno* and laws

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[35] *Bauer* v. *Acheson,* 106 Fed. Supp. 443 (1952); *Nathan* v. *Dulles,* 129, Fed. Supp. 951 (1955); *Schachtmann* v. *Dulles,* 225 Fed. (2d) 938 (1955).

[36] Louis L. Jaffe, "The Right to Travel: The Passport Problem" in *Foreign Affairs,* Vol. 35, No. 1, p. 52ff.; also note Fifth Amendment to the U.S. Constitution (1789): ". . . nor be deprived of life, liberty or property without due process of law . . ."

[37] *Kent et al.* v. *Dulles,* 357 U.S. 116 (1957).

[38] See also: *Bulletin of the International Commission of Jurists,* No. 8, p. 17ff.

[39] See Jaffe, *op. cit.*

from the time of Elizabeth I, James I and other Stuart kings limited this right, but these provisions were later repealed so that the right of free exit under Common Law again applied and was and is granted to British citizens without restriction.

It was stated above that more recent constitutions have tended to include a separate provision referring to freedom of exit more commonly than was the practice before, but certain restrictions apply here. One of these was also mentioned above, namely, where the State regards freedom of exit as sufficiently protected by some other constitutional provision and feels that specific standards relating to freedom of exit are inadvisable or superfluous. What is far more regrettable, however, is the tendency of numerous Communist States when revising their Constitutions to amend the enumeration of basic rights. As a result some of the Communist States of Eastern Europe, which still included the basic right of freedom to emigrate in their Constitutions adopted after 1945, have no longer included this right in their recently amended Constitutions. Also, the Constitution of the Mongolian People's Republic of 1945, which was amended in 1952, contained reference to freedom of movement and free choice of residence as a right of citizens; the new Constitution of July 6, 1960, contains no such provision. Article 10 of the Constitution of the Democratic Republic of Viet-Nam, proclaimed in 1946, states: "The citizens of Viet-Nam shall enjoy freedom of speech, freedom of the press, freedom of assembly, freedom of religion, the right of free residence and of free movement throughout the country and the right to travel abroad." This last provision was not included in the Constitution which came into force on January 1, 1960. Article 28/2 of the 1960 Constitution states: "Citizens of the Democratic Republic of Viet-Nam shall enjoy freedom of residence and freedom of movement." [40] The Constitution of the Republic of Czechoslovakia of May 9, 1948, also contained a provision proclaiming general freedom to emigrate. This is no longer the case in the Constitution of July 11, 1960, of what is now termed the Czechoslovak "Socialist" Republic.[41] These examples clearly show a tendency that is opposed to freedom of exit, but it will not be considered here whether this change has had practical effects also or whether it was merely a matter of deleting provisions that existed on paper alone.

[40] German text of the Constitution in *Osteuroparecht* (edited by Deutsche Gesellschaft für Osteuropakunde; Stuttgart: Deutsche Verlagsanstalt, 1960), Vol. 2/3 p. 178ff.

[41] Article 7, para. 2 of the 1948 Constitution states: "The right to emigrate may be restricted only on the basis of a law." Article 31 of the 1960 Constitution states: "Inviolability of secrecy of correspondence and freedom of movement are guaranteed." German text in *Jahrbuch für Ostrecht,* (edited by Institut für Ostrecht, Munich; Herrenalb im Schwarzwald: Ikulta Verlag, 1960), Vol. I, No. 2, p. 367ff.

As a general rule it may be said that, despite the above-mentioned trend, a surprising number of totalitarian States proclaim freedom of exit in their Constitutions.[42] Of course, these provisions may have no real significance for the people that is oppressed by a dictatorship with either a left-wing or a right-wing bias. Nevertheless, it is interesting for the objective observer to note that even a police State finds it desirable to show a semblance of granting this right. This may be a sign of the fact that freedom of movement has become one of the criteria of liberal democracy in men's minds.

A further possibility of regulating a basic right lies in the adoption of simple laws. For instance, the 1936 Constitution of the USSR contains no reference to freedom of movement. However, Article 5 of the Civil Code of the Russian Socialist Federal Soviet Republic (RSFSR) of 1922 provides that Soviet citizens shall enjoy freedom of movement and residence throughout the territory of the RSFSR.[43] There is no known instance of any broad interpretation of this freedom of movement within the country, which, as is pointed out below, is not granted at all in practice, nor is there likely to be any such interpretation. Moreover, item 5 in the introductory legislation to the 1922 Civil Code states that broad interpretation of the Civil Code is possible only in cases where the interests of the "workers' and peasants' State or the working masses so require".[44]

This concludes the brief survey of variations in legal standards governing freedom of exit, ranging from specific and unlimited constitutional guarantees to interpretation on the basis of other constitutional provisions, simple legislation or reference to Common Law in its numerous variations.

Control and Restriction of Exit

What matters most of all for the individual who wants to leave a country is not the written or unwritten guarantees of freedom of exit. What he wants to know is whether or not he will be allowed to leave *de facto*. Since the process of leaving the country is governed by a series of legal and administrative provisions in each State as well as by a host of other regulations that have an indirect but substantial impact on freedom of exit, the existence of such freedom is determined in each individual case by a wide variety of factors.

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[42] E.g., Cuba, Dominican Republic under the dictator Trujillo, and German Democratic Republic.

[43] Reinhard Maurach, *Handbuch der Sowjetverfassung,* (Munich: Isar Verlag, 1955), p. 328ff. The amendments to the Civil Code of December 8, 1961, arrived too late for inclusion here.

[44] Vladimir Gsovski, *Soviet Civil Law,* (Ann Arbor: University of Michigan Law School, 1949), Vol. I, p. 19ff.

As pointed out earlier there are justifiable restrictions on freedom of exit. These restrictions need to be written down in law, and administrative authorities are needed to implement these provisions. The great majority of such regulations, which are often tied up with a mass of uncertain legal concepts, together with the discretionary powers of executive authorities, represent a very considerable danger for the principle of freedom of exit.

This applies particularly in the case of documents required for exit purposes. The institution of travel documents arose from the pressing need for control of entries and exits for reasons of national security and general welfare. Most countries require their own citizens and foreign subjects desiring to leave the national territory to produce a pass or some equivalent indentity paper. In some countries special authorization has to be obtained in the form of an exit visa, a police emigration authority and so on. Passport regulations are one of the most effective tools in the hands of a State for the purpose of controlling, restricting or entirely preventing exit. As a rule, such regulations represent a body of positive and negative requirements with a view to the issue of a passport and generally give the issuing authority broad discretionary powers with regard to these requirements. It is therefore of particular importance that persons applying for a travel document should have a right of appeal against rejection of their application and that there should be access to an independent court should a constitutional guarantee be violated and application to administrative authorities be rejected. As a final feature of this legal protection, which is essential under the principle of the Rule of Law, the administrative authority competent to issue passports or exit documents should be required by appropriate provisions to give its decision on any individual claim within a specified period and to inform the applicant of the reasons in the case of refusal.

The report by Mr. José D. Ingles to the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights of the United Nations Economic and Social Council is of great interest in this connection.[45] The theme was "Study of Discrimination in Respect of the Right of Everyone to Leave any Country, including his Own, and to Return to his Country", and was based on information supplied by sixteen Governments and a number of non-governmental organizations and dealing specifically with the problems of passports. The Commission's debates [46] on the report also referred repeatedly to the dangers

[45] Progress Report by the Special Rapporteur, Mr. José D. Ingles, United Nations Distribution No. E/CN 4/Sub. 2/L.215, November 3, 1960.
[46] Sub-Commission on Prevention of Discrimination and Protection of Minorities, 13th Session, 311th-314th meetings, E/CN 4/Sub. 2/SR. 311, 312, 313, 314.

threatening freedom of exit where there are excessive executive powers, as well as to the need for the above-mentioned essentials such as judicial and non-judicial review and decision by authorities within a given period to be guaranteed. In addition to passport legislation, each country has a number of other provisions restricting freedom of exit, chief among these being measures to protect emigrants, public health standards, currency regulations, and customs regulations. So long as all these provisions and their application do not involve any discrimination or suspension of freedom of exit and are in the public interest, such restrictions may be regrettable as regards complete freedom of exit but they cannot be regarded as violating the basic right to freedom of exit. In many cases, however, the control measures in question are merely a means of applying discrimination for political purposes in the field of freedom of exit. This is referred to in a publication of the International Labour Office [47] which states:

> ... while emigration in most countries is not seriously limited by statute, administrations have more or less effective means of opposing the departure of a given category of persons or emigration to a given country if they so desire ... Used on a very large scale, this purely administrative device could, even in the absence of a statutory provision, bring emigration to a standstill; [48] this is virtually what has happened in the Eastern European countries and the Soviet Union.

Violation of the Basic Right to Freedom of Exit

Any attempt to define the concept of "violation of freedom of exit" must take into consideration the fact that freedom of exit is a basic right which is by nature subject to government restrictions for the protection of the persons claiming that right and the protection of the national community.[49] This consideration leads to a definition of violations of freedom of exit based on the justifiable restrictions. These restrictions were defined by the United Nations Universal Declaration of Human Rights in a form applying to all the basic rights and freedoms laid down there. Article 29, paragraph 2 states the following:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

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[47] International Labour Office, *International Migration 1945-1957*, (Geneva: Imprimerie du "Journal de Genève", 1959), p. 213-214.
[48] These comments on emigration also apply, albeit to a lesser extent, to exit – author.
[49] See p. 69 above.

Many modern constitutions prescribe a narrower and at the same time a more specific framework for permissible reservations by stipulating that restrictions of basic rights in general may only be imposed by laws and exclusively in the interest of public safety, order, morals or health, or for the protection of the rights and freedoms of other persons. Thus, there will be violation of freedom of exit in all cases where refusal of permission to leave the country is not covered by a permissible reservation.

Violation of freedom of exit is possible in many forms, which is evident from the above definition. Attention must first be given to all legal provisions laying down unjustified restrictions of freedom of exit. In addition, all legislative and administrative acts and court decisions have to be regarded as violating freedom of exit to the extent that they represent discrimination [50] in the sphere of this freedom. The most common violation of freedom of exit is in fact in the form of discrimination against persons or groups of persons owing to their political beliefs. Other reasons for discrimination with regard to freedom of exit have become far rarer nowadays, although cases of racial and religious discrimination have occurred and still do. The instances of violation of freedom of exit quoted below are not meant to be an exhaustive enumeration, and their purpose is merely to illustrate the general and theoretical considerations stated here as well as to prove that freedom of exit is still frequently violated at present and therefore requires quite exceptional protection.

The 1936 Constitution of the USSR contains no provisions regarding either freedom of movement within the country or the right to emigrate or to leave the country.[51] One reason why it does not make any reference to the important basic right of freedom of movement within national territory may be that this right was severely restricted *de facto* with the introduction of the passport system (Acts of 1932 and 1940 concerning the obligation to have passports). Only holders of passports enjoy freedom of movement in the USSR, excluding prohibited areas and frontier zones, while all persons without passports (primarily rural dwellers) need to have permission of the administrative authority in order to change their place of residence to urban estates and even more so to large

[50] Discrimination as defined in Article 2 of the Universal Declaraton of Human Rights: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

[51] See p. 82 above.

towns.[52] In considering the legal and practical situation in the Soviet Union with regard to freedom of exit, we must start from the basic principle that there is neither constitutional nor legal guarantee of this freedom. Questions of entry into and exit from the Soviet Union were governed by the provisions issued on June 5, 1925 (Collected Legislation of the USSR, 1939, No. 37, Article 277) by the Council of People's Commissars and confirmed by the Central Executive Committee. Exit from the USSR is subject to issue of a passport valid only for a specific period, and generally for not more than one year. There are (a) diplomatic passports, (b) service passports and (c) general passports.[53] The authorities issuing passports are either the military authorities or the Ministry of the Interior. On the basis of existing practice in the Soviet Union it may be said that a Soviet citizen will generally be entitled to a passport authorizing exit only if he leaves the country on an official mission, which also covers participation in conferences of non-government organizations or scientific congresses. Travelling abroad for purely private purposes is allowed very seldom and generally only in the case of reliable party officials. In recent years there has been a very slight let-up in this practice, leading to organized trips abroad by Soviet citizens. There are no legal provisions to govern emigration.[54] Permission to emigrate is granted in extremely rare cases by the Praesidium of the Supreme Soviet, which also authorizes withdrawal of citizenship.

It is a punishable offence to leave the country without a valid passport, and Article 83 of the Criminal Code of the RSFSR of January 1, 1961, states: "Exit from the Soviet Union, entry into the Soviet Union, crossing the border without a proper passport or permission of the competent authority constitutes an offence punishable by one to three years' imprisonment." [55] The same wording is found in Article 20 of the Law concerning criminal liability for

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[52] Cf. R. Maurach, *op. cit.*, p. 328ff. See also the exact description of restrictions on freedom of movement and the passport system in the Soviet Union in H. McClosky and J. Turner, *The Soviet Dictatorship* (New York: McGraw-Hill Book Company Inc., 1960), p. 468ff.

[53] Vlasov and Studenikin, *Sovetskoe Administrativnoe Pravo* (Soviet Administrative Law), (Moscow: Gosyvrizdat, 1959), p. 274ff.

[54] *Ibid.*

[55] Criminal Code of the RSFSR of October 27, 1960, in force since January 1, 1961, published in a special official edition under the title of: "The Laws and Decisions of the Supreme Soviet of the RSFSR adopted at the session of the Supreme Soviet of the RSFSR of October 25-27, 1960." German text in an article "Criminal Code, Criminal Procedure and Judicial Establishment Law of the RSFSR", *Berichte des Osteuropainstituts an der Freien Universität Berlin* (Berlin: 1961), Vol. 46, p. 3ff. This Criminal Code replaced the Criminal Code of the RSFSR of January 1, 1937. The Criminal Codes of the other Union Republics diverge only in minor details.

crimes against the State,[56] which is valid throughout the Soviet Union.[57] Article 84 of the Criminal Code of the RSFSR of 1927 dealt with the same offence, but provided for more severe imprisonment, in the form of sentence to a work camp.

The above-mentioned criminal provisions can be applied only to cases of unlawful short-term exit when the person concerned intends to return to the USSR. Any other forms of unlawful exit or residence abroad without valid authorization, or failure to follow an official order to return to the Soviet Union renders the person concerned liable to far more severe penalties, which can without any exaggeration be called draconian.[58] For instance, the Ordinance of November 21, 1929,[59] stated that any Soviet Official abroad who had "gone over to the camp of the enemies of the working class and the peasants" and who refused to return to the Soviet Union would be declared outside the law. Such outlawing had led to confiscation of property and death by shooting within 24 hours of the apprehension of that person. This punishment could only be ordered by the Supreme Court of the USSR. Fleeing the country and refusal to return, constituting high treason, could also be made an indictable and punishable offence in accordance with Article 58(1)(a) of the Criminal Code of the RSFSR of 1927. The above-quoted Ordinance of 1929 was repealed by the Law concerning confirmation of the basic criminal laws in the USSR and the Union Republics of December 25, 1958.[60]

Fleeing the country and refusal to return to the Soviet Union, irrespective of whether the person concerned is a Soviet citizen on an official mission or not, has since then been covered exclusively by the charge of high treason as stated in Article 1 of the Law

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[56] Statute concerning criminal liability for offences against the State of December 25, 1959, in *Vedomosti Verkhovnogo Soveta SSSR* (Gazette of the Supreme Soviet of the USSR; hereafter cited: Vedomosti, Moscow), No. 1 (933); Russian and English text in an article "The Federal Criminal Law of the Soviet Union", in *Law in Eastern Europe,* Vol. 3, p. 73ff. (Edited by University of Leyden; Leyden: A. W. Sythoff, 1959).

[57] The anomaly that the same criminal offence is dealt with both in a law of a Union Republic and in a law valid for the whole Union is due to the division of competence in Soviet criminal legislation; see the article "The Principles of Criminal Legislation in the USSR and the Union Republics", *Studien des Instituts für Ostrecht, Munich,* (Herrenalb im Schwarzwald: Ikulta Verlag, 1960), Vol. 10, p. 14ff.

[58] See W. W. Kulski, *"The Soviet Regime",* (Syracuse: University Press, 1954), p. 239ff.

[59] Ordinance of the Praesidium of the Central Executive Committee of the USSR of November 21, 1929, *Sobranie Zakonov SSSR* (Collection of Laws of the USSR) No. 6, p. 66, (Moscow: 1930).

[60] The list of items of legislation repealed by this Statute is contained in a *ukase* of the Praesidium of the Supreme Soviet of the USSR of April 13, 1959, see *Vedomosti,* 1959, No. 15, Article 91.

concerning criminal responsibility for crimes against the State and in Article 64(a) of the Criminal Code of the RSFSR of 1961. These sections, which vary only slightly from the high treason Article 58(1)(a) of the Criminal Code of 1927, give a very broad definition of high treason:

> Treason against the nation, that is to say a deliberate act performed by a citizen of the USSR to the detriment of national independence, territorial defence or military power of the USSR: joining the enemy's side, espionage, divulging national or military secrets to a foreign power, *flight abroad or refusal to return from abroad to the USSR,* support for a foreign power while performing unfriendly acts directed against the USSR or conspiracy with the purpose of seizing power is punishable by 10 to 15 years' imprisonment, together with confiscation of property, or by the death sentence, together with confiscation of property. (Emphasis added).

This provision postulates that fleeing abroad is in itself an anti-Soviet act even if it is not combined with any activities of a kind normally connected with the concept of high treason.

Until the 1927 Criminal Code was repealed, a member of the armed forces fleeing abroad was liable to be declared a deserter and condemned to death, with confiscation of property. Since criminal proceedings can generally not be conducted when a person has fled the country, Soviet criminal legislation introduced a system of family responsibility unknown in democratic States, in order to deter members of the Soviet armed forces from deserting. Article 58(1)(c) of the 1927 Criminal Code stated that family members of a deserter who had helped him to flee or had known of his intention to flee without informing the authorities were punishable by five on ten years' imprisonment, with confiscation of property. The other adult members of the family of the deserter who had lived in the same house as the deserter at the time of the offence or were supported by the deserter were made liable to deprivation of the right to vote and five years' banishment to remote parts of Siberia. Article 58(1)(c) laid down the heaviest punishments for family members of a deserter helping him or failing to denounce him. This in itself is in strong conflict with the legal beliefs of a free democratic society, which frees family members from any such obligation under penal law to denounce others. There was a particularly glaring breach of the legal principle *nullum crimen sine culpa* in the second provision of Article 58(1)(c) which laid down collective criminal responsibility of the family members of a deserter even if they had not helped him or even known of his intention to flee.[61] These provisions concerning the flight of a member of the armed forces and the responsibility of family members are happily no longer to

[61] See Kulski, *op. cit.*, p. 240ff.

be found in the new Criminal Code of the RSFSR. The Law concerning criminal responsibility for military crimes [62] refers only to the crime of desertion common to many countries and avoids any provisions laying down collective responsibility for family members.

The preceding comments show only too clearly that the basic right of freedom of exit, and therefore an essential part of personal freedom, is denied to citizens of the Soviet Union. But the Soviet Union deprives not only its own citizens of this Human Right, but also thousands of foreigners on Soviet territory. Most of these persons were brought to Russia by war-time events, either by being deported by the Soviet authorities from territories they occupied or because they are still retained as prisoners of war. Despite repeated applications and despite numerous protests by their Governments they are still waiting for permission finally to return to their countries. In this way the Soviet authorities are violating not only basic Human Rights but also generally recognized rules of international law.[63]

The comments on freedom of exit in connection with the Soviet Union, apply, subject to slight variations, to all Communist countries in Europe and Asia. The Iron Curtain separating the countries of the Eastern Bloc from the rest of Europe was, as repeatedly emphasized by Communist authorities, "erected for the protection of the Socialist camp against the subversive activities of the revenge-seeking and militaristic countries of Western capitalism". But the events of the last ten years have shown only too clearly against whom the barbed-wire barrier and the mine-fields are really directed. They are there first of all in order to make exit impossible, in conjunction with the legal, administrative and juridical precautions. The most moving and strongest proof that this is so is provided by the innumerable refugees from those territories, and particularly those of them who were wounded or killed where the Iron Curtain stands, by the bullets of the frontier police or by mines. The last remaining gap of any size in the Iron Curtain was closed on August 13, 1961, when a wall was erected through the middle of Berlin.[64]

Other extreme cases of violation of freedom of exit are found in the dictatorships of Latin America: in the Dominican Republic prior to the murder of Trujillo, in Cuba, in Paraguay and in Nicaragua. On the continent of Africa the United Arab Republic and

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[62] Law of December 25, 1958; see *Izvestiya* of December 26, 1958, and *Vedomosti*, 1959, No. 1 (933); Russian and English texts in *Law in Eastern Europe, op. cit.*

[63] Cf. L. Oppenheim, *International Law*, (8th ed. revised by H. Lauterpacht, London: Longmans, Green and Co., 1955), p. 690ff.

[64] See *The Berlin Wall – A Defiance of Human Rights*, published by the International Commission of Jurists, Geneva, March 1962.

the Republic of South Africa have to be mentioned in particular. These examples have one distinction in common with regard to the countries of the Eastern bloc, in that prohibition of exit is normally restricted to active political opponents, whereas the Communist States of Europe oppose any form of emigration and in most cases any form of exit. The Departure from the Union Regulation Act of 1955 [65] in the Union of South Africa states that exit without official authorization is a punishable offence and gives the Government complete discretion in granting the right of exit. South African politicians and students have repeatedly been refused the right to leave the country.[66]

The negative attitude of the Government of the United Arab Republic with regard to freedom of exit and of emigration may be illustrated by the statements of the Egyptian representative in the debate of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[67] He said that the individual State could not be required to grant the right of free exit as laid down in Article 13, paragraph 2 of the Universal Declaration of Human Rights as a collective right, but only as an individual right. He based this view on the possible adverse effects of mass emigration on the economy of a country. As was correctly pointed out in the course of the debate, this view that right of exit exists only for the individual would destroy freedom of exit. The text of Article 13, paragraph 2 of the Universal Declaration ("the right of everyone . . .") also argues against such interpretation of this basic right. Even when due consideration is given to the right of a State to impose restrictions when its economy is threatened, any distinction as to a collective and an individual Human Right of freedom of exit must be rejected. It is for the particular State itself to provide that minimum of freedom and economic and social welfare that is necessary in order to counteract any trend towards mass emigration. The argument that mass emigration would harm the economy of the State loses all justification as soon as the cause of emigration lies in political terror or in the failure of an imposed economic system.

The severest and most frequent violations of freedom of exit are those under totalitarian regimes, whatever their ideological basis. The main reason is that refusal of freedom of exit is a generally inevitable complement of any national system built up on coercion and terror. So long as persons can avoid political pressure by leaving the country, such a system will be deprived of complete

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[65] Section 2.
[66] See *South Africa and the Rule of Law*, published by the International Commission of Jurists, Geneva 1960, p. 38.
[67] See fn. 46.

success, and it will lead to an increasing lack of manpower resulting finally in the economic collapse of the country. This is true of all totalitarian States. For the Communist States, whose totalitarian system is essentially a mixture of ideology and terror, there are further reasons that necessitate hermetic sealing of the country from non-Communist States. There is first and foremost the loss of prestige arising from mass departures and the consequent negative impact on Communist Parties in other countries. For the Communist ideology, which in the view of its representatives is the basis for the best social system and the only one with prospects for the future and whose aim is the conquest of the whole world, it is utterly unacceptable that anyone can voluntarily leave this social order in order to submit to an "inferior" one. In the present stage of the arms race between the world powers, the fear of betrayal of national and military secrets by departing nationals is also of great importance.

The International Character of Freedom of Exit

The preceding comments show that departure from a country is in the first instance a domestic question. As such it can and must be regulated by the various States in the interests of citizens but also in the justified interests of the welfare of the State. At the same time it is also a question belonging to the field of international law, in view of the bearing that freedom of exit has on Human Rights. Human Rights did not become accepted in international law until quite recently. Until a few decades ago they were regarded merely as basic rights which each State was free to settle. The first steps were taken after the First World War and the Charter of the United Nations finally made the recognition and observance of Human Rights one of its principal aims, thereby giving Human Rights the status of a question to be governed at the international level.[68] The Economic and Social Council of the United Nations was required by Article 68 of the United Nations Charter to set up a Commission on Human Rights. This Commission formed several Sub-Commissions, one of which deals with the protection of minorities and the prevention of discrimination. This Sub-Commission is at present carrying out a thorough examination of all matters connected with freedom of exit.[69] The Commission on Human Rights also drew up the Universal Declaration of Human Rights

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[68] On the international law character of Human Rights, see also: Heinz Guradze, *Der Stand der Menschenrechte im Völkerrecht* (Göttingen: Otto Schwartz & Co., 1956).

[69] See fn. 45 and fn. 46.

and various drafts for the Human Rights Covenants still under discussion. Both in the Universal Declaration and in the Draft Convenant on Civil and Political Rights the right of freedom of exit has been included.[70] Of course, the Universal Declaration is not a treaty in the framework of international law, but it is held by the overwhelming majority to represent a recommendation by the General Assembly to member States within the meaning of Article 10 of the Charter of the United Nations. On the other hand, the Covenant on Civil and Political Rights, which exists at present only in draft form, would have binding effect upon ratification. Binding requirements for States were imposed by the European Convention on Human Rights and Fundamental Freedoms of November 4, 1950.[71] Freedom of exit was originally not included among its provisions. The reason was that agreement could not be reached regarding inclusion of this right and it was decided to reserve provisions governing it for later drafting, together with other provisions, in order to avoid the danger of postponing or even jeopardizing signature of the whole Convention. Thus, one Protocol has already been subsequently established, adding three further basic rights to those already listed in the Convention.[72]

On January 22, 1960, the Consultative Assembly of the Council of Europe adopted Recommendation No. 234 proposing the signature of a second Protocol to contain provisions safeguarding six more Human Rights not previously listed either in the Convention or in the first Protocol.[73] These six rights include that of freedom of movement and freedom of exit. Article 2, paragraph 2 of the draft Protocol reads: "Everyone shall be free to leave any State, including his own." The Committee of Ministers of the Council of Europe transmitted the Recommendation to a Committee of Experts,

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[70] Article 13, paragraph 2 of the Universal Declaration of Human Rights; see above p. 63; Article 12, Paragraph 2 of the draft Covenant on Civil and Political Rights, adopted by the Third Committee of the General Assembly of the United Nations on November 17, 1959, states: "Everyone shall be free to leave any country, including his own."

[71] The Convention is a sort of common Constitution of rights and freedoms. It is a Charter sanctioned by a specific system of collective supervision. It thus places constitutional and legislative guarantees on an international basis . . ."; T. Eustathiades "The Convention on Human Rights and the Statute of the Council of Europe", *Die Friedenswarte* (Basel: Verlag für Recht und Gesellschaft A.G., 1955), Vol. 52 No. 2, p. 93ff.

[72] These basic rights are: the right to property, parents' right to educate their children and the right of free elections. This first additional Protocol was signed at the meeting of the Committee of Ministers on March 26, 1952. Cf. K. J. Partsch, "Origins of the European Human Rights Convention," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* (Stuttgart: W. Kohlhammer Verlag, 1953/1954), Vol. 15, p. 631ff.

[73] See *European Co-operation in 1960,* a report by the Secretary-General of the Council of Europe, 1961, (Strasbourg: Council of Europe, 1961), p. 197ff.

which is due to report in 1962, following which the debates preceding possible signature of the additional Agreement will take place among member States.

A further document in international law that refers to freedom of exit is the American Declaration of the Rights and Duties of Man, adopted at the Ninth Conference of the Organization of American States, held in Bogotá from March 30 to May 2, 1948.[74]

In addition, the draft of a Human Rights Convention for the Organization of American States was prepared by the Inter-American Council of Jurists in 1959 and transmitted to the Council of the Organization of American States. This Convention *in statu nascendi* also includes freedom of exit among the Human Rights to be protected.[75]

This brief survey of the aspects of freedom of exit in international law provides a sufficient basis for the conclusion that freedom of exit is regarded by the vast majority of present-day States as constituting a Human Right that requires international protection. This also means, however, that the whole subject enters the field of international law, although it cannot thereby lose its significance in municipal law.

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[74] Article VIII of the Declaration states: "Every person has the right to fix his residence within the territory of the State of which he is a national, to move about freely within such territory, and not to leave it except by his own will."

[75] Article 15 of the Draft Convention on Human Rights reads: "Subject to any general legislative enactments of the State concerend that provide for such restrictions as may reasonably be necessary to protect national security, public safety, public health or morality, or the rights and freedoms of others and as are consistent with the other rights recognized in this Convenion: ... 1b) Everyone shall have the right to leave any country, including his own."

THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN MUNICIPAL LAW

CONTENTS

INTRODUCTION *

The Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on November 4, 1950, by the fifteen Member States of the Council of Europe, and the Additional Protocol of March 20, 1952, came into force on September 3, 1953. To date fourteen States have ratified the Convention and the Protocol; ten of them have admitted that the European Commission of Human Rights can receive individual petitions, and eight have acknowledged the jurisdiction of the European Court of Human Rights as being obligatory.[1] As of December 31, 1960, nearly 1,000 individual petitions had been lodged with the Commission, and 715 decisions had been handed down; on July 1, 1961, the Court gave its ruling on the merits of the *Lawless Case,* the first to be brought before it.[2] *International* case law on the scope of the rights and freedoms guaranteed by the Convention is therefore now in the course of being built up. At the same time, however, the Convention and the Protocol can be invoked before the courts of the fourteen States which have ratified them: *municipal* case law on the application of these texts is thus also being formed. A large number of basic rulings handed down by the Supreme Courts of several of the signatory States has already been published in the *Annuaire de la Convention Européenne des Droits de l'Homme* (Volumes II and III) and in the *International Law Reports.* The study of such internal and parallel case law is rewarding from two viewpoints; on the one hand, it indicates the conditions under which the provisions of the Convention are being embodied in the legal system of each State involved; and, on the other hand, it shows how the substance of these provisions is being interpreted by the courts in these States

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* The author is deeply indebted to M. Michel Virally, Professor at the Universities of Strasbourg and Geneva, for his kindness in making available to him the as yet unpublished paper by M. Adolf Süsterhenn, *L'application de la Convention européenne sur le plan du droit interne,* delivered at the Colloquium on the international protection of Human Rights on the European scale, held at the Faculty of Law, Strasbourg, on November 14 and 15, 1960. The constitutional texts quoted in the present study have been taken from the following sources: *Annuaire des droits de l'homme,* published by the Secretariat of the United Nations (New York); B. Mirkine-Guetzévitch, *Les constitutions européennes* (Paris: P.U.F., 1951). A. J. Peaslee, *Constitutions of Nations* (The Hague: M. Nijhoff, 1956), 3 volumes.

[1] *Yearbook of the European Convention on Human Rights* (The Hague: Nijhoff), Vol. III (1960) pp. 92ff.: "State of Ratifications, Declarations, and Reservations".

[2] An analysis of the *Lawless* case was given in the *Journal of the International Commission of Jurists,* Vol. III, No. 2 (Winter 1961), pp. 112–119.

and complements the study of the international case law of the European Commission and the European Court. A draft Inter-American Convention for the Protection of Human Rights is at present under discussion; it has been directly inspired by its European counterpart. Other drafts may, perhaps, soon be drawn up on a regional scale for Africa. Those concerned with the preparation of such texts would do well not to overlook any aspect of the experience in this field being gained by the Member States of the Council of Europe; the application of the Convention under the legal system of each of these States is an element in this experience.

The question of the conditions governing the application of the Convention under the municipal law of the signatory countries – the primary aim of our study – is a particular aspect of a very general problem, namely that of the relationship existing between customary international law and international conventions, and municipal law. It is essential to put the subject in its proper perspective, and to give an outline of the essentials of the general problem: the first part of the article will be devoted to this. The second part will discuss the solutions arrived at in positive law as regards the application of the provisions of the Convention within the municipal law of signatory States. Finally, the third part will be devoted to an analysis of the case law already established in some of these States on the substance of the provisions of the Convention.

PART I: INTERNATIONAL LAW AND MUNICIPAL LAW

Many recent constitutions affirm the principle of the supremacy of "generally recognised rules of international law". Limiting the remarks to States bound by the Convention, only the Constitutions of Austria (Article 9), of Ireland (Article 29) and of Italy (Article 10) will be quoted. Authors such as Oppenheim also maintain that rules of international law operate as part of municipal law without having even been expressly adopted as such, and that this doctrine "is a rule of positive law".[3] This type of formula gives rise to the gravest misunderstandings, because it mistakenly simplifies a question which in reality is very complex. The supremacy of international law over municipal law is a truism if it is taken only to mean that the State is bound to conform thereto; but the whole point is precisely to ascertain *how the link* between international law and municipal law *is effected.* There are two doctrinal approaches to this problem both of which affect the basis of inter-

[3] L. Oppenheim, *International Law* (8th ed., revised by H. Lauterpacht; London: Longmans, Roberts and Green, 1955), p. 44.

national law. From the end of the last century the leader of the *Dualist* school was Heinrich Triepel who elaborated his theories in this work *Völkerrecht und Landesrecht,* published in 1889.[4] The Dualist doctrine, of which the other great theoretician was Dionisio Anzilotti, holds that international law and municipal law constitute two entirely distinct and independent systems, never superimposable one upon the other. This concept is opposed by the *Monistic* school, founded on a unitarian concept of the whole body of legal standards. The Monistic doctrine has furthermore evolved in accordance with two differing views, one giving supremacy to municipal law and the other giving it to international law. The proponents of the latter approach hold that municipal law is subject to the standards of international law. Thus, for Professor Hans Kelsen, the unitarian and hierarchical system formed by the body of legal standards derives from a *hypothetische Ursprungsnorm,* the State being furthermore merely a "point of imputation" *(Zurechnungspunkt);* for Georges Scelle, who elaborated an original theory of Monism in a masterly fashion in his *Précis de droit des gens,* published in 1934, the first step is ruthlessly to eliminate from legal science quite a number of fictions, such as those of the "personality", the "will", or the "sovereignty" of the State; positive law is binding only on beings endowed with a conscious will, the governors, the agents and the governed.[5]

If it is sought to find what solutions in positive law have been adopted in this field, one immediately comes up against the full range of relativity of international law, which only becomes apparent as refracted through a plurality of national systems. More exactly, the problem arises in an area where international law conceived as a unitarian discipline and the constitutional law of each State overlap. For the sake of clarity it is proposed to break the question down into four points: (1) is international law part of municipal law? (2) if yes, how and under what conditions is the integration effected? (3) what place does "incorporated" international law occupy in municipal law? (4) what is the position of individuals in relation to rules of international law?

(1) Is International Law Part of Municipal Law?

The reply of the proponents of the Dualist school is obviously in the negative: the two systems are in different spheres. For Triepel,

[4] Text used here is the French translation by René Brunet under the title *Droit international et droit interne* (Paris: Pedone, 1920). See also the same author: *Les rapports entre le droit international et le droit interne, Recueil des Cours de l'Académie de droit international,* 1923, pp. 77ff. (hereafter *Recueil).*
[5] Georges Scelle, *Précis de droit des gens* (Paris: Sirey, 1934), Vol. II, p. 345.

the two systems are distinguished by the sources from which they derive and by the social relationships they govern; international law proceeds from the common will of two or more States and applies to the relationship between equal and sovereign States; municipal law proceeds from the will of a State and applies to its relationship with its citizens and the reciprocal relationships between the latter.[6] For Anzilotti "international standards cannot affect the obligatory validity of internal standards and *vice-versa*".[7] For both these authorities, when a rule of international law is accepted into municipal law this step, irrespective of appearances, does not follow as an automatic or passive acceptance, but rather as a transfer which completely modifies its nature. Of itself, international law gives rise to obligations as between States, nothing more. The solution proposed by the Monistic school is diametrically opposed to this view. For Georges Scelle, both customary international law and international conventions, form part of municipal law without the necessity for any formal act of "acceptance" or "introduction" to ensure validity; and international law abrogates as of right any rules of municipal law which may be in conflict with it.[8]

It would be idle to pursue our examination of the question on the theoretical level. The solutions reached in positive law will be more clearly apparent if a distinction is first drawn between customary international law and international conventions.

a) Customary International Law

The tendency in most recent constitutions is to acknowledge the rules of customary international law as forming an integral part of municipal law. This solution is very clearly demonstrated by the Constitutions of the Federal Republic of Germany (Article 25), of Austria (Article 9) and of Italy (Article 10). It is also the solution adopted in the United Kingdom by virtue of a long tradition going back to Blackstone, and which finds expression in the adage that the Law of Nations is part of the law of the land. There is no point in quibbling, after the fashion of certain Dualist theoreticians, on the point of whether this incorporation of international law into municipal law is real or only apparent and whether, in the particular case of English law, it must first be adopted by the Common Law.[9] The important thing is that the rule exists. Professor Paul de Visscher, in a series of lectures on *International Trends in Modern Constitutions* given by him at the Academy of Inter-

[6] Triepel, *Recueil,* 1923, pp. 77ff.
[7] D. Anzilotti, *Cours de droit international,* (Paris: Sirey, 1929). Vol. I, pp. 50ff.; the French translation is by Gilbert Gidel.
[8] Scelle, *op. cit.* p. 349.
[9] Triepel, *Recueil,* 1923, p. 89.

national Law in 1952, did not hestiate to claim that this rule is now common to all countries.[10]

b) International Conventions

This study bears more directly on the second aspect of the question; the solutions reached under positive law in this connection are much less clear-cut.

The constitutions of some States admit of the direct incorporation into municipal law of treaty provisions on the same footing as the traditional principles of international law. Thus, under the terms of the Federal Constitution of the United States (Article VI, paragraph 2) "This Constitution and the laws of the United States ... and all Treaties made, or which shall be made, under the authority of the United States shall be the supreme Law of the Land". The French constitutions of 1946 (Article 26) and of 1958 (Article 55) embody a similar solution. The majority of European constitutions make no formal decision on this point.

In contrast, the traditions of the United Kingdom in constitutional matters require that, in order to have validity in municipal law, treaty provisions must be incorporated in an Act of Parliament.[11] We will revert later to this point which is important to our subject; for the present we will merely bear in mind that a treaty is of itself inoperative as regards amending or complementing Common or Statute Law.

It should also be borne in mind that, in countries such as the United States and France, which have the most liberal approach as regards incorporating international conventions into their municipal law, such incorporation is nevertheless subject to the observance of certain procedures. Even Georges Scelle has to acknowledge that the immediate and unconditional substitution of the inter-State standard for the internal standard – the solution he advocates on grounds of logic alone – is not in conformity with French positive law and that, from the practical viewpoint, there is some value in recording the entry of the inter-State standard into municipal law.[12] This remark brings us to the study of the second question.

(2) How and Under What Conditions Does International Law Become Part of Municipal Law?

We are dealing here with international conventions only, in effect treaty provisions, since, as was pointed out, the automatic integration of customary law is a commonly admitted rule. We

[10] *Recueil*, 1952, I, pp. 523–525.
[11] Oppenheim, *op. cit.* pp. 39ff.
[12] Scelle, *op. cit.* p. 353.

will pass over this point very quickly, reverting later to a more detailed study – with particular regard to the European Convention on Human Rights – of the case of countries where the Constitution leaves the question open, or those where constitutional tradition requires that the content of a treaty be embodied in municipal law. We would, however, like to point to the solution adopted by French law as being fully characteristic. Under the Constitution of 1875, treaties, once signed and ratified, still had to be *promulgated* by the Head of the State, and there was doctrinal discussion on the point of whether this promulgation was or was not a consequence of the Dualist theory, and on whether or not it involved a novation.[13] The discussion has meanwhile been rendered pointless.

The French Constitutions of 1946 (Article 26) and 1958 (Article 55) have dispensed with the formality of promulgation and require only that the treaties be *published* to give them force of law. American constitutional law adopts a rather similar solution by making the entry into force of treaties subject to a "proclamation" by the President of the United States. Swiss constitutional law also lays down simple publication of diplomatic conventions as the condition of their adoption into municipal law. Professor Paul Guggenheim emphasises that such publication is declarative and not constitutive in effect.[14]

(3) What Place Do Rules of International Law Occupy in Municipal Law?

Again restricting remarks to international conventions, we assume their incorporation in due form into municipal law. According to a formula favoured by French case law, treaties, when once ratified and published, have the "force of law". This formula is ambiguous because in France, as elsewhere, municipal law appears as an hierarchic body of standards, and the whole question is to know where to situate treaties in this hierarchy.

Two preliminary remarks may be made in this connection.

First, let us be quite clear on the meaning of the hierarchy of legal rules. Briefly, it means that a rule can only be amended or abrogated by a rule of equal or higher standing. Can a treaty which has just been incorporated into the municipal law of a given State amend or abrogate any of the rules of municipal law? Can the provisions of the treaty itself be amended or abrogated by other rules of municipal law?

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[13] See A. Mestre "Les traités et le droit interne", *Recueil*, 1931, IV, pp. 254ff.
[14] P. Guggenheim, *Traité de droit international public*, (Geneva: Georg, 1953), Vol. I, pp. 33–35.

Secondly, from the viewpoint of the Dualist theory the question is settled straight away: the rule from international law is valid only if embodied in a rule of municipal law and, as such, can be maintained, abrogated or amended, on the same footing and under the same conditions as any other standard of municipal law. This is the case in legal systems such as that of the United Kingdom, where treaty provisions become part of municipal law only through the intermediary of an Act of Parliament: obviously such a law will carry no more and no less weight than any other Act of Parliament.

The proponents of the Monistic theory naturally affirm the supremacy of international conventions or customary international law over all municipal law even those of a constitutional nature. Georges Scelle even goes so far as to claim that, in the event of a conflict between the provisions of a treaty and those of a constitution, the latter must be regarded as abrogated *ipso facto*.[15] This view is very far from being merely a doctrinal approach, since it is very frequently the view reflected in the decisions of arbitration tribunals, of the Permanent Court of International Justice and of the International Court of Justice. We can only refer the reader to works containing a complete list of the findings of arbitration tribunals, opinions and judgments, in which the supremacy of treaty provisions over ordinary or constitutional laws is upheld.[16] Here mention will be made only of the often quoted terms of judgment No. 7 of the Permanent Court of International Justice, delivered on May 25, 1926 (case concerning certain German interests in Polish Upper Silesia): "From the standpoint of international law and of the Court which is its organ *municipal laws are merely facts,* which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".[17]

We cannot however limit ourselves solely to the viewpoint of international law as such, nor can we refrain from studying the manner in which it is mirrored in very dissimilar constitutional systems. Professor Paul de Visscher classifies these systems into four groups, in the study by him, to which reference has already been made:[18]

1. One system is to place the treaty on the same footing as the ordinary law. This is done under American constitutional law. In interpreting the provisions of Article VI (paragraph 2) of the Federal Constitution already cited above, the decisions of the courts

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[15] Scelle, *op. cit.*, p. 356.
[16] See in particular Charles Rousseau, *Les principes généraux du droit international public* (Paris: Pedone, 1944), pp. 418–419; Louis Cavaré, *Le droit international public positif* (2nd ed.; Paris :Pedone, 1961), pp. 162–166.
[17] Series A, No. 7, p. 19; author's emphasis.
[18] *Recueil,* 1952, I, pp. 563ff.

place treaties at the same level as the ordinary law of *the States,* but hold that federal laws take precedence over international conventions or customary international law: in cases of doubt the courts try to interpret treaties in a manner which would enable them to be reconciled with municipal legislation.[19]

2. Under a second system the treaty is placed above the ordinary law, but the absence of any supervision by the courts over the validity of legislation deprives this system of some of its practical scope. This is the solution adopted by French law since the 1946 Constitution (Article 26). It is confirmed in very clear terms by the 1958 Constitution (Article 55): "Treaties or agreements, properly ratified or approved have, upon their publication, an authority superior to ordinary legislation." In the event of conflict between the provisions of a treaty and those of a law preceding it in date, the decisions of the courts indicate that the treaty provisions shall be applied.[20] And what if the law is of more recent date than the treaty? The decisions are not very precise; it would appear that the courts, if they cannot reconcile the conflicting provisions, are inclined to apply municipal law, such is their reluctance to exercise any form of supervision over the validity of legislation.[21]

3. A third system also places the treaty above the ordinary law, and the existence of constitutional supervision over the validity of these laws is claimed to make the principle fully effective. This solution is advanced as being the one adopted by the Constitutions of the Federal Republic of Germany (Article 100, paragraph 2) and of Austria (Article 145). As application of the European Convention on Human Rights has brought these provisions into play, we will study them in Part II of this article, when it will be seen that their interpretation is the subject of much controversy.

4. Finally, a fourth system, of which the only example seems at present to be the Constitution of the Netherlands, as most recently amended on September 11, 1956 (Articles 63 and 66), places the treaty above all municipal law, including constitutional law. Article 66 states: "The laws in force in the Kingdom shall not be enforced if their application is incompatible with the provisions of international agreements obligatorily applicable to all persons, *whether or not such agreements are concluded after the adoption of the said laws (author's emphasis).* Thus the treaty takes precedence over ordinary law, irrespective of whether or not the

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[19] Oppenheim, *op. cit.,* pp. 42ff.; Charles Cheney Hyde, *International Law,* (2nd ed.; Boston: Little, Brown & Co., 1947), p. 1463.

[20] See the most recent decisions commented on in *Annuaire français de droit international,* 1960, p. 1027.

[21] See the many decisions commented on by Rousseau, *op. cit.;* pp. 419–424, and Marcel Sibert, *Traité de droit international public* (Paris: Dalloz, 1951), pp. 246–247.

law is of an earlier or a later date. Article 63 reads: "When the development of the international legal system so requires, constitutional provisions may be derogated from by an international agreement". A treaty may therefore take precedence over the Constitution, on condition, however, that such treaty shall have been ratified by a special majority in both Houses.

(4) What Is the Position of Individuals in Relation to Rules of International Law?

There can be no doubt that the *government* of a State which is a party to a duly ratified treaty is bound by the provisions thereof and, this being so, can be required to "make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken".[22] It is bound *vis-à-vis* the governments of other contracting States, and non-observance of its obligations will entail penalties in accordance with the rules of international law respecting the liability of States. But, within the State itself, can the governed avail themselves of the provisions of the treaty? In particular, can they invoke its provisions before the courts? It should be noted that this is quite a different question from that examined above, relating to the principle and methods of incorporating rules of international law into municipal law. The fact that the provisions of a treaty have been incorporated into municipal law does not necessarily mean that individuals can avail themselves thereof.

For the supporters of the Dualist school the reply is in no doubt: only the State is the subject of international law; the rights and the obligations arising under treaties are related to the social group taken as a whole and apply only to the "person" of the State. Triepel writes: ". . . [Individuals] are never or in any way governed by rules of international law. International law accords them no rights of any sort, issues no order or interdiction to them".[23] For a very long time the Dualist theory influenced the decisions of the courts, not only in England where the solution followed on quite naturally from the principle of non-penetration into municipal law of rules stemming from conventions, but also in Austria, Germany and even in France where the courts furthermore held that treaties had "force of law", which clearly shows that two separate questions are involved. For its part, international case law was undecided.[24]

The first indications of a change in the municipal case law of continental European countries are given in two judgments of the

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[22] Permanent Court of International Justice, Advisory Opinion, No. 10, Series B, No. 10, p. 20.
[23] *Op. cit.*, p. 252.
[24] See Rousseau, *op. cit.*, pp. 431–434, Sibert, *op. cit.*, pp. 264–266.

Reichsgericht of November 29, 1927, and March 28, 1928, and a judgment of the Amsterdam Court of Appeal of March 13, 1928; this latter decision stated very clearly that the Treaty of Lausanne directly concerned the rights and interests of the nationals of contracting countries and that these nationals were bound by its provisions.[25] The decisive turning-point in international case law is, however, marked by the famous Opinion No. 15 delivered on March 3, 1928, by the Permanent Court of International Justice and which related to the competence of the Danzig Courts.[26] The question at issue was whether railway staff in Danzig who had come under Polish administration could invoke before the Court, in support of some financial claims, the provisions of a Danzig-Polish agreement called the *Beamtenabkommen.* The Court declared: "Does the *Beamtenabkommen,* as it stands, form part of the series of provisions governing the legal relationship between the Polish Railways Administration and the Danzig officials who have passed into its service? The answer to this question depends upon the intention of the contracting Parties . . . It cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the *Beamtenabkommen*". The *intention of the parties* – i.e., the Governments of the signatory States – *to establish rights and obligations for individuals:* such is the idea henceforth guiding the bulk of doctrine and case law in the matter and which will also serve as the guide in Part II of this study. This new trend, which recognizes that the individual is subject to international law and also gives him at least encouragement to avail himself, directly and personally, of its provisions, is reflected in the Constitution of the Federal Republic of Germany by the clause of Article 25, according to the terms of which rules of international law ". . . [shall] create rights and duties directly for the inhabitants of the federal territory".

The rights of individuals to make use of treaty provisions cannot therefore be defined by a uniform formula. The question is rather one of the nature of the matter concerned. It would be unwise to say, as the German Constitution seems to do, that a treaty *always* establishes rights and obligations directly applicable to individuals, but it *can* do so. When is this result achieved? On the basis of what seems to be the predominant position in present international law, two elements must be taken into consideration.

First, in the very terms of Opinion No. 15 itself, there is the

[25] *Annual Digest,* 1927–28, No. 285, p. 415.
[26] Series B, No. 15, p. 17.

intention of the contracting parties. This intention will be made clear by the *intrinsic provisions of the treaty* in general, and above all by the aim of the treaty. It is very unlikely that a pact of military or political alliance could have a direct bearing on individual situations. On the other hand, a treaty altering a frontier could well affect private interest; rules obviously intented for the governed rather than for the governors are all the more clearly apparent in international conventions on such matters as nationality, rights of foreigners, status of persons, patents, trademarks and copyright.

The second element must be sought not only in the *intrinsic provisions of the treaty* itself (their drafting is the main point to be considered), but also in *the implementing measures taken by the States signatories* thereto. To enable a treaty to be applied directly to individuals, and be invoked by them on the same basis as municipal law, it is necessary that, first, its provisions must be sufficiently comprehensive and precise and, secondly, that the institutions of the signatory State permit of the immediate application of such provisions. Fulfilment of this double condition renders the treaty *self-executing,* to use the usual terminology borrowed from English law; the question of knowing whether any given treaty meets this condition is patently a matter to be decided by the courts.[27] The very liberal tendencies in the most recent decisions of courts in many countries confirm the decline of the Dualist doctrine: it is no longer contested that an individual can be subject to international law and can avail himself of treaty provisions, on condition that they are capable of immediate application. It will suffice to mention the well-known *Sei Fujii* case, in connection with which a Court of Appeal in California held that Articles 1, 2 and 55 of the United Nations Charter were self-executing and that a Japanese subject could invoke them to contest the validity of a law prohibiting the acquisition of real property by certain categories of foreigners.[28] Before the French *Conseil d'Etat* an appellant recently attacked an administrative decision refusing an extension of the period of validity of his passport; he based his appeal on the Universal Declaration of Human Rights; from the grounds advanced in the judgment rejecting his appeal it may be deduced that, if the text adopted by the General Assembly of the United Nations in 1948 had been in the form of a treaty signed and ratified by France, the appellant would have had a very good prospect of winning his case.[29] It should be noted that a treaty can well be self-executing in one country but not in another, since this quality depends on two conditions,

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[27] Hyde, *op. cit.,* pp. 1462ff.
[28] *American Journal of International Law,* 1950, p. 590, and, 1952, p. 559.
[29] Conseil d'Etat, May 11, 1960, Sieur Car, *Journal du droit international (Clunet),* 1961, p. 404, Commentary by R. Pinto.

one being intrinsic to the document and the other being extraneous to it. No matter how comprehensive and precise the provisions of a convention may be, it can happen that the institutions of a State do not lend themselves to their immediate application; in such cases the convention binds only the governments, who will be required to effect the amendments necessary. Part II will discuss the extent to which the European Convention on Human Rights may be regarded as self-executing in this respect.

French legal terminology does not seem to have decided on a generally accepted translation of the words *self-executing*. It is proposed that the expression should be *capable of immediate application,* the word *immediate* being understood in its most literal sense – *without an intermediary.*

PART II: THE EUROPEAN CONVENTION: THE PRINCIPLES OF ITS APPLICATION TO MUNICIPAL LAW

The foregoing explanations may at times have seemed to be leading rather far from the Convention for the Protection of Human Rights and Fundamental Freedoms. It is believed, however, that they were necessary since they provide the background against which the characteristics of the European Convention come into immediate and clear relief.

First, a quick review of the points to be studied and of the documentary material available. Fourteen States have ratified the Convention and the Protocol. The problem is to know, in respect of each of these States: (1) if the provisions of the Convention and the Protocol have been incorporated into municipal law; (2) if yes, what conditions and consequences does this integration entail? For the reply it will be necessary to investigate constitutional and legislative texts, parliamentary proceedings and the decisions of the courts. Documentary sources, principally the *Yearbook of the European Convention of Human Rights* (Volumes II and III) and the *International Law Reports,* contain, however, information relating to the solutions adopted in only nine of the States bound by the Convention: Austria, Belgium, the Federal Republic of Germany, Greece, Ireland, Iceland, Italy, Netherlands and the United Kingdom. The question does not appear to have yet come before the Parliaments or courts of the remaining five countries: Denmark, Luxembourg, Norway, Sweden and Turkey. Furthermore, the Constitutions of these countries contain no provisions from which a definite answer might be deduced. We will therefore limit ourselves to discussing the solutions found in positive law in the nine countries listed above, refraining from any conjecture regarding possible solutions in the other five. As was done in Part I, the question will

be broken down into four sections, except that sections (1) and (2) can be taken together without loss of clarity. The different aspects will be studied in the same order as before.

(1) Do the Provisions of the European Convention Form Part of Municipal Law?

The reply is negative in the case of three States, affirmative for the other six.

a) First solultion: exclusion from municipal law

(i) We will begin with the simplest case, that of *Ireland.* The solution is founded on the "Dualist" tradition of English law, on a formal constitutional text and on a judgment of the Supreme Court.

Article 29 of the Constitution of Ireland of July 1, 1937, states:

> (3) Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States ...
> (6) No international agreement shall be part of the domestic law of the State, save as may be determined by the Oireachtas [parliament].

This is a written version of the English constitutional tradition as already briefly outlined: adoption of customary international law as part of the "law of the land" and exclusion of international conventions unless incorporated into municipal law. When, therefore, an appeal based on alleged violation of Articles 1, 5 and 6 of the Convention was brought before the Supreme Court by way of *habeas corpus* proceedings, the Court had no option but to reject it because the provisions of the Convention had not been incorporated into an Irish law. The case in which this judgment was handed down is none other than the celebrated case of *G. R. Lawless,* which was then in its initial stages and which was to end four years later before the European Court of Human Rights in Strasbourg.[30] On July 12, 1957, an order of administrative internment had been made against Lawless who was suspected of belonging to a clandestine and illegal armed organization; this procedure was based on a 1940 Law respecting the security of the State. The appellant initiated *habeas corpus* proceedings which finally reached the Supreme Court. In addition to other grounds, his appeal alleged that the legislative measure invoked against him was in conflict with Articles 1, 5 (para. 1) and 6 of the European Convention and that the Government of Ireland was bound by the Convention. The

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[30] See *Journal of the International Commission of Jurists, op. cit.,* no. 2.

Court gave its findings in a judgment dated December 3, 1957.[31] Referring to the grounds cited, the Court, recalling the rigid nature of the Constitution of Ireland and the terms of Article 29(6), declared:

> The Oireachtas has not determined that the Convention on Human Rights and Fundamental Freedoms is to be part of the domestic law of the State and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law.
> No argument can prevail against the express command of Sec. 6 of Article 29 of the Constitution before judges whose declared duty it is to uphold the Constitution and the laws.
> The Court accordingly cannot accept the idea that the primacy of domestic legislation is displaced by the State becoming a Party to the Convention for the protection of Human Rights and Fundamental Freedoms.....

The Court therefore dismissed the appeal, and no other course was then open to Lawless than to take his case to the European tribunals.

(ii) A similar solution was adopted in *Iceland,* in a judgment given by the Municipal Court of Reykjavik on June 28, 1960.[32] A taxpayer appealed for the annulment of a decision by the financial authorities who had taxed him in application of a 1957 law instituting a tax on large landed estates; the appellant maintained that the law was incompatible with the provisions of the European Convention. Even though unable to base his findings on a formal constitutional text as in the preceding case, the court dismissed the application. While acknowledging that Iceland had signed and ratified the Convention, the Court stated:

> On the other hand, this Convention has not been legalized in this country, neither as a general law nor as constitutional law. Plaintiff cannot, therefore, base his claims here in Court upon the said Convention granting him any such right to a release from the tax provisions of law No. 44/1957 as according to the foregoing he does not enjoy according to Icelandic constitutional law.

It may also be pointed out that another taxpayer brought an appeal against the same law to the European Commission of Human Rights, which dismissed it by a decision of December 20, 1960.[33]

(iii) Finally, there can be no doubt that this is the solution adopted in positive law in the *United Kingdom.* To the best of our knowledge, case law contains no decision on this point, and there

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[31] *Yearbook,* II, p. 608; *International Law Reports* (hereafter I.L.R.), 1957, p. 420. In the judgment given by the Irish Supreme Court the appellant's name is given in the Irish form, *O'Laighléis.*
[32] *Yearbook,* III, p. 642.
[33] *Yearbook,* III, p. 394 (Application No. 511/59).

is, of course, no constitutional text. But we can nevertheless fully justify our assertion, firstly on a very strong constitutional tradition and secondly on the position taken up by the government before Parliament.

We have already explained the constitutional tradition. The principle is that it is for the government, and for the government alone, to take decisions regarding the fulfilment of its international obligations; if and when it should consider such a step timely, it is for the government to submit to Parliament a Bill aimed at transforming an international standard into a rule of municipal law. A treaty as such is a matter solely for the government. This is Dualism in its purest form. It is interesting to note that this aspect of English constitutional law has among many others been incorporated in written form in the Constitution of India. Part IV of that Constitution is devoted to the "Directive Principles of State Policy"; in Article 51, which deals with international relations, it is stated, in particular, that the State shall "foster respect for international law and treaty obligations". Article 37 of the Constitution, however, says in substance that the principles set forth in the said Part IV are basic. Further the Government should be guided by them and it is the duty of the State to respect them; but no tribunal can oblige the State to apply them.[34]

Furthermore the government spokesman in the House of Commons has on two occasions expressed in very strong terms the government's resolve to maintain this tradition. The subject at debate was recognition by the United Kingdom of the competence of the European Commission of Human Rights as regards individual appeals, a matter which Article 25 of the Convention leaves to the discretion of signatory States. On November 26, 1958, the Under-Secretary of State for Foreign Affairs, Mr. D. Ormsby-Gore, replying to an oral question from Mr. Brockway, stated:

> The position which Her Majesty's Government have continuously taken up is that they do not recognise the right of the individual petition, because they take the view that States are the proper subject of international law, and if individuals are given rights under international treaties, effect should be given to those rights through the national law of the States concerned . . . . .
> If one subscribes to a Convention one then sees that the laws of one's country are in conformity with the Convention and the individual cases are then tried under the laws of one's own country.

On June 25, 1959, Mr. Elwyn Jones, Q.C., made a courageous attempt to swim against the current by appealing to the government to recognize the right of individual appeal; he emphasized that

[34] On this point see H. Mosler, "L'application du droit international public par les tribunaux nationaux," *Recueil*, 1957, I, pp. 636ff.

nowadays the individual was almost unanimously acknowledged as being subject to international law and that in preventing him from appealing directly to the Commission the Convention was being deprived of a lot of its effectiveness. Replying for the government, Mr. Allan fully upheld the position it had adopted, stating in particular:

> It has always been clear that the British Government would not accept or concede the right of individual petition; and this decision is in full accordance with the belief that these rest properly with the State.... The obligations under the Convention rest squarely on the Government and we intend to fulfil our obligations.[35]

The only effect of the European Convention in the three signatory States we have just mentioned will, therefore, be to oblige the governments to adapt their national legislations, an obligation not entailing any limit of time or sanction other than the very unlikely event of the sense of responsibility of the recalcitrant State being challenged by the other contracting States. It may also be mentioned in this connection that Article 57 of the Convention obliges all signatories to furnish, on request by the Secretary-General of the Council of Europe, "an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention". An interesting example of this adaptation of municipal law was given by Norway, one of the countries which has not as yet taken a decision on the principle involved. Article 2 of the Norwegian Constitution, having declared that the Evangelical Lutheran religion continued to be the official religion of the State went on to state *ex abrupto:* "The Jesuits shall not be tolerated". When ratifying the Convention, the Norwegian Government felt obliged to make reservations in respect of Article 9 which upholds the freedom of religion in its various forms. Subsequently the Norwegian Parliament put the matter in order by passing a law on November 1, 1956, eliminating from its Constitution this provision, so contrary to freedom of worship and, at any rate, so discourteous to those affected.[36]

b) Second solution: integration with municipal law

It would appear that this is the solution at present existing in positive law in Italy, even though to the best of our knowledge it has not yet been affirmed by any decision in case law; it appears to be embodied in the preparatory work and in the text itself of the law ratifying the Convention; Article 2 of this law states that the

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[35] *Yearbook,* II, pp. 546ff.
[36] *Annuaire des droits de l'homme,* (published by the Secretariat of the United Nations), 1956, p. 175.

provisions of the Convention and of the Protocal "shall be implemented in full".[37]

In the case of the other five countries included in this group – *the Federal Republic of Germany, Austria, Belgium, Greece, and the Netherlands* – the decisions of the courts, already important and always consistent, permit us to affirm without any possibility of doubt that the provisions of the Convention and Protocol are regarded as an integral part of municipal law.

In most cases this solution results from the fact that the courts when seized of an application based on one or more provisions of the Convention, seek immediately to define the meaning and scope of the text invoked, thus implicitly acknowledging its applicability. Consequently, all the decisions in case law analyzed below are so many affirmative replies to this question of principle. For the moment we will limit ourselves to quoting two decisions which tackle the problem directly and provide an explicit solution.

The first is a decision handed down in *Germany*. In accordance with Article 59 of the German Constitution the President of the Federation negotiates treaties; these, when they are intended to be binding on the Federation as a whole, must then be ratified by the Federal Parliament in the same form as laid down for the voting of Federal legislation. The Constitution contains no other conditions governing the entry into force of treaties. This procedure was followed in the case of the European Convention. The question of the effect of its ratification on German municipal law was raised for the first time before the Higher Administrative Court of Münster in connection with a case we shall analyze later. The Court settled the question in very clear terms in a judgment dated November 25, 1955.[38] It begins by stating the problem in the following terms:

> The applicability of Article 6 of the Convention ... depends on whether the substantive clauses of the Convention are directly binding on the courts, or whether they simply place the Federal Republic of Germany under an obligation to bring its municipal law into line with the Convention. No judicial decision has yet settled this matter ....

The Court then states the positions taken up by various authors. It must be remembered that German law, greatly influenced by Triepel, was for a long time one of the citadels of Dualism and that the provisions of the 1949 Constitution are far from being explicit. There was thus no question of any foregone conclusions in this respect. The Münster Court nevertheless reached findings diametrically opposed to the Dualist tradition:

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[37] This meaning is taken by: A. Süsterhenn in his unpublished work *L'application de la Convention européenne sur le plan du droit interne*, p. 310. Publication is expected shortly.

[38] *Yearbook*, II, p. 572; *I.L.R.*, 1955, p. 608.

> In the opinion of the Court . . . Article 2 of the ratifying law is not only a formal law . . . but also a law in the material sense of the term. Consequently *the Convention has become a text of municipal law and thus forms part of positive law directly applicable to the matter at issue.* (Author's emphasis.)

German case law has since maintained this position and we will see in Part III that it is far ahead as regards the number of decisions given on the substance of the provisions of the Convention.

The second decision of principle was given in *Austria.* Austria ratified the Convention and Protocol only in September 1958. In accordance with the terms of Articles 49(I) and 50(I) of the Constitution, treaties must be ratified by the National Council *(Nationalrat)* and published by order of the Federal Chancellor in the official Gazette of the Federation (Bundesgesetzblatt). Do the provisions of treaties become, in consequence, part of municipal law? This question was put to the Constitutional Court in respect of the European Convention; the Court answered in the affirmative in a judgment dated June 27, 1960.[39]

> As a consequence of its approval by the National Council . . . and its publication in the Federal Official Gazette . . ., the Convention became a souce of law *inasmuch it is* a provision equivalent to a federal law, and its compulsive force in *domestic law is indisputable.* (Author's emphasis.)

We now have to indicate what consequences, from the two viewpoints mentioned, arise from the incorporation into municipal law of the provisions of the Convention and the Protocol. It need hardly be recalled that for the rest of our study we will be considering only the six States in which such incorporation into municipal law has been explicitly or implicitly acknowledged.

(2) What Place Do the Provisions of the European Convention Occupy in Municipal Law?

We prefer not to pronounce on the state of the law in Belgium, Greece or Italy: there is, to the best of our knowledge, no legislative or constitutional text or any decision in case law enabling a firm conclusion to be drawn. For the other three countries we do at least have some elements of the solution at our disposal.

a) Supremacy of the Convention over ordinary law?

In Part I we mentioned briefly that, in the opinion of Professor Paul de Visscher, this was the system adopted under current positive law in Germany and Austria. In reality the question is very complicated and we can only include German and Austrian law under this heading subject to a big question-mark.

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[39] *Yearbook,* III, p. 616.

Under the terms of Article 25 of the Constitution of the *Federal Republic of Germany:* "The general rules of international law shall form part of federal law. They shall take precedence over the laws . . .". The formula "the general rules of international law" *(die allgemeinen Regeln des Völkerrechts)* is very similar to Article 4 of the 1919 Constitution *(die allgemein anerkannten Regeln des Völkerrechts)* and is obviously aimed at customary international law. Article 25 of the Constitution therefore does not formally decide the question of the supremacy of international conventions over ordinary law. This is also reflected in a judgment of the Federal Constitutional Court dated May 10, 1957, dismissing an appeal based on the contention that a violation of the European Convention would constitute *ipso facto* a violation of Article 25 of the Constitution.[40]

Two other decisions of the Federal Constitutional Court, dated November 18, 1954, and March 21, 1957, also dismiss appeals based on alleged violations, the first concerning some Articles of the Convention and the second in respect of the first Article of the Protocol.[41] These judgments are however simply founded on the fact that the decisions being contested preceded in date the entry into force of the Convention and the Protocol. Therefore they do not settle the question in which we are interested.

Furthermore Article 100 of the Constitution indicates the conditions under which the constitutional validity of a law may be contested in the courts. In accordance with paragraph (1) the court must withhold any decision and seek a ruling from the Federal Constitutional Court. Paragraph (2) adds: "If in litigation it is doubtful whether a rule of international law forms part of federal law . . ., the court shall obtain the decision of the Federal Constitutional Court". It would appear that this provision places international conventions and customary international law on the same footing, but it does not state formally that conventions will take precedence over municipal law in the same way as customary law does.

Finally we come to a judgment of the Federal Constitutional Court dated January 14, 1960, which has been the subject of much comment and critical appreciation.[42] In this case, an accused person who had been sentenced to 18 months' imprisonment for attempted abortion lodged an appeal, and applied for provisional release until such time as a final decision should have been given in the case. His application for provisional release having been successively dismissed by the tribunal and by the Munich Court of Appeal, he

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[40] *BVG*, 6, p. 389.
[41] *Ibid.*, 4, p. 110 and 6, p. 290.
[42] *Yearbook*, III, p. 628. With the judgment are given the references to commentaries thereon.

initiated an appeal on constitutional grounds. The appeal was based on two grounds: (1) violation of Articles 2(2) and 104(1) of the Constitution respecting individual freedom (a point of no interest in our study); and (2) violation of Articles 5(3) and (4), and 6(1) of the European Convention. The Court, having given fairly lengthy reasons for dismissing the first grounds of appeal, also dismissed the second, stating in this connection:

> An appeal to the constitutional Court cannot be based on the Convention of Human Rights (Article 90 of the Federal Constitutional Court Act).

Several commentators have rightly observed that these reasons are rather in the line of a technicality avoiding the principle and that they were rather brief in view of the importance of the question at issue. It has also been remarked that the judgment was handed down by the committee charged with the preliminary examination of appeals on constitutional grounds and that if the Court had given its decision in plenary sitting it might perhaps have adopted a different position.

It is also possible that the question was badly put. When we speak of the supremacy of the European Convention, or of treaty provisions in general, over the ordinary federal law, what is meant exactly? The meaning is that the federal legislator cannot later, by means of a unilateral measure introduce provisions derogating from or contrary to the Convention. For example, in view of the very clear provisions of Article 3 of the Convention, a Federal law could not introduce torture into criminal investigations or physical mutilation into the scale of penalties. This, however, does not necessarily mean that the provisions of the Convention have validity in the constitutional field nor that a constitutional appeal is the proper means of penalizing violations. There is a difference of meaning between "constitutionality" and "supremacy". The Federal Supreme Court, which is entrusted under Article 95(1) of the Constitution with ensuring the unity of federal law, would perhaps have been better qualified to settle the point.

We will now consider the case of *Austria.* The Austrian Constitution also makes provision for a Constitutional Court to which Articles 137 to 148 are devoted. Under the terms of Article 144 the Constitutional Court is competent in proceedings arising out acts or decisions of the administration, and based on allegations of violations of rights "guaranteed by the Constitution". Under the terms of Article 145 this Court is also competent in cases involving "violations of international law, in accordance with the provisions of a special federal law". These provisions are not very clear regarding the place of international conventions in municipal legislation. What is the position in case law?

The judgment of the Constitutional Court dated June 27, 1960,

which we have already quoted, does not give us any decisive answer. The appeal lodged with it was made against a decision of the Ministry of Finance taken in execution of a law applying a treaty. It was founded on Article 144 of the Constitution on the grounds of violation of certain constitutionally guaranteed rights. These rights included that provided for under Article 6 of the European Convention, namely that every case be heard by an independent and impartial tribunal. The appellant therefore claimed in substance that: (1) there was a conflict between the "law of application" and Article 6 of the Convention; (2) that the rights protected by the Convention were included among the "constitutionally guaranteed rights"; 3) that the matter must therefore be decided in favour of the Convention. The Court dismissed the case for reasons we will set forth later. For the present we will merely quote, from the reasoning in the judgment, the following passage:

> The Convention therefore has no effect upon the application of the Second Law on Restitution. Hence it does not follow from Article 6 of the Convention that the disputed decision is unconstitutional.

The Court therefore decided in the negative as regards point (1) by declaring that there was no conflict between the law applying the treaty and the Convention. This obviated the necessity of deciding points (2) and (3). It may furthermore be recalled that in the above-quoted reasoning the Court acknowledged the Convention as a source of municipal law since it was *"a provision equivalent to a federal law". Equivalent,* not *superior.* It would thus appear that the Court places, at least implicitly, the provisions of the Convention on an equal, but not superior, level to that of ordinary Federal legislation.

b) Supremacy of the Convention over all laws, ordinary or constitutional

This, as we have already briefly mentioned, is the system applied in the Netherlands, since the amendment of the Constitution in 1956. The position is here much clearer because it is defined by formal texts. It can be summed up in two points.

On the one hand, by virtue of Article 66 of the Constitution, the provisions of international agreements, thus of the European Convention and of the Protocol, take precedence over the ordinary laws, whether or not these laws date from before or after the Convention. In the event of dispute there can be no doubt as to the direction in which the solution is to be sought.

Furthermore by virtue of Article 63: "When the development of the international legal system so requires, constitutional provisions may be derogated from by an international agreement". The

only requirement is that the agreement must be ratified by the two Chambers of the States-General by an increased majority. We would however point out that it is not quite correct to say, as is sometimes claimed,[43] that treaties in general and the Convention in particular, take precedence over the Constitution. Such supremacy is possible but does not exist as of right since it is subject to special conditions of ratification. The practical result is nevertheless the same in the light of Article 60 of the Constitution which says: "The courts are not competent to pronounce on the constitutional validity of international agreements". Thus whether or not the Convention is in conflict with an ordinary law, and irrespective of the date of the said law, or even with the Constitution itself, there can be no obstacle to its application by the courts.

(3) To What Extent Can Individuals Avail Themselves of the Provisions of the European Convention?

It is understood that we are dealing only with the proceedings involving the municipal law of the six States being discussed. We are not referring in any way to so-called "individual" appeals before the European Commission of Human Rights. In Part I we saw that the right of the individual to invoke the provisions of a treaty before a court was subject to three conditions: that it was the intention of the signatory States to accord the individual this right, that the terms of the document be sufficiently precise to be capable of immediate application, and that the implementing measures of the country concerned must favour such application. We are also aware that some provisions of a Convention may be capable of immediate application and others not, or that they can be immediately applicable in one country but not in another: each question must be essentially judged on its merits.

In the particular case of the European Convention we shall first analyze its provisions to seek where a valid solution may lie; then we shall analyze the relevant case law for the substance of the solutions accepted.

a) Aims of the Convention

(i) It is abundantly clear from many provisions of the Convention that the *intention of the signatories,* or at least *of the draftsmen,* was not to bind only governments, *but also and above all to provide guarantees for the governed.* We need quote only the most characteristic of these provisions:

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[43] See, for example, A. Süsterhenn, *op. cit.,* p. 310.

Article 1. The High Contracting Parties *shall secure to everyone* within their jurisdiction *the rights and freedoms* defined in Section 1 of this Convention.

Article 13. Everyone whose rights and freedoms as set forth in this Convention are violated *shall have an effective remedy before a national authority,* notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 26. The Commission may only deal with the matter *after all domestic remedies have been exhausted,* according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

Article 57. On receipt of a request from the Secretary-General of the Council of Europe any High Contracting Party shall furnish an explanation of *the manner in which its internal law ensures the effective implementation* of any of the provisions of this Convention. (Author's emphasis.)

(ii) From the beginning of the preparatory work in connection with the drawing up of the Convention, in February 1950, there were two conflicting approaches within the commission of experts appointed to draft the proposed instrument. One group favoured a statement of general principles which each party would apply in accordance with its national legislation and case law. The other group demanded that the nature and extent of the rights to be protected be precisely defined in texts having an inherent legislative value. On the instructions of the Committee of Ministers a commission of senior officials, which met in June 1950, settled the dispute. The definitive text of the Convention is a reproduction of the draft adopted by that commission with only very minor amendments. This draft, however, incorporated much more of the second approach than of the first, and the draftsmen clearly intented to give *a detailed definition of the rights and freedoms listed.*[44] In point of fact the provisions of the Convention are on the whole *sufficiently precise to be capable of immediate application.*

This appreciation must, however, be modified to a certain extent. We must first isolate within the Convention those provisions relating directly to the rights protected. These are contained in Section 1 (Articles 2 to 18), the other Sections containing only procedural rules. With these provisions we take Articles 1 to 3 of the Protocol. Can it be said at first sight that all these provisions are capable of immediate application, or is this true of only some of them? Mr. Adolf Süsterhenn, German member of the European Commission holds all of Section 1 and Articles 1 and 2 of the

[44] On this point see: *La Convention européenne des droits de l'homme* (Strasbourg: Council of Europe, 1958), pp. 24ff.

Protocol to *be self-executing;* he excludes only Article 3 of the Protocol and believes that this is the solution adopted in German case law in recent years.[45] No one can take exception to the exclusion of Article 3 of the Protocol under the terms of which the parties undertake to organize free elections regularly; it would be difficult to claim that this Article is capable of immediate application. Regarding the others, it would however be very difficult to give general effect to the formula proposed by Mr. Süsterhenn, valid as it doubtless may be in German law.

(iii) Here the third element in our criterion, *the implementing measures taken by the country concerned,* comes into play. This becomes immediately clear when we read Article 2 of the Protocol, under the terms of which "no person shall be denied the right to education". Application of this provision would certainly present no problem in Germany; it could be more delicate a matter in Greece or Turkey. Simple and clear rules such as those in Article 3, 7, 11, 12 or 14 can doubtless be regarded as being capable of immediate application practically anywhere. Let us consider, however, Article 6 which lays down in very general terms directives regarding civil and penal procedures; in one country these rules may fit perfectly into the framework of that country's institutions, whereas in another country they may require the amendment of existing procedures and thus be incapable of strict application until such time as the changes have been completed. It is therefore impossible to define by means of a universally valid formula what is and what is not *self-executing* in the Convention and the Protocol; this is something which has to be determined in the light of the position obtaining in the country concerned.

b) The decisions of the courts

Each of the decisions which will be analyzed in Part III, and which relate to the application of certain provisions of Section 1 of the Convention in different countries, may be regarded as so much confirmation by the courts of the right of individuals to avail themselves of these provisions before national tribunals. It will be seen that this right has been admitted in *Belgium* for Article 8, in *Greece* for Articles 5 and 9, and in *the Netherlands* for Article 9. The case law of the *Federal Republic of Germany* offers by far the richest choice and, in accordance with the analysis made by Mr. Süsterhenn, appears to accept the immediately executory nature of most of the Articles in Section 1. That does not mean that all the appeals have been successful, far from it, but merely that no doubt has existed concerning their admissability. In the case of *Italy* we are not aware of any decision taken in this connection.

[45] *Op. cit.,* pp. 303ff.

The case of *Austria* deserves special mention. Let us again revert to the judgment dated June 27, 1960 of the Constitutional Court, which we have already cited on two occasions. It will be recalled that in one part of its reasoning, the Court stated that the Convention had acquired the status of a source of law equivalent to a federal law and that its obligatory validity in municipal law was not arguable. Thus far for the principle; now for the practice. The appeal was founded on Article 6 of the Convention. The Court therefore analyzed Article 6 and declared:

> The Constitutional Court considers that Article 6 of the Convention is not immediately applicable and executory; in its opinion it is *"non self-executing"* ... The Constitutional Court is convinced that the lack of precision of the new notions embodied in Article 6, when compared with a whole legal system of civil and penal procedure, leads to the conclusion that Article 6 *contains only principles constituting a programme* which must undoubtedly be put into effect and respected by the legislator, but *which do not in themselves constitute an immediately applicable body of law.* (Author's emphasis.)

There is nothing contradictory in the judgment. On the contrary it shows very clearly that a convention can be incorporated into municipal law without its provisions becoming capable of immediate application by the mere fact of such incorporation; two quite different questions are involved. We have also seen that Article 6 was one of those the self-executing nature of which could be seriously challenged. Furthermore, on September 23, 1959 – before the Court had handed down its ruling – the Austrian Government had brought before the *Nationalrat* a constitutional Bill for the fulfilment of the obligations assumed by ratification of the European Convention.[46] This Bill which has not yet been voted incorporates the provisions of Articles 3, 7, 8(1) and 12 of the Convention almost word for word into the Constitution; it furthermore incorporates into the Basic Law of December 21, 1867, the essence of Article 10 of the Convention and Article 2 of the Protocol. Such a step, which will have the effect of giving these provisions some constitutional value is certainly excellent; the reasoning given in this connection shows, however, a certain contradiction between the position of the government and that of the court. The government's declaration included the following:[47]

> The Federal Government was of the opinion, that the only duty these instruments placed upon Austria was that of bringing its domestic legislation into conformity with the said Convention and the said Protocol thereto in so far as Austrian legislation was not already in conformity with them ... On the other hand *these instruments have not given rise to any substantive law which can be immediately applied.*

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[46] *Yearbook*, II, pp. 528ff.
[47] *Ibid.*, pp. 539–541.

> The Federal Government regards these instruments as *non self-executing* ... the Bundesrat expressed agreement with this view, as did its appropriate Committee ... Yet although the wording of the Convention appears to justify such an interpretation, doubt has been expressed as to its validity in certain quarters. The object of the Preamble is therefore to define what interpretation will have to be given to it in future. (Author's emphasis.)

Finally the government declared that so far as Austria was concerned the Convention did not immediately apply. Thus while the Court has very judiciously distinguished between the two questions, i.e., that of the incorporation of the Convention taken as a whole into municipal law, and that of the self-executing nature of any of its provisions taken individually, the government seems to confuse these two aspects. By a blanket refusal to acknowledge the self-executing nature of the provisions of the Convention it obviously means to contest the automatic nature of their incorporation into municipal law. In affirming that the only possible effect of the Convention is to oblige the government to adapt the legislation to the principles set forth therein the government gave unexpected support to the Dualist doctrine.[48] It will also be noted that the government omitted to include in the Bill provisions corresponding to these in Article 6 of the Convention, and which the Court had held to be not capable of immediate application; the government doubtless feels that Austrian legislation arleady satisfies the principles contained in Article 6. The only conclusion possible, until such time as the new constitutional law is enacted, is that it is permissible to consider the decisions of the constitutional Court as reflecting Austrian positive law on the matter. Those decisions of the courts accord with the traditions of the Viennese school of international law. One of this school's most brilliant representatives, Professor Alfred Verdross, in the latest edition of his *Völkerrecht,* recently emphasized the importance and the extent of the rights conferred on individuals by the European Convention.[49]

The solutions adopted in positive law on the questions studied in this paragraph may be summed up as follows:

1. In at least six of the States which ratified the European Convention the provisions of the Convention and the Protocol have passed into municipal law.

2. With the exception of the Netherlands it is difficult to decide the place occupied by these provisions in the municipal law of each country.

3. If the spirit and the letter of the Convention, particularly

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[48] Meaning taken by K. Vasak, "Was bedeutet die Aussage "ein Staatsvertrag sei self-executing"?," in *Juristische Blätter* (Vienna), December 23, 1961, pp. 621–622.

[49] A. Verdross, *Völkerrecht* (4th ed.; Vienna: Springer, 1959), pp. 498–499.

the text of Article 13, are observed, the provisions of Section I are in general capable of immediate application. This question must, however, be taken separately for each Article and each country.

PART III. THE INTERPRETATION OF THE PROVISIONS OF THE CONVENTION UNDER MUNICIPAL LAW

On the assumption that the question of admissability has been settled, it remains for us to examine how municipal case law has interpreted the substance of certain provisions of the European Convention. Let us first define the subject:

(i) This case law concerns only the provisions defining the rights and freedoms guaranteed, therefore only those contained in Section I of the Convention and Articles 1 to 3 of the Protocol.

(ii) The solutions adopted by such case law are valid only for the municipal law of the country concerned. It is for the international organs – the Commission of Human Rights, the Committee of Ministers, the European Court of Human Rights – to interpret these provisions at the level of international law. There will, however, inevitably be some overlap between national and international case law.

(iii) We are aware of court decisions on the substance of the law involved in only four of the six States which have incorporated the Convention into their municipal law – Germany, Belgium, Greece and the Netherlands; these decisions relate to about ten Articles of Section I – we know of none relating to the Protocol.

We will classify these court decisions into two groups. Some of them relate to Article 6 which lay down general rules for the good administration of justice. The others relate to rights and freedoms proper. We will analyze them successively.

(1) The Rules for Good Administration of Justice (Article 6)

The decisions under this heading are all taken from German case law.

a) Right to free choice of defence counsel

Under the terms of Article 6, paragraph 3 (c) every accused person has the right to legal assistance of his own choosing; furthermore if he is without the means to pay for such assistance he is entitled to the assistance of a lawyer appointed *ex officio*. The Constitutional Court heard an appeal lodged by a defendant who, basing his case on this provision, claimed that he was entitled to cumulate these rights, both as regards choice and gratuitousness. By a decision on December 16, 1958, the Court dismissed the

appeal, rejecting the tendentious interpretation on which it was based.[50]

b) Right to public hearings and judgment

Under the terms of Article 6, paragraph I, everyone is entitled to a *public* hearing of his case; judgment shall also be pronounced *publicly*. Some difficulties have arisen in the application of these rules, principally in two spheres.

On the one hand, the German code of civil procedure provides for the possibility of written proceedings, at the end of which judgment is not pronounced in public but is notified to the parties concerned. Is this procedure compatible with the provisions of Article 6? The point has been contested before the Federal Supreme Court. This court, in a judgment delivered on June 27, 1957, dismissed the appeal, basing its finding primarily on the spirit of Article 6 and quite properly emphasizing that hearings and giving of judgment in public are not necessary if the parties have opted in favour of a different procedure and provided that this makes due allowance for the conflicting interests involved.[51]

On the other hand, certain administrative tribunals apply special rules of procedure, which make no provision for judgment to be given at a public hearing after the oral hearings are terminated. Is not this procedure in conflict with Article 6? This question was raised before the Münster Higher Administrative Court which gave its decision in the judgment of November 25, 1955, already quoted.[52] On the point of whether the rules regarding public hearings are also valid in the case of administrative tribunals, the Court declared:

> ... [it] does not mean that the obligation to pronounce judgment publicly, in accordance with Article 6, applies to administrative courts; that clause refers only to the determination by a tribunal of civil rights and obligations or of any criminal charge. It thus refers, ... [to] ... civil and criminal courts, not administrative courts which determine disputes of public law ... The wording is clear and does not, therefore, admit of an extensive interpretation.

This solution was also adopted by the Federal Administrative Court, in a judgment on January 30, 1958, and by the Federal Constitution Court in a judgment on April 25, 1958. We may also point out that the European Commission of Human Rights to which the same question was put by petition No. 423/58, gave a ruling in a similar sense on July 7, 1959. Thus there has been a common

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[50] *BVG*, 9, p. 36.
[51] *Yearbook*, II, p. 596.
[52] *Yearbook*, II, pp. 580, 582; *I.L.R.* 1955, p. 608.

interpretation that the provisions of Article 6 regarding hearings and judgment in public apply only to courts of civil and criminal jurisdiction, but not to administrative tribunals.[53]

c) Competence in criminal matters

The question can arise again in cases where an administrative tribunal is competent to inflict penalties. It was posed before the Federal Supreme Court in connection with the power of certain tribunals competent in fiscal matters to impose fines. In a judgment of April 21, 1959, the Court found that the procedural rules of these tribunals respected the principles contained in Article 6 and were thus perfectly in order.[54]

(2) Guaranteed Rights and Freedoms

a) The European Commission of Human Rights has often noted a tendency on the part of some appellants to read between the lines of the Convention, seeking a guarantee for *purely imaginary rights.*[55] The same thing can be noted in certain decisions given under municipal law. From the first clause of Article 5 – "Everyone has the right to liberty and security of person" – attempts have been made to deduce such rights as:

– the right of an individual to establish his residence and engage in an occupation *on the territory of a State other than that of which he is a national;* the Münster Higher Administrative Court heard an appeal by an Italian subject, a commercial traveller by profession, against a decision of the administration refusing to renew his permit to reside in Germany; by a judgment of April 13, 1954, it dismissed the appeal, emphasizing that the Convention had not conferred any right on the nationals of signatory States to reside on the territory of other States;[56]

– with regard to the right of the individual to *free choice of residence* on the territory of the State of which he is a national, this question was the subject of a decree by the Greek Council of State in 1954.[57] A person sentenced to deportation for the crime of rebellion claimed that this type of deprivation of liberty was

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[53] On this question see the study by J. Velu, "Le problème de l'application aux jurisdictions administratives des règles de la Convention européenne des droits de l'homme relatives à la publicité des audiences et des jugements" in *Revue de droit international et de droit comparé* (Brussels), 1961, Nos. 3–4, pp. 129ff.

[54] *BGH* (S), 13, p. 102.

[55] See the table of decisions given on these lines by the Commission in *Yearbook*, II, pp. 514, 516.

[56] *I.L.R.*, 1954, p. 209.

[57] *I.L.R.*, 1954, p. 168.

not provided for under Article 5; the Council of State dismissed the appeal, finding that Article 5 placed no restrictions on the administration in removing from certain parts of the national territory persons regarded as a danger to public security.

b) Attempts have occasionally been made to draw facile deductions from the *prohibition of inhuman treatment* contained in Article 3. Thus a Czechoslovak subject laid an appeal to the Berlin Higher Administrative Court against a decision to return him to his country of origin. He claimed that if he were sent back to Czechoslovakia he would almost certainly be condemned to death for desertion or espionnage. Before giving judgment the Court examined in great detail the elements, rather confused in themselves, adduced by the appellant in explanation of his position *vis-à-vis* the Czechoslovak authorities, as well as the provisions in Czechoslovak legislation respecting repression of the crimes for which he risked being charged. Having compared the penal provisions under this legislation with their counterparts in several Western countries, the Court, in its judgment of September 28, 1960, concluded:[58]

> Thus the penalties laid down in the Czechoslovak Penal Code are within the usual limits set by the Western countries, so *that the expulsion cannot be considered inhuman treatment.*
> Contrary to the opinion rendered by the [first judges] treatment does not become inhuman by the mere fact that the appellant is subject to the jurisdiction of a country in the Eastern bloc. (Author's emphasis.)

c) The provisions in Article 5(3) respecting the *guarantees given to an arrested person as regards penal procedure* have sometimes been invoked in support of an application for release pending trial. The text states that the accused shall be entitled "to trial within a reasonable time or to release pending trial". A court may therefore have to examine the question of whether, in all the circumstances of the case, the duration of detention pending trial is or is not within the limits of "reasonable". This was done by the Bremen Appeals Court in a judgment of February 17, 1960.[59]

The Court declared:

> The determination of the period depends, among other things, on the difficulty of the enquiry, the time that has passed since the offence was committed and the attitude of the accused who must be prepared to be detained longer if, by his conduct, he prolongs the judicial enquiry. It can be said, however, that the reasonable time is exceeded if, through no fault of the accused, it is longer than the maximum sentence that could be imposed making reasonable allowance for all the circumstan-

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[58] *Yearbook*, III, pp. 640, 642.
[59] *Yearbook*, III, p. 636.

> ces ... In the present case, the preventive detention suffered by the accused did not exceed the limits ...
> In view of the seriousness of the offences, however, and of his previous convictions, *he can expect a sentence of more than four months' imprisonment.* (Author's emphasis).

The appeal was dismissed.

d) The provisions of Article 8 regarding *respect for private and family life* have been invoked in several ways.

The following case will give an idea of the lengths to which the imagination of appellants can go in the interpretation of texts. The case ended in the federal Constitutional Court's judgment of May 10, 1957, which we have already quoted with regard to constitutional appeals.[60] A person had been sentenced to one year's imprisonment by the Hamburg Court under Article 175 of the German Penal Code, relating to the offence of homosexuality. He first appealed to the Federal Supreme Court, which dismissed his appeal. He then appealed to the federal Constitutional Court, contesting the validity of Article 175 of the Penal Code. His appeal was based on two grounds: a) violation of the "constitutionally guaranteed rights" contained in Articles 3(2) and (3) and 2(1) of the Constitution – the rights relating to equality of the sexes and to free development of the personality; b) violation of Article 8(1) of the European Convention, which deals with respect for private and family life. The Court took the trouble to refute point by point the subtle arguments adduced by appellant, doing so in a decision comprising more than 50 printed pages, a part of which even reproduces the depositions of medical experts who had been called to give evidence on the relationship between homosexuality and free development of the personality. With regard to the only point of interest to us – Article 8 of the Convention – the Court observes that the scope of the principle laid down in the first paragraph is limited by the provisions in the second paragraph, which authorize, in particular, interference by the public authority as may be necessary "for the protection of health or morals".

Much more well founded are appeals in which Article 8 has been invoked against administrative decisions tending to disrupt the family life of spouses of differing nationalities. The following are two parallel cases; in both cases a Belgian subject had married a German woman; the couples experienced the greatest difficulties in founding homes, as the Belgian authorities wished to expel the woman when they tried to settle in Belgium, and the German authorities wished to expel the husband when they tried to settle in Germany. One case was brought before a German Court, the other before a Belgian Court; the Courts decided the respective cases in

[60] *BVG*, 6, p. 389.

diametrically opposed ways. The Federal Administrative Court in its judgment of October 25, 1956, on the first case interpreted Article 8 in a manner very favourable to family rights. The essence of its reasoning is as follows:[61]

> If the unity and integrity of the family are threatened, the interests of family protection must be taken into account and set against other public interests.
> It is Article 8 of the Convention which shows how public interests should be assessed. According to this Article, everyone has the right to respect for his family life. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. None of these conditions applies to the present case.

The Court holding that Article 8 of the European Convention had been violated, therefore annulled the expulsion order made against the husband. In contrast, the Belgian Court of Appeals giving judgment in the other case on September 21, 1959, confirmed the decision taken in respect of the woman, basing its decision on the following grounds:[62]

> Whereas the said Article 8 referred to permits the authorities to interfere with the right to respect for family life, when such interference is prescribed by law and is necessary in a democratic society in the interests of national security and the prevention of disorder;
> Whereas Article 12, (5) of the Act of 28th March 1952 makes it an offence for a foreigner who had been expelled to re-enter the Kingdom without a special permit from the Ministry of Justice;
> *Accordingly the steps taken against the appellant were prescribed by law;...* (Author's emphasis.)

e) Several appeals have been lodged on the basis of the provisions of Article 9 respecting *freedom of religion and of worship.*

The Greek Supreme Court, in its judgment No. 386/1955, declared that the provisions of a 1938 Law requiring prior authorization from the competent ecclesiastical authority and the Minister of Public Worship for the construction and utilization of premises intended for public worship of any religious confession, were in no way contrary to the provisions of Article 9 of the Convention:[63]

> ... according to Article 9 of the said Convention, freedom of religion is recognised but subject to such limitations as are prescribed by the law and are necessary measures in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others...

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[61] *Yearbook*, II, p. 590; *I.L.R.*, 1956, p. 393.
[62] *Yearbook*, III, pp. 626, 628.
[63] *Yearbook*, II, p. 608.

The Netherlands Court of Appeals, in a judgment of April 13, 1960, handed down a decision in an appeal laid by a pastor of the Reformed Church against a ruling obliging him to pay the contributions prescribed by the law respecting old-age insurance.[64] The appellant contested the compatibility of this law, if it were proposed to apply it to ministers of religion, with Article 9 of the Convention, since, it was claimed, freedom of worship implied that it was for the church alone to provide for the needs of its ministers. The Court dismissed the appeal for the following reasons:

> ... the freedom [through Article 9] to manifest one's religion or beliefs herein guaranteed is not the same thing as freedom to oppose one's own religious ideas or beliefs to the provisions of the law, and whereas, therefore, the provision of the Convention under which the appeal is lodged does not mean that anyone may be free to evade the enforcement of laws even when they have nothing to do with the manifestation of religion or beliefs by alleging the nullity or irrelevance of such laws because of religious ideas or beliefs that do not accord with them; ...

f) Article 13 proclaims that everyone whose rights have been violated shall have *an effective remedy before a national authority.* The Rhineland-Palatinate Constitutional Court was called on to give a ruling on the point of whether this provision required a *constitutional* appeal be open for the protection of *all* the rights guaranteed by the Convention. In point of fact the Constitution of the Rhineland-Palatinate provides that a constitutional appeal shall be open to private individuals in only one case, that of the nationalization of private property. Is this limitation compatible with the terms of Article 13? In its judgment of March 16, 1959, the Court replied in the affirmative.[65] It noted judiciously that the *effective* remedy required under Article 13 is not necessarily a *constitutional* remedy. Citizen's rights can be fully guaranteed by the present system which offers channels of appeal to the ordinary courts and to administrative tribunals.

CONCLUSION

The unusual nature of many of the appeals brought before national tribunals to-date may induce a certain amount of scepticism. Of them all, we have recorded only one instance of an annulment granted because of violation of the European Convention – that given by the Federal Administrative Court on October 25, 1956, for violation of Article 8. It seems that no other appeal was

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[64] *Yearbook*, III, pp. 668, 670.
[65] *Yearbook*, II, p. 598.

successful. The very flexibility of the provisions in Section I of the Convention certainly provides easy material for the tortuous reasoning of appellants and criminals eager to exploit every trick of procedure. A general review of all the cases submitted to the European Commission of Human Rights would probably result in a similar impression. This leads to the question: Is that what the Convention and the remedies it provides were instituted for?

It should however be borne in mind that a study of appeals, whether lodged with municipal courts or before the European Commission, will reveal only situations which have come to a *crisis*. The essential point, which we thus tend to overlook, is the *hidden efficacy* of the Convention, the influence of its provisions on the day to day practice of administration and of justice in the countries in which it is in force; this efficacy obviously stems from the possibility of sanctions, i.e., appeals; the fact that recourse is rarely had to the appeals procedure, or is sometimes badly founded, is of little importance. The really new element introduced by the European Convention in the fourteen States which have ratified it is a system of legal rules which are not only international but also supranational. Member States are bound by these rules to a greater degree than would be the case with any treaty, for the lodging of an appeal before the European tribunals and the possibility of a majority decision in the Committee of Ministers or in the Court opens an initial breach in their sovereignty. This is a first step towards that system of the Rule of Law which a leading French professor of international law, who died before his time, Marcel Sibert, postulated as being "that of the primacy of international law administered by a supra-State instance imposing its will on States within a single legal system".[66]

A single legal system: it is towards this aim that efforts must be directed if the breach is to be widened. For the provisions of the Convention to attain their full efficacy, they must, as the drafters intended, penetrate into municipal law, reaching even to the level of individuals. The system will only attain its proper balance if the individual, making use of rights derived directly from the European Convention, can invoke them before the judges of his country in the same way as before international courts. Under this system of unified law the judge of the municipal court, as strongly emphasized by Georges Scelle, is called upon to exercise international jurisdiction to the extent that he applies standards of a supra-State character. Only then will the State be fully bound by any convention to which it has subscribed.

At the beginning we said that the American and African jurists who are at present studying draft instruments aimed at securing

[66] Sibert *op. cit.*, p. 246.

protection of Human Rights on a regional basis would do well not to overlook any aspects of the experience gained in this field in the past ten years by fourteen European States. We believe that the first lesson to be drawn from that experience is that a convention for the protection of Human Rights must be viewed from the standpoint of its immediate and direct applicability to individuals. If a State chooses to bind itself, it must accept the consequences of its decisions; it cannot continue indefinitely to give with one hand and withhold with the other. Every expansion of law presupposes a loss of sovereignty, if it be true as Hans Kelsen wrote: "Until now the concept of the sovereignty of the national States has, rightly or wrongly, impeded every attempt to organize international order . . . and to transform the international community, which even today is at a low level of development, into a *civitas maxima* in the fullest sense of the term.".[67]

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67 Hans Kelsen, "Les rapports de système entre le droit interne et le droit national public," *Recueil,* 1926, IV, p. 326.

APPENDIX

EXTRACTS FROM THE (EUROPEAN) CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND PROTOCOL TO THE CONVENTION

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5

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:

a) the lawful detention of a person after conviction by a competent court;

b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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 or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph I (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. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedly by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of provisions of this Article shall have an enforceable right to compensation.

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b) to have adequate time and facilities for the preparation of his defence;

c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 25

1. The Commision may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

2. Such declarations may be made for a specific period.

3. The declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.

4. The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs.

Article 26

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

Article 57

On receipt of a request from the Secretary-General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention.

Protocol

Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceeding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

THE POWERS OF THE JUDICIARY IN EAST GERMANY

1. Election and Position of Judges

On October 1, 1959 the Soviet zone People's Assembly approved the "Act respecting elections of district and circuit court judges by the local peoples' representative organs" and the "Act to amend the Judicial Organization Act". Both Acts were incorporated in a new Judicial Organization Act which came into force on November 1, 1959.[1] With the Election of Judges Act the Soviet zone legislature has complied with a demand made by Walter Ulbricht at the 33rd Plenary Session of the Socialist Unity Party (SED) in October 1957, when he declared that the election of judges by the local representatives of the people would be more democratic than the hitherto existing system of appointment by the Minister of Justice.[2] Since resolutions adopted by the SED represent a basis for concrete measures in matters of justice[3] it was only logical that the Ministry of Justice should immediately proceed to draft an Election of Judges Act in accordance with the decisions of the 33rd Plenary Session. The Election of Judges Act was prepared by the autumn of 1959, in accordance with the timetable for legislative matters[4] drawn up following the Fifth Party Congress (July, 1958).

The minimum age for judges has been raised from 23 to 25 years (Section 16, Judicial Organization Act). Important amendments have been made to the provisions concerning the political and technical qualifications required for the office of judge. Whereas hitherto a judge was required to strive "without reserve for the goals of the German Democratic Republic" (Section 11 of the former Judicial Organization Act), the Act now requires that he "strive without reserve for the victory of socialism in the German Democratic Republic and faithfully uphold the power of the workers and peasants" (Section 15). Thus the political factor in a judgeship has been made considerably more specific. The Party and the administration now dispose of a standard even better suited to their aims

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1 G.Bl. I, 1959, p. 756.
2 *Neues Deutschland* (East-Berlin), October 20, 1957.
3 Hilde Benjamin, in *Neue Justiz*, 1956, p. 294.
4 *Neue Justiz*, 1958, p. 551.

against which they can measure the suitability and usefulness of a judge.

The professional qualification for judgeship remains, as before, "the acquisition of training in law at an educational establishment recognized for this purpose"; now, however, appointees must also have "proved themselves during the prescribed preparatory period" (Section 15, para. 2). This provision is also in compliance with a demand from the Fifth Party Congress of the SED to the effect that young jurists should be trained for the responsible position of "socialist" judge and Public Prosecutor.[5] This preparatory period has been designated "probationary period" in the Ordinance of July 22, 1959 [6] issued jointly by the Minister of Justice and the Attorney-General. The purpose of this probationary period "is to strengthen students [graduating from the universities and the Walter Ulbricht German Academy of Legal and Political Science, *author's note*] against the dangers of formalistic legal behaviour and to instil in them a favourable attitude to the cause of the workers' and peasants' power".[7] This means that only those can aspire to appointment as judge who during their probationary period have, by performing physical and "socio-political" work, furnished proof that their thought follows Party lines and that they are true representatives of the working-class, closely bound to the masses. The probationary period serves basically as a test whether the graduate intended for appointment as judge or Public Prosecutor fulfils the political requirements for the post (Section 15, Judicial Organization Act).

No change has occurred in the method of selecting judges for the Supreme Court; under the procedure already existing in their case they were elected by the People's Assembly for five year terms. The names are submitted to the Assembly by the Council of Ministers. Judges of District Courts are elected by the District Assembly, judges of Rural Circuit Courts by the Circuit Assembly, judges of urban districts by the Municipal Assembly or the Municipal District Assembly where the municipal district is newly created. The term of office is three years (Section 19, Judicial Organization Act).

The newly introduced method of electing judges for the District and Circuit Courts shows, on detailed examination, hardly any change from the "less democratic" procedure of appointment by the Minister of Justice. There is, of course, an act of election by the local representatives of the people – Circuit Assembly, Dis-

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[5] Seifert, in *Neue Justiz,* 1958, p. 553.
[6] *Probation Arrangements,* printed separately as a special issue of *Decisions and Communications of the Ministry of Justice,* August 1959.
[7] Benjamin, loc. cit., p. 692.

trict Assembly, Municipal Assembly, Municipal District Assembly – but this does not mean election in the sense of choosing from several candidates. The Minister of Justice first determines the number of judges to be elected to the individual courts and, in agreement with the "National Front" Committees of the appropriate local people's bodies, proposes an equal number of candidates (Section 19, para. 4, Judicial Organization Act). For three judges to be elected to a Circuit Court, for example, the Circuit Assembly is presented with a list containing three names. There is therefore no possibility of making a choice; at most, the Assembly could reject a candidate who appeared to be unsuitable. But even this cannot happen, since the Minister's proposals have been agreed on with the "National Front", whose representatives are also the local representatives of the people. The consultation, now legally prescribed, with the "National Front" changes practically nothing in the previous procedure, since even previously the Minister of Justice could not appoint anyone unless the main power in the "National Front", the SED, agreed. The election of judges has, therefore, contrary to Ulbricht's claim, not made justice "more democratic"; the Minister of Justice, Hilde Benjamin, retains the deciding initiative. This is made particularly clear by the provisions of Section 19, para. 5 of the Judicial Organization Act.

"From among the judges elected, the Minister of Justice appoints the Presidents of the Circuit and District Courts, their deputies and the senior judges in the District Courts."

The local representatives of the people therefore have no influence on the filling of these senior judicial posts.

After their election the judges must give the following undertaking to the representatives of the people:

"I undertake, as a judge of the German Democratic Republic, to perform my functions in accordance with the principles of the Constitution, always to uphold the unconditional observance of socialist legality and always to strive without reserve for the victory of socialism in the German Democratic Republic, for the continued further strengthening of the workers' and peasants' State, for the democratic re-unification of Germany and for peace."

The first elections of judges to the Circuit and District Courts were held from October 15 to November 30, 1960.[8] The result was as expected: of approximately 1,000 candidates for judgeships, put forward for election by the Minister of Justice, Hilde Benjamin, in agreement with the local and district committees of the "National Front", not a single one was rejected by the local representatives of the people. It became clear that the real purpose of these judicial

[8] First Executive Instruction to Election of Judges Act, Official Gazette I, 1960, p. 248.

elections lay in the "election campaign" and its political evaluation and exploitation as well as in the efforts to make judges even more dependent on the SED.

During the campaign period from September 1, 1960 onward thousands of election meetings were held, at which the candidates had to present themselves to the people and have discussions with the citizens in their future area of jurisdiction. These manifestations led to one result keenly desired by the communist officials, i.e., "undertakings by the workers to exceed their production plans or to perform other social acts".[9] Thus, for example, the "Forwards" brigade in the Steam Boiler Works, Halle, undertook to produce by October 20, 1960, in honour of the judicial elections, a specified quantity of piping, thereby achieving a four-day advance on planned production. In the "Unity" agricultural producers' co-operative in Plössnitz the members undertook to fill, despite considerable difficulty, their milk quota at all costs and to increase their contribution to the cultural fund by 1 per cent. Inhabitants of Electoral Ward 17 in Halle-South pledged themselves, during meetings with candidates, to devote additional hours to the "National Building Drive"; at other election meetings young persons declared their readiness to enrol in the "National People's Army". The fact that all these pledges (regarding the fulfilment of which there is, incidentally, rarely any further comment) have nothing to do with the preparation of elections to the Judiciary is both well known and a matter of indifference to the Party and State officials; the main thing is that they enabled the exploitation of human capacity for work to be pursued.

The fact that judges are elected for three or five years does not mean that they cannot be removed from office during that period; the principle of irremovability of judges does not apply in the Soviet-occupied zone, in common with the rest of the Eastern bloc. Under Section 25 of the Judicial Organization Act, a judge of a District or Circuit Court can be removed from office before the expiry of the term for which he was elected by the people's representatives who elected him in agreement with the Minister of Justice, if

> he has offended against the Constitution or other laws or has otherwise gravely transgressed his duties as judge;
> he has been legally sentenced by a court of law, facts becoming known relating to his conduct before election and which, due allowance being made for all the circumstances, are incompatible with his continuance in office.

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[9] *Neue Justiz*, 1960, p. 740.

A judge can also be removed from office if he is physically or mentally incapable of fulfilling his duties. Under the Judicial Organization Act 1952, judges appointed by the Minister of Justice could be removed before expiry of their term by the Minister after consultation with the administrative board of the Ministry of Justice. The new provisions of the Act (Section 25) do indeed now transfer the right of removal to the people's representatives who elected the judge, but the right can only be exercised "in agreement with the Minister of Justice". If agreement cannot be reached, then the view of the Minister is certain to prevail; thus the real power remains in the hands of the administrators. A judge of the Supreme Court can, subject to the same conditions, be deposed by the People's Assembly acting on an opinion of the Justice Committee of the Assembly. Before a decision on removal from office is taken, the viewpoint of the judge concerned must be ascertained; there is no formal legal or complaints procedure by which the judge can appeal against the decision.

Judges against whom removal proceedings are pending or legal proceedings have been instituted may be temporarily removed from office pending the outcome of such proceedings (Section 31 of the Act). The people's representatives play no part in this temporary suspension from office. The right of removal in such circumstances lies with the Council of Ministers in the case of judges of the Supreme Court, and with the Minister of Justice in the case of other judges. The body which elected the judge is merely to be informed of the temporary suspension. This guarantees that a judge no longer acceptable to the ruling powers in the Soviet-occupied zone will be kept in office not a day longer than is deemed convenient.

The provision that a judge can be removed if he "gravely transgresses" his duties is typical of the new Soviet zone legislation. It is so flexible that it can be made to cover practically anything. Its flexibility has even been increased by the inclusion in Section 18 of the Act of a listing of "the basic duties of a judge". These duties include the following:

> to live according to the principles of Socialist morals[10] and to contribute actively and in an exemplary fashion to the building of socialism, unremittingly to pursue his political and technical education, to be on his guard and participate actively in political work among the workers.

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[10] The "Ten Commandments of Socialist Morals", proclaimed by Ulbricht to the Fifth Party Congress of the SED, (July 1958) have thus acquired the force of law for judges in the Soviet-occupied zone:

1. Thou shalt always strive for the international solidarity of the working class and of all workers, and for the indestructible alliance of all socialist countries.

A grave transgression of these basic principles will be easy to uncover, if desired, so that the removal of a judge who has fallen out of favour can then be effected.

The Fourth Executive Instruction to the Judicial Organization Act of December 14, 1960 (Official Gazette II, p. 517) determines the participation of local councils and local representatives of the people in the implementation of disciplinary and removal measures against judges. The chairman of the Circuit or District Council, as appopriate, is to be informed of any application to institute disciplinary proceedings against a judge, of the decision to start the proceedings, of arrangements for hearings and of the findings. The chairman can participate in the hearings. If there are grounds justifying the removal of a judge under Section 25 of the Act, the Minister of Justice will institute, through the chairman of the council, an application for removal addressed to the local representatives of the people. If such grounds first become known to the chairman, he must secure the agreement of the Minister before proposing that the council apply to the people's representatives for removal of the judge. Consequently, there can be no disciplinary proceedings without the cognizance of the Minister of Justice.

2. Socialist Legality and Partiality of Jurisdiction

The Judicial Organization Act gives expression to the fact that in the East German People's Democracy the principle of separation of powers is no longer acknowledged; the courts are "organs of the unified state power of the people's democracy" (Section 1, second sentence). This inclusion of the courts among the organs of the State is intended to show the superior quality achieved by "socialist democracy" as compared to the "bourgeois-capitalist" State.[11] The courts, in common with all other State organs, are

2. Thou shalt love thy Fatherland and thou shalt always be prepared to strive with all thy might for the defence of the power of the workers and peasants.
3. Thou shalt perform good deeds for socialism, because socialism leads to a better life for all workers.
4. Thou shalt work in a spirit of mutual help and comradely co-operation in the building of socialism, respecting the collective and taking its criticisms to heart.
6. Thou shalt cherish and increase the property of the people.
7. Thou shalt always strive to improve thine output, to be frugal and to strengthen socialist work discipline.
8. Thou shalt rear thy children in the spirit of peace and socialism to be well-educated persons, firm of character and strong of physique.
9. Thou shalt lead a wholesome life and respect thy family.
10. Thou shalt lend solidarity to people struggling for their national liberation and defending their national independence.

[11] Hilde Benjamin, *Neue Justiz*, 1959, pp. 689 ff.

made responsible for the attainment of the economic objective, which is the principal one; according to Section 2 of he Act, jurisdiction must aid the "victory" of socialism. In exercising their functions the courts must contribute "to successful attainment of the State aims in their field, in particular to fulfilment of the aims of the national economy" (Section 2, para. 2). This legal obligation is also in line with the principle of unified State power: like all other State organs the primary duty of the courts is to co-operate towards the attainment of the political objective and its economic foundations; accomplishment of the economic task is the concrete programme which also holds good for the courts.[12] Consequently, court decisions which do not further the "victory of socialism" or can even be regarded as detrimental to it cannot be upheld. Such decisions would run contrary to the legal prescription that the courts must further the victory of socialism; they would be regarded as an offence against "socialist legality" and, as such, would be quashed. Section 2 of the Judicial Organization Act thus lays down the politico-juridical guiding principles to which the courts in the Soviet zone must conform.

Discussion and controversy in the Soviet-occupied zone regarding the concept of "socialist legality" have been frequent. The first point to emerge therefrom is that this concept cannot be compared to, or put on a similar footing with, similar concepts in the West, and, above all, that it has nothing to do with the concept of the Rule of Law.[13] It becomes, furthermore, clear that the principle of socialist legality has no positive effect on the legal safeguards of the individual citizen, even if Soviet zone legal experts and officials of the administration of justice do try to demonstrate that strict observance of socialist legality serves the interests of legal safeguards for citizens. While it is true that "unconditional respect of the laws is an indispensable factor in socialist legality",[14] this however "must not induce a non-dialectical positivist approach to the law".[15] It would therefore be erroneous to classify socialist legality as being simply legal positivism. Positivist traits do indeed become apparent in Soviet-zone jurisdiction and legal science in the efforts to preserve legality, but of considerably greater significance are the conclusions drawn from the principle of socialist legality which, in practice, enable any standard to be applied in

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12 Hilde Benjamin, loc. cit., p. 691.

13 See Bilinsky: "Concept and Evolution of Socialist Legality", in *Studies by the Institute of East German Law,* Munich, 1959, Vol. 8, pp. 5 ff.

14 Hilde Benjamin: "The 7th Plenary Session of the Central Committee of the Socialist Unity and the Work of the Organs of Justice", in *Neue Justiz,* 1960, p. 1 ff (p. 4).

15 Leymann/Petzold: "On the Essence of Socialist Legality in the G.D.R.", in *Staat und Recht,* 1959, p. 691.

any desired way, any legal maxim to be converted to its opposite or, if it should appear necessary to do so, to be regarded as outmoded and no longer applicable.

The meaning to be attributed to "socialist legality" and the concrete results which must follow from its strict observance are determined at any time by the current position in the class struggle; the crucial points and principal tasks designated by the SED along the path to Socialism/Communism govern what is to be regarded as socialist legality at any juncture. The general opinion is that situations could arise wherein legal provisions no longer correspond to socialist requirements and that, consequently, these provisions would hinder rather than help the evolution of socialist order.[16] If such restrictive provisions were nevertheless to be applied, by invoking the principle of socialist legality, this would be a normative approach which would conflict with dialectical principles and would have to be sternly repressed. This view is clearly stated by Professor Karl Polak, a scientific assistant to the Central Committee of the SED.[17]

Whereas Polak comes to the conclusion that deviation from such legal provisions is permissible if the progress of the development laid down by the Party leadership should so require, the Minister of Justice, Hilde Benjamin, wishes to leave such adjustments entirely within the province of the central organs of the State; the subordinate organs would merely have the right, and the duty, to indicate, on the basis either of their own findings or of relevant comments from citizens, where and when the existing laws are no longer in accord with the stage of development.[18] Only in this fashion could the principle of socialist legality operate in conjunction with that of "democratic centralism". This difference of viewpoint between Polak and Hilde Benjamin is, of course, only theoretical in nature and does not lead, in the practical aspects of justice, to different results from the application of the principle of socialist legality, which in the final analysis is only a means of ensuring the sole rule of the State Communist Party:

> Socialist legality is upheld by a court if the laws of our State are well thought out politically and are applied in accordance with the aims of the German Democratic Republic. The principle of socialist legality sets the Courts the task of contributing by their proceedings, and in

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[16] Heinicke: "The Tasks of the Labour Courts in 1959", in *Arbeitsrecht,* 1959, Vol. 4, p. 101.
[17] K. Polak: "On dialectics in Political Science", East Berlin, 1959; *idem*: "The Position of Legal and Political Science in the German Democratic Republic", in *Staat und Recht,* 1959, pp. 1326 ff, and 1960, pp. 1 ff.
[18] Hilde Benjamin: "The 7th Plenary Session of the Central Committee of the Socialist Unity Party and the Work of the Organs of Justice", in *Neue Justiz,* 1960, pp. 1 ff.

> every decision, to the strengthening of the power of the workers and peasants and of making the populace aware that our system of laws is in harmony with the interests of the citizens.[19]

The principle of socialist legality is supplemented by the principle of partiality in judgments; both form a dialectical unity.[20, 21]

This partiality is to take the form that every court decision must consciously favour the just cause of the masses of working people and thus further the immediate interests of these masses. Since, however, the consciousness of the working masses (the proletariat) is not yet unified and does not react spontaneously, the class has need of guidance by a group familiar with the evolution of society and aware of the course of human history. This guiding group – the *"vanguard"* – is the Communist Party, i.e., in the Soviet-occupied zone, the SED.[22] If partiality in the courts is to advance the interests of the class (power of the workers and peasants, the proletariat), the viewpoints and decisions of the guiding Communist Party must be given primary consideration; only thus can there be "correct application of the laws as intended by Party and Government".[23] Respect for the principles of socialist legality and partiality therefore means:

> The judicial decision must reflect readiness to implement the decisions of the Party of the working class and of the Government[24] or partiality in the application of the law means that it is applied in such a way as to correspond to the viewpoint of the majority of the workers and is thus in line with the goals of the Party's and Government's policy. This entails acknowledgement and attainment of the dialectical unity of legality and partiality.[25]

The courts are thus obliged, as a primary function, to help in the realization of decisions of the SED. Judges in the Soviet zone are constantly faced with the demand to exercise conscious partiality in their work, to "base their decisions on partiality, as political beings",[26] since

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[19] "Court and Jurisdiction in the G.D.R.", Supplement 3 to the *Magistrates' Journal*, December 1956, p. 11.
[20] Work programme of the Ministry of Justice, in *Neue Justiz*, 1954, p. 322.
[21] Hilde Benjamin: "Effecting the Dialectical Unity of Legality and Partiality", in *Neue Justiz*, 1958, p. 368.
[22] See Art. 126 of the Constitution of the U.S.S.R.; also Polak: *Dialectics in Political Science*, East Berlin, 1959, p. 201.
[23] Hilde Benjamin at the Fourth Party Congress of the SED, *Neue Justiz*, 1954, p. 223.
[24] Melsheimer: "Socialist Legality in Criminal Proceedings", in *Neue Justiz*, 1956, pp. 289 ff (p. 295).
[25] Hilde Benjamin: "Effecting the Dialectical Unity of Legality and Partiality", in *Neue Justiz*, 1958, p. 368.
[26] Böhme: "Hints for the New Magistrate", in *Neue Justiz*, 1955, p. 327.

> the more partial they are in the exercise of their important function, the more convincing to the masses will be every indictment, every pleading and every verdict.[27]

Thus it is not surprising that court decisions frequently cite textually resolutions and other declarations of the SED as grounds for their findings. The demand for genuine "partiality" also leads the Minister of Justice, Hilde Benjamin, to report in the official journal, *Neue Justiz,* on each plenary session of the Central Committee of the SED, deducing therefrom additional tasks to be accomplished in the administration of justice:

> The resolutions of the Central Committee of the Party of the working class always contain important directives and guidance for all State organs; in particular, they direct the attention of the organs of justice, in a singularly significant way, to the fields of greatest current importance which call for the full attention of these organs. Rapid practical implementation of the directive received is the solemn duty of all responsible officials in the administration of justice, particularly judges, Public Prosecutors and notaries.[28]
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> In them [the Party resolutions (author's note)] we see, therefore, not only general political directives, but they also represent the basis for concrete measures to be taken by those of us engaged in the administration of justice.[29]

With explanations of this kind, Party resolutions are raised to the dignity of law. Despite this clearly proclaimed link between judges and the Party of the working class, the principle of the independence of the Judiciary, contained in Article 127 of the Constitution and Section 7 of the Judicial Organization Act, is repeatedly emphasized. Hilde Benjamin is of the opinion that the independence of the Judiciary is guaranteed, despite "the fact that the comrade judges are also subject to the political directives of the Party, and indeed need them to a certain extent, and that even in their case the Party plays the role of a mentor".[30]

When Melsheimer states that "the judge must always bear in mind that he is dispensing justice in the name of the workers and that he is responsible to them" [31], it is clear that the judge is answerable to the SED for his decisions, since the "Party of the working class" is held to be the most conscious and progressive element in the working population. A final confirmation of this view is given

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[27] Benjamin/Melsheimer: "10 Years of Democratic Justice in Germany", in *Neue Justiz,* 1955, pp. 259 ff (p. 266).
[28] "The 17th Plenary Session of the Socialist Unity Party and the Tasks of Justice in Rural Areas", in *Neue Justiz,* 1954, p. 97.
[29] "The Results of the 21st Plenary Session of the Central Commitee of the Socialist Unity Party and the Work of the Organs of Justice", in *Neue Justiz,* 1954, p. 679.
[30] "Full Realization of Socialist Legality", in *Neue Justiz,* 1956, pp. 228-229.
[31] "Socialist Legality in Criminal Proceedings", in *Neue Justiz,* 1956, p. 294.

by Josef Streit, an official of the SED: "A number of judges and Public Prosecutors are not clear on the basic points of our policy . . . they have not grasped the fact that they carry a great responsibility towards the Party, since they were appointed to their functions in their capacity as comrades and, as Party Members, are also subject to Party supervision and are responsible to the Party for all their actions."[32] This link to a political party nullifies the independence of the Judiciary. Implementation of the principle of "partiality" in jurisdiction is only one measure serving to eliminate such independence completely.

3. The Accountability of Judges

The "Act respecting the local organs of State power" of January 18, 1957,[33] had already laid down important provisions regarding the relationship between the organs of justice and the local councils and representatives of the people. Under that Act the local representative organs – Circuit Assembly, District Assembly, Municipal Assembly and communal representatives – are the supreme organs of the State power in matters coming within their competence (Section 1 of the Act). Section 8 states very clearly:

> The organs of justice and public prosecution operating within the jurisdiction of the local representative bodies of the people . . . must co-operate closely with these bodies and respect and support them as being the supreme organs of power respecting matters for which they are competent. The local representative bodies of the people have the right to require the directors of the organs, enterprises and institutions named in Section 1 to supply information on matters coming within the competence of such representative bodies.

In accordance with these general principles the local representatives of the people are entitled, under Section 8, para. 3 of the Act, to criticize the work of the courts, if, through deficiencies in the latter, "the accomplishment of the tasks of the local representatives of the people, the building of Socialism and the evolution of democratic life are impeded". The Circuit Assembly can thus criticize the Circuit Court, the District Assembly the District Court. The court is "obliged to reply to the criticism within four weeks", and thus is practically compelled to justify itself to he representatives of the people. This further restriction of the independence of judges is deduced from the thesis of their "answerability to the people".

Exceeding the provisions of the "Act respecting the local organs of State power", Section 5 of the Judicial Organization Act

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[32] "On New Working Methods in the Administration of Justice", in *Neue Justiz*, 1958, p. 369.
[33] G.Bl. I, p. 65.

now provides for a straightforward obligation on the part of all Circuit and District Court judges to account for their actions to the competent local representatives of the people. Such justification should indicate the extent to which the judges have contributed by their verdicts and other activities to the accomplishment of the political and economic tasks in their area. Conversely, the local representatives are thereby given an opportunity to influence the principles on which the judicial decisions are based. Section 5 of the Judicial Organization Act also provides for a close link between the courts and the local organs of State power, i.e., the offices of the administrative authorities. The judges must "respect the tasks set forth in the resolutions of the local organs of State power and must contribute actively to their accomplishment, in particular by alluding to developments in the crime rate or to other manifestations revealed by an analysis of jurisdiction and of political activities among the workers". The judges are thus obliged to bring their activities in line with the main points of the economic plan (the Seven-Year Plan) in their district or circuit. The course of justice must not be allowed to be governed by "spontaneous" events, the judges waiting to see what cases are submitted to them for decision; rather must the judges take active steps to decide matters contributing to the accomplishment of the main political and economic tasks. The approval of his report by the people's representatives and their attitude to him will largely depend on what points the judge can put forward in rendering his account of the co-operation with the local organs of State power demanded of him.

This new link between the judges and the local organs of State power can only be evaluated in conjunction with the Election of Judges Act [34], which came into force at the same time, and with the provisions regarding removal of judges. The principle of accountability to the "working masses", who, through their representatives, elected the judges is claimed to be a particularly impressive demonstration of internal democracy within the State. Since, however, the local representatives of the people are themselves also under the leadership of the SED, for, indeed, it is in the local representative bodies that the Party's claim to leadership is forced through in a particularly callous manner, the dependence of the judges on the Party is, in effect, merely reinforced by their now legally prescribed dependence on the local representative bodies. This "democratization of justice" omits the very element which would have been in the interest of the population: legal safeguards represented by justice being administered independently of Party influence and truly subject only to the Constitution and the law.

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[34] See above.

4. Guidance and Supervision of Decisions by the Judicial Administrative Authorities

Under the colourless and for Western jurists meaningless heading "Relations between the Ministry of Justice and the Courts", Section 13 of the new Judicial Organization Act embodies a principle taken from Soviet law, one which had hitherto only been mentioned in by-laws, administrative ordinances, directives and articles but which nevertheless has for years exercised a deciding influence on judgments in the zone: the principle of "Guidance and Supervision". Article 13 of the Act provides as follows:

> The District and Circuit Courts are guided and supervised in their activities by the Ministry of Justice. Such guidance and supervision are intended to ensure the fulfilment of the tasks of jurisdiction and of political activities among the workers. They also embrace co-operation between the Court and the local organs of State power and shall ensure that the Court, in the performance of its functions, assists in the accomplishment of the tasks set forth in the resolutions of the local representatives of the people and the bodies coming under them.

Guidance and supervision are exercised under several forms. The old-style inspection of the courts which used to take place about once a year and covered their over-all activities has been forced more and more into the background, yielding place to the "investigation" which is carried out either as an individual investigation performed by an investigator from the judicial administrative services or as an investigation performed by a so-called "complex brigade". The investigation is a consequence of "the guidance functions assumed by the judicial administrative authorities with a view to the condemnation of the criminals of the June putsch".[35] During her study tour in the Soviet Union in 1952, Hilde Benjamin apparently took particular note of the influence exercised by the judicial administrative authorities on jurisdiction. After the events of June 17, 1953, and when Mrs. Benjamin had become Minister of Justice, she drew the practical consequences from the impressions she had gained on her tour. She formed an "operational staff" of which, in addition to herself, the members included Attorney-General Dr. Melsheimer, judges of the Supreme Court, attorneys from the Attorney-General's Office and some senior officers of the Ministry of Justice. Two People's Judges, Grube and Neumann, were appointed "investigators". They travelled throughout the zone and (mostly at night) reported by telephone to an official of the operative staff on duty in the Supreme Court building details of cases coming

[35] This is a reference to the insurrection of June 17, 1953. Quoted from Hilde Benjamin: "The Investigator-Helper and Counsellor", in *Neue Justiz*, 1954, p. 285.

before the courts for judgment in connection with charges of participation in the rising of June 17. If the official on night-duty considered the case as clear-cut, he gave the investigator his decision regarding the severity of the sentence to be imposed; otherwise he postponed decision until the case had been submitted to Mrs. Benjamin the following morning; when she gave her decision it was communicated by telephone to the investigator. The investigators passed on these instructions to the judge dealing with the case, who had to follow them. Naturally, in the operational staff there was no official mention of instructions, but merely of "help for the judges". The guidance instituted at that time for a specific set of cases was then systematically extended to the whole field of civil and penal law and to State notaries; the investigators commenced their activities in the Ministry of Justice and in the district judicial administrative offices. The great importance attached to these activities can be measured by the fact that the former President of the East Berlin Court of Appeal, Ranke, was appointed deputy to the Minister of Justice and entrusted with the administration and supervision of the whole investigation system in the Ministry of Justice. In addition to the implementation of instructions through district judicial administrative offices and local courts, his task consists of improving the "qualifications" of the investigators in the Ministry and in the district offices, since "the activities of the investigator represent the direct transmission of political direction from above downwards. The investigator introduces all innovations to be brought to the attention of the judges. He is a helper and political counsellor. He must be the first to understand every new stage in our political, national and legal development so that he can give correct guidance on it." [36]

The new provisions contained in Section 13 of the Judicial Organization Act provide the legal basis for the investigation system in the administration of justice in the zone. They also make the Ministry of Justice responsible for taking appropriate measures to ensure that the judgments and decisions of the courts serve to advance the "victory of socialism". One of these measures is the new "Working Methods for Judicial Administrative Offices" [37] issued by the Minister of Justice, Hilde Benjamin, on November 30, 1960, which transfers to the district judicial administrative offices the supervision and guidance of the District and Circuit Courts. "In this connection, the main subject of guidance must be jurisdiction, which is the main task of the courts" (Section 2, para. 2 of the document), but guidance and supervision must, as explicitly stated

[36] Hilde Benjamin, loc. cit., p. 290.
[37] Printed in the *Instructions and Communications of the Ministry of Justice,* special issue, December 1960. This document is "for official use only".

in Section 13 of the Judicial Organization Act, extend also to the political work of the courts among the workers. As representatives of the Minister, the investigators from the Ministry of Justice have to explain the directives from above and to transmit the opinion and experience of the Ministry. "They counsel and support the director of the judicial administrative office in his directorial activities and help the investigators from his office to accomplish their tasks" (Section 1, para. 2 of the document). The director of the judicial administrative office exercises functions of guidance and supervision over the presidents of courts, while the main function of the investigators attached to the legal branch of the judicial administrative office consists in guiding and supervising the work of the District and Circuit Courts (Section 14 of the document). Guidance must have the primary aim of bringing court decisions into line with the functions of national guidance performed by the local representatives of the people and of safeguarding socialist legality. The principal method to be adopted by investigators is "immediate operative guidance" (Section 17). This can be applied in the form of "individual or brigade investigations in co-operation with the investigators from the 'Senior Personnel' branch or by complex brigades", and also by discussion, seminars, comparison of results, statistical evaluation and publications.

The investigators from the judicial administrative authorities are to ensure that all court decisions are based on conscious partiality.[38] If Section 7 of the Judicial Organization Act nonetheless states that the judges "are independent in their jurisdiction, subject only to the Constitution and the Law", then this indicates that partiality in jurisdiction and guidance in creating or strengthening this partiality can be made to conform with the concept of judicial independence obtaining in the Soviet-occupied zone.[39] Even though the guidance given by the investigators represents, from the viewpoint of practice in a constitutional State, an intolerable interference in judicial independence of decision, there is, in accordance with the view held in the Soviet-occupied zone, no infraction of the principle of independence, since such interference is intended to prevent the development of any tendencies hostile to the working class in court decisions.

It is noteworthy that in legalizing the link between the courts and the judical administrative authorities the Soviet-occupied zone reveals a trend deviating from developments in the Soviet Union. While it is true that after the dissolution of the Ministry of Justice of the U.S.S.R.[40] the close link between the administrative authorities and the courts (administrative supervision) has not been fully severed,

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[38] See above.
[39] See, for example, Melsheimer, in *Neue Justiz*, 1956, p. 289.
[40] Decree of May 31, 1956.

it has nevertheless been greatly weakened in several Republics of the Union.[41] For the Soviet-occupied zone the Minister of Justice Hilde Benjamin stated even in 1957 that the judges continued to need the guidance and supervision of the Ministry of Justice.[42] This viewpoint has now found its legal expression in Section 13 of the Judicial Organization Act.

Thus the circle is closed: socialist legality – partiality in court work – answerability to the working masses and local representatives of the people – guidance and supervision by the judicial administrative autirities. The system has really sealed off the field of case law, with the aim of preventing politically false or undesirable verdicts. The opportunities of influencing judges, now available to the system as a result of the practical application of the principles of partiality and "democratic centralism", are many and varied. Besides criticism by the local representatives of the people and guidance by the investigators, the SED itself can now influence them, at least those who are Party members – which is the case for at least 95 per cent. of the judges. In each court, as in each administrative authority and in each "state-owned plant", there exists a primary Party organization. The "comrade" judges have to participate in the sessions and discussions held by these units. This gives the Party an opportunity, through the chairman of the primary Party organization or the group organizers, to communicate its advice and wishes to the judges. Party discipline requires that such advice be followed even if it is directly aimed at influencing the judge in formulating his decisions. Thus, the representatives of the people, the judicial administrative authorities and even the Party all influence judges by the guidance they impose on them. Under such circumstances judicial independence can no longer exist.

WALTHER ROSENTHAL *

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41 See Dernecker, in *Law in East and West*, 1957, p. 232 and ibid., 1959, p. 117.

42 *State and Law in the Ligth of the Great October*, commemorative volume, VEB Deutscher Zentral Verlag, Berlin 1957.

NOTES

OMBUDSMAN FOR BRITAIN?

"Justice", which is the British Section of the Commission, published in October 1961 an important Report *, now commonly referred to as the Whyatt Report, concerned with the redress of grievances arising from conflict between the citizen and the Administration. To understand fully the nature of the proposals in this Report it is necessary to consider the broad background to it.

Historical Background

It was not until this century that successive British Governments, in common with governments facing similar problems elsewhere, introduced on a large scale social and economic legislation which had the effect of bringing the individual more and more into every day contact with government – for example in matters such as national insurance schemes, war pensions and compensation for land compulsorily acquired by the government. Where the citizen came into conflict with the government there did not exist for him any special courts or procedure whereby he could challenge the action of the Executive. There was never any system comparable to say the *Conseil d'Etat* in France or the Administration Courts in Germany. Furthermore until 1947 the citizen could not sue the Crown (i.e., Government Departments) in tort. But legislation, as it arose, often set up tribunals to hear complaints from parties on the issues involved, although it was not clear for a time whether the tribunals were designed to facilitate the administration or to adjudicate between the citizen and the department concerned. Following a storm of criticism which had been directed mainly by lawyers at the central Government Departments, the Committee on Ministers' Powers was appointed in 1929 (also known as the Donoughmore Committee) to investigate the powers exercised by Ministers both in the legislative and the quasi-judicial field. Although the recommendations of the Committee were not implemented by legislation, the Committee's work served to highlight the immense powers now possessed by the Executive. In the meantime the number of tribunals continued to grow; it should here be explained that these tribunals were not

* The Citizen and the Administration: *the redress of grievances,* a Report by "Justice", the British Section of the International Commission of Jurists; Director of Research Sir John Whyatt, with a forword by the Rt. Hon. Sir Oliver Franks G.C.M.G., K.C.B., C.B.E., and a preface by the Rt. Hon. Lord Shawcross Q.C., the Chairman of "Justice". Published in London by Stevens & Sons Ltd., xiv and 104 pp. 10 s. 6 d. net.

exactly considered as part of the ordinary system of courts, although the High Court was able to review their decisions on certain occasions by means of the old writs of certiorari, prohibition and mandamus. More Welfare State legislation followed the second World War and the next development occured in 1955 when the Committee on Administrative Tribunals and Enquiries (known as the Franks Committee) was appointed with the following terms of reference: –

> To consider and make recommendations on : –
>
> (a) The constitution and working of tribunals other than the ordinary courts of law, constituted under any Act of Parliament by a Minister of the Crown or for the purposes of a Minister's functions.
>
> (b) The working of such administrative procedures as include the holding of an enquiry or hearing by or on behalf of a Minister on an appeal or as a result of objections or representations, and in particular the procedure for the compulsory purchase of land."

The Committee whose Report was published in 1957 made a very careful study of the tribunal system, and made a number of important recommendations; it firmly came to the conclusion that the vital purpose of tribunals was to adjudicate objectively on the issues between the two parties involved, and moreover stated that all tribunals should be characterized by openness, fairness and impartiality. One of the recommendations of the Committee was to set up two Councils on Tribunals with supervisory functions over all tribunals brought under their purview. This recommendation was implemented by the Government in 1958 with the establishment of the Council on Tribunals. One solution to the growing problem of administrative law which the Franks Committee *did* reject, as indeed the Donoughmore Committee had rejected, was the suggestion to set up an Administrative Division of the High Court, an idea canvassed in a pamphlet entitled "The Rule of Law" prepared in 1955 by a group of Conservative Party lawyers.

Now with regard to its terms of reference the Franks Committee restricted its inquiry to those instances where a formal tribunal procedure was already in existence. It never considered the large field of government action where the citizen could not take a complaint against a Government Department to a tribunal because no tribunal or other statutory procedure existed, and consequently had no statutory method of getting satisfaction for his grievance.

However, in the last few years in Britain there has been a growing awareness that this balance between Government Departments and the individual is weighted, when it comes to conflict, too heavily in favour of the government. Several celebrated cases, the most notable of which was *Crichel Down,* have exposed inadequacies in what may be described as the complaint system. But at the same time it should not be thought that the citizen in Britain is without

means of protesting against government action. Far from it. The citizen may be able to find a remedy in the ordinary courts, or before an administrative tribunal; or he can always take the matter up with the Government Department concerned and try, in that way, to get satisfaction; or he can take the matter up with his Member of Parliament, who can investigate the complaint on his behalf and, if necessary, raise the matter in the House of Commons, a procedure which could lead to an official inquiry being ordered by the government which might be either a Departmental Inquiry or an Inquiry under the Tribunals of Inquiry (Evidence) Act, 1921; or he can approach for advice and help a representative organization like the Citizen's Advice Bureaux; or he can report his grievance to the Council on Tribunals; or he may be able to get his grievance taken up by the Press.

Report by Justice

In 1959 "Justice", which is the British Section of the International Commission of Jurists, decided to institute an independent inquiry on its own initiative and appointed its own Committee of distinguished men [1], three lawyers and an economist, with the following terms of reference: –

> To inquire into the adequacy of the existing means for investigating complaints against administrative acts or decisions of Government Departments and other public bodies, where there is no tribunal or other statutory procedure available for dealing with the complaints; and to consider possible improvements to such means, with particular reference to the Scandinavian institution known as the Ombudsman.

"Justice", then, proposed to inquire into that sphere of government activity which the Franks Committee by its terms of reference had precluded itself from entering, i.e., that special and very important area where "no tribunal or other statutory procedure" existed to hear complaints against government action. A word of explanation is here necessary about the position and function of the Scandinavian "Ombudsman" referred to in the terms of reference. In Sweden the Ombudsman has, since 1809, been an Officer of Parliament whose job it is to ensure that civil servants carry out their duties and to take action if they fail to do so; in his work the Ombudsman may receive and investigate complaints from individuals of government action.

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[1] The Committee was composed of the following persons: Sir John Whyatt, formerly Chief Justice of Singapore, Mr. Norman S. Marsh, Director of the British Institute of International and Comparative Law and a former Secretary-General of the International Commission of Jurists, Sir Sydney Caine, Director of the London School of Economics and Professor H. W. R. Wade, Professor of English Law at Oxford University. Lord Shawcross, Chairman of Justice, was orginally appointed Chairman of this Committee but was unable to play an effective part in the work of the Committee. The Chairmanship therefore devolved on Mr. Marsh.

Denmark established an Ombudsman on similar lines to the Swedish Officer in 1955. An Ombudsman exists in Finland, while it is likely that the Bill to establish a Norwegian Commissioner for the Civil Administration will become operative in 1962. Finally it should be noted that there is a Bill at this moment before the New Zealand Parliament which purports to establish a Parliamentary Commissioner for Investigations with powers closely resembling those of the Scandinavian Ombudsman.

The British Government had professed itself interested in the outcome of "Justice's" Report and had intimated to Parliament that any action in this field of administrative law would await the outcome of the Report. It was therefore with special interest that this widely-anticipated Report was received, when published at the end of last October.

The Report has a foreword by Sir Oliver Franks, the Chairman of the Franks Committee of 1957, and a Preface by Lord Shawcross, the Chairman of "Justice". Although this inquiry was entrusted to a Committee it is placed on record in the Preface that the work of inquiry has been essentially done by Sir John Whyatt, "Justice's" Director of Research.

Except for Appendix A, which is briefly concerned with complaints against local government authorities, the Report is concerned with central Government Departments only. The Whyatt Committee was probably wise not to include in its inquiry complaints against local authorities, the police (who are the subject of a current study by a Royal Commission) and nationalized industries. A very wide field of investigation might have resulted in a too large and therefore indigestible, plateful of reform. The Report divides the complaints of citizens into two categories. Into the first category fall those complaints against the discretionary decisions of officials, in which the complainant disagrees with the way the official has used his discretion but has no means of challenging it. Here in effect the citizen is complaining that there is no appeal from the decision. An example given by the Report of this kind of decision is as follows : –

> A doctor prescribed a special food preparation and distilled water for a child suffering from hypercalcaemia. The father of the child was a working man in the £ 9 per week class and the cost of the preparations was £ 9 per month. The doctor could have requested the Senior Administrative Medical Officer of the National Health Service for his Region to allow the preparations to be prescribed free of charge but he did not do so. There is no appeal from a doctor's decision in such a case.

In the second category are complaints against acts of what the Report terms maladministration; the citizen is complaining in this sort of case of official misconduct or unjust conduct, which may cause, for example, loss, damage, or hardship to the citizen through inefficiency, error or negligence on the part of the official or officials.

The Report appears a little deficient in examples in Britain of maladministration. But one case cited in the Report can be summarized as follows: –

X was employed by the Electricity Board as a meter repairer. His health deteriorated and his trouble was at last diagnosed as mercury poisoning caused by his work as a meter repairer. X was absent from work for long periods due to his illness. Eventually he sued the Board claiming £1,200 for loss of earnings, and for general damages. The Board agreed the figures were correct but denied the liability. At the trial it was found (after pleadings had been amended) that X's claim was statute-barred since the cause of action had arisen more than three years before X had issued his writ. The judge found that X's ill-health was directly attributable to the Board's negligence, but gave judgement to the Board because X' claim was statute-barred. Subsequently X applied under a statute for a gratuity. He was offered £750 and later a higher amount. He refused these offers, pointing out that £1,200 had been agreed by the Board as the correct figure for loss of earnings and that he continued to suffer considerable pain. He was unable to earn a living because of permanent disability and his total weekly income was 13 s 6 d disability allowance. He had no assets. Representations were made on his behalf to the Minister of Fuel and Power, who said that he did not think he could intervene. Subsequently the matter came to the attention of the Prime Minister who supported the Minister and stated he had read with sympathy the circumstances of the case but added "further correspondence would serve no useful purpose".

The Report's Proposals

With regard to the first category of complaints the recommendations of the Report do not appear highly contentious. The proposal is to set up, where necessary and by statutory order, more tribunals, and to establish also a General Tribunal formed to deal with complaints against discretionary decisions where no tribunals exist. In this way the citizen would have the right of some sort of appeal to an independent body in the field in which the official's decision had been discretionary. There is nothing radically new here, but the proposals are important if the recommendations concerned with complaints in the second category are to be realistically implemented.

It is in this second set of recommendations that the Report explores new ground. The proposals are almost bound to be controversial as they involve constitutional changes. Here, then, the Report calls for the establishment of a Parliamentary Commissioner along the lines of (but of course in many ways different to) the Scandinavian Ombudsman. The Commissioner would be an Officer of Parliament and therefore not a member of the Executive, and would be in a

similar constitutional position *vis-à-vis* security of tenure and status to the Comptroller and Auditor-General, an officer who has audited the public accounts for nearly 100 years.

Complaints to the Commissioner's Office would in the first place come only from Members of Parliament, who would, presumably, be mainly channelling on their constituents' complaints. Later (perhaps after five years) complaints would come direct from members of the public. Before a proposed investigation into a complaint by the Commissioner, the Minister, whose department was involved, would have the right to veto the investigation, though no doubt the veto might have to be vindicated later in Parliament. During the investigation the Commissioner would have access to departmental files, but these would not include internal minutes. Like the Scandinavian Ombudsman the Commissioner would report annually to Parliament, or more often in special circumstances. But unlike the Scandinavian Ombudsman he would not be able to institute in any way proceedings against civil servants, who would never be mentioned by name in Reports to Parliament. The Commissioner's job would be to investigate, report and recommend; and his Reports would be available to the Press. He would not himself be able to get a wrong righted and his function would not be to interfere on those occasions when the citizen had the opportunity to take a discretionary decision before a tribunal for adjudication. It is thus seen that an important prerequisite for the envisaged proper functioning of the Commissioner's Office would be the extension of the tribunal system and the creation of the General Tribunal recommended by Report's earlier proposals already discussed above. For the new Office would be strangled at birth if flooded with a vast amount of work more properly meant for tribunals adjudicating on the discretionary decisions of the Executive.

Difficulties over the Implementation of the Report

Opponents to the establishment of the Parliamentary Commissioner are inclined to argue that an Ombudsman might work in small countries but would be unsuitable in Britain. It is true that Sweden, Denmark, Finland, Norway and New Zealand are all small in population compared to Britain but they are also examples of countries where parliamentary democracy truly flourishes. Again it could be argued that while there *must* be a special kind of check in Sweden because the civil servant there is not responsible to Ministers, there is no need in Britain for the Ombudsman kind of check, because in Britain civil servants *are* responsible to Ministers. This latter argument does not appear to be borne out by the facts nor does it take into account the changing circumstances occasioned by the legislation of the Welfare State and the resultant minute control

exercised by the Administration over the life of the ordinary citizen.

Resistance to the implementation of the Report is likely to come, if it does come, from two sources, viz. from within Parliament itself and from the Civil Service. In presenting the Report Sir John Whyatt and his colleagues must have constantly borne in mind the essential need to present proposals that could be "sold" to Establishment. It is probably due to this factor that two partly unsatisfactory features in the proposals, viz. the Minister's veto and the routing of the complaint via the M.P. are found. Certain Members of Parliament may see in the proposals for a Parliamentary Commissioner the beginnings of a system that will derogate from one of an M.P.'s historic functions and privileges, that of receiving and hearing complaints from constituents. But the Report has made it clear that the parliamentary procedure available to an M.P. to obtain redress for his constituent's grievances is just no longer adequate. The Commissioner's Office should be seen then as an aid, not as a replacement, to the M.P. in helping him secure justice for his constituent. Furthermore the Commissioner would be an Officer of Parliament and thus finally responsible to the House. In any case at the present time the M.P. often has to act merely as a post-box passing on a complaint or problem to the appropriate department for comment or action. Also the time factor presupposes a busy M.P. (especially a Member of the Government – and the Government comprises something around 10 % of all Members of the House of Commons) can not properly give enough time to complaints requiring very detailed work with the probable result that the M.P. will often have to accept the ruling or answer of a department without challenge. An investigation on behalf of an M.P. by the Commissioner's Office would tend to be more objective than a similar sort of investigation by the Civil Service itself, because the latter too often has to act as a judge in its own cause. All this is not to say that there will not be strong support for the Commissioner from many M.P.'s. For instance Dr. Donald Johnson, M.P. for Carlisle, a tireless champion of individual justice, sponsored a motion in the House of Commons on October 30, calling for the appointment of a Parliament Commissioner.

Civil Service resistance to the Report might well prove stronger than Parliament's. The tradition of the Civil Service has always been one of anonymity and the Service may well resist strongly the imposition of proposals whereby the internal workings of its system are revealed – particularly through the scrutiny of its files – to the public gaze (and it must be remembered that this scrutiny of files is vital to the success of the Commissioner's work). Furthermore it has been voiced that administrative efficiency would decline with the ever present threat, as it were, of investigations. Certainly, however, in Scandinavian countries the Civil Service does not appear to have

suffered any loss of prestige or efficiency through the Ombudsman's investigations. In fact the Commissioner's activities could well enhance further the prestige of the Civil Service. In the words of the Report, ". . . [the Commissioner] may come to be regarded by the Civil Service as a valuable and impartial defence against unjustified attacks to which the individual civil servant cannot himself respond".

It would be understandable to expect the Treasury to be concerned with the size and cost of the proposed new Office. In the opinion of Sir Sydney Caine, one of the members of the Whyatt Committee, its cost should not be excessive, "a few tens of thousands of Pounds". In Denmark the 1000 complaints received in one year by the Ombudsman have necessitated a department of only 10 persons including secretaries. Similarly in Sweden the Ombudsman has a very small staff to deal with around 1000 annual complaints. The size of the Commissioner's Office would depend on the number of complaints handled, a figure difficult to gauge as there do not appear to be any figures readily available for the annual throughput of M.P.s complaints. The figures given by Mr. T. E. Utley in his book "Occasion for Ombudsman"[2] may be a guide, viz, one M.P. analyzed his grievance quota at 26 complaints for 2 months. This works out at 156 cases a year (if such a multiplication is justifiable). Going one step further this would work out at a little under 100,000 complaints a year for all M.P.s, a figure which sounds on the high side. It is difficult to estimate what percentage of this sort of figure the Commissioner would be required to handle. But a large number of the complaints would be complaints against local government and therefore presumably outside the Commissioner's remit. Also a number of the complaints would be of the kind which Mr. Geoffrey Marshall, in a critique[3] of the Whyatt Report, describes as "rudeness at the counter". Another significant point to note is that according to the Report the John Hilton Bureau at Cambridge, which advises persons on social and economic problems and has therefore much contact with government, is consulted by 200,000 persons a year; yet the Bureau only employs a staff of 40 persons. While then the size of the Commissioner's Office is purely a matter for speculation, fears that its establishment would entail grafting a bureaucracy on a bureaucracy are probably remote.

The Report has received mainly favourable comment in the Press. Enlightened opinion generally seems to be anxious for reform. Certain writers in serious periodicals have admittedly criticized the Report. For instance Professor Mitchell of Edinburgh University is

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[2] T. E. Utley, *Occasion for Ombudsman* (London: Christopher Johnson, 1961), pp. 43-45.
[3] *The Lawyer* (London), Vol. 4, No. 3, Michaelmas 1961, p. 29.

mainly against the proposals.[4] He would prefer legal and not administrative remedies. Miss I. M. Petersen, a Danish judge, rightly points out a danger to the principle of ministerial responsibility in the Report's proposals for an extension of the tribunal system.[5] For, the result of such an extension might be to leave final control over many matters of policy in the hands of the specialized tribunals. Professor de Smith of London University, on the other hand, comes down broadly in favour of the Report.[6] Lady Iris Capell believes that an extension both of the Citizen's Advice Bureaux service and of the powers of the Council on Tribunals would provide a more suitable solution than the creation of an Ombudsman.[7] Proponents of the Report may be disappointed in a preliminary debate on the Report in the House of Lords on December 7 last, in which there was a noticeable absence of enthusiasm for the proposals from some important speakers.

There has been some doubt expressed as to the correctness of the dichotomic aspect of the Report, though its authors do explain there is bound to be some overlapping. However the point that the Commissioner's function must be very carefully demarcated should be well made. For instance there is cited in the Report the interesting case of the prisoner who was serving a 12 year sentence in Parkhurst prison, the Isle of Wight. This man petitioned the Home Secretary for a transfer to Bedford prison some 100 miles away on the usual monthly draft so that he could be visited by his mother. The reason was this. His 84 year old mother was rapidly going blind and she could not travel (all this was admitted). If the prisoner's request was refused his old mother would never see him again. The case was taken up in the House of Commons by the prisoner's M.P. but to no avail; the prisoner was not transferred. The officials apparently admitted there was some genuine hardship, but the compassionate circumstances were not held sufficent to justify the prisoner's transfer. Now it is not fully clear to the writer whether this sort of case falls within the category of a discretionary decision from which there should be an appeal to a tribunal, or an example of "maladministration", that is, an unjust decision by the official on the facts, which would be appropriate for reference to the Parliamentary Commissioner for investigation and an impartial report.

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[4] *Public Law* (London: Stevens and Sons Ltd.), Spring 1962, pp. 24-33.
[5] *Ibid.* pp. 15-23.
[6] *The Political Quarterly* (London: Stevens and Sons Ltd.), Jan.-Mar. 1962, Vol. 33, No. 1, pp. 9-19.
[7] Iris Capell: *The Aggrieved Citizen* (London: The Liberal Publication Department), undated: in the series "Unservile State Papers".

Conclusion

Whatever the outcome of the Report there is no doubt as to the quality of the Whyatt Report and the timeliness of the proposals. Due to the flexibility of the British Constitution all that is required to effect any of the changes proposed in the Report is a simple Act of Parliament.

It is significant to notice that the idea of an Ombudsman could catch on in other Common Law countries besides the United Kingdom and New Zealand. The idea of an Ombudsman in India, where there are already believed to be in existence over 110 tribunals of an administrative kind, has been mooted recently, following the publication of the Whyatt Report.[8]

Finally I should add that the Report is excellently presented and produced. It is a pity that there is no index, and that the sources are not listed, although in regard to the latter point it is perhaps understandable that in a private Report of this sort the sources should not be made public. There is a very minor error on page 7 of the Report where the words "of Jurists" have been omitted in line 33 after the word "Commission".

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[8] Thought (Delhi), November 11, 1961, Vol. XIII, No. 45, p. 2.

DOCUMENT

INTER-AMERICAN DRAFT CONVENTION ON HUMAN RIGHTS

The Draft Convention on Human Rights published below has been prepared and approved by the Inter-American Council of Jurists at its Fourth Meeting (August 24 – September 9, 1959). The Draft has been transmitted to the Council of the Organization of American States in order that it may be submitted to the Eleventh Inter-American Conference.

After the ratification of the European Convention on Human Rights and Fundamental Freedoms, which has been in force since September 3, 1953, the OAS is the second group of States which envisages the protection of human rights on an international level and by international organs (Inter-American Commission for the Protection of Human Rights, Inter-American Court of Human Rights).

The International Commission of Jurists feels that the idea of guaranteeing and protecting internationally human rights by conventions of a regional rather than world-wide applicability certainly deserves close scrutiny. Readers will recall that the African jurists who attended the Lagos Conference on the Rule of Law, which was held by the International Commission of Jurists at Lagos, Nigeria, in January 1961, declared in the *Law of Lagos:*

> That in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States.

In contrast to the European Convention on Human Rights which guarantees a limited number of classical civil liberties (right to life, liberty and security of person, equality before the law, freedom of conscience and religion, freedom of thought and expression, freedom of association and assembly, etc.), the Inter-American Draft Convention contains no less than 14 articles relating to the recognition of economic, social and cultural rights (right to employment, to social security, to education, etc.). For the full effectiveness of these rights, "the States shall endeavour to promote a steady rate of pro-

duction and an equitable distribution of goods and services, in both the social and cultural fields". It is obvious that the implementation of such provisions places a heavy burden of reforms and progressive legislation on the signatory and ratifying States.

The Fourth Meeting of the Inter-American Council of Jurists was attended by the representatives of Brazil, Costa Rica, Argentine, United States of America, Venezuela, Ecuador, Bolivia, Dominican Republic, Nicaragua, Cuba, Peru, Mexico, Paraguay, Haiti, Colombia, Guatemala, El Salvador, Uruguay, Panama, and Chile.

The delegation of Argentine, although having voted affirmatively, made a reservation stating, amongst others that "several aspects of the draft, excepting that which refers to the listing of civil and political rights, have not been subjected to the detailed study required by such important matters". The United States Delegation reserved "its position with respect to the Draft Convention on Human Rights and an Inter-American Court for the Protection of Human Rights, as well as with respect to its participation in the organisms which may evolve from those instruments". Finally, the Delegation of Mexico abstained from voting, because it believed "that the preparation of the Draft Convention on Human Rights providing for the Inter-American Commission for the Protection of Human Rights and the Inter-American Court of Human Rights was not carried out with the thought and consideration required for the preparation of an instrument that so widely restricts domestic jurisdiction and seriously compromises the international responsibility of the State".

The Draft Convention is reproduced below in full and readers are encouraged to express their views and send their comments to the International Commission of Jurists.*

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* The text is taken from *Final Act of the Fourth Meeting of the Inter-American Council of Jurists, Santiago, Chile, August 24 – September 9, 1959,* published by Pan American Union, Washington, D.C., January 1960.

HUMAN RIGHTS

WHEREAS :

In Resolution VIII the Fifth Meeting of Consultation of Ministers of Foreign Affairs entrusted to the Inter-American Council of Jurists the preparation, at its Fourth Meeting, of a draft Convention on Human Rights, authorizing it to refer this task, if it should not itself accomplish it, to the Council of the Organization of American States, so that the latter might commission the Inter-American Juridical Committee, or the entity it considered appropriate, to prepare the draft ; and it likewise entrusted to the Council of Jurists the preparation of a draft convention or draft conventions on the Creation of an Inter-American Court for the Protection of Human Rights and of other organizations appropriate for the protection and observance of those rights ; and

This Council, at its Fourth Meeting, has prepared a draft convention concerning the substantive part of human rights, as well as the institutional and procedural part of these rights, including the creation and functioning of an Inter-American Court of Human Rights and an Inter-American Commission for the Protection of Human Rights;

The Inter-American Council of Jurists

RESOLVES :

To transmit to the Council of the Organization of American States, for the purposes of Part 1, paragraph 2, of the resolution of the Fifth Meeting of Consultation cited above, in order that it may be submitted to the Eleventh Inter-American Conference and transmitted to the governments 60 days prior to the opening of the Conference, the following :

DRAFT CONVENTION ON HUMAN RIGHTS

PART I

HUMAN RIGHTS

Article 1

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all human beings within their territory and subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Chapter I. Civil and political rights

Article 2

1. The right to life is inherent in the human person. This right shall be protected by law from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries where capital punishment has not been abolished, sentence of death may be imposed only as a penalty for the most serious crimes and pursuant to the final judgment of a competent court, and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.

3. In no case shall capital punishment be inflicted for political offenses.

4. Capital punishment shall not be imposed upon persons who, at the time the crime was committed were under 18 years of age; nor shall it be applied to pregnant women.

Article 3

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment.

2. Punishment shall not be passed on to any person other than the criminal.

Article 4

1. No one shall be subjected to slavery or to servitude, which are prohibited in all their forms, as is the slave trade.

2. No one shall be required to perform forced or compulsory labor. This provision cannot be interpreted as meaning that, in those countries in which certain crimes can be punished by a sentence of imprisonment at forced labor, it prohibits serving such sentence imposed by a competent court.

3. Nor, for the purpose of this article, shall the term "forced or compulsory labor" include:

a. Any work or service normally required of a person legally detained;

b. Any military service and, in countries where conscientious objectors are recognized, any national service required of them by law;

c. Any service exacted in cases of danger or calamity threatening the life or the well-being of the community; and

d. Any work or service that forms part of normal civic obligations.

Article 5

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except for reasons established beforehand by law and in accordance with the procedure prescribed therein.

2. Anyone who is arrested shall be informed of the reasons for his arrest and shall be promptly notified of the charge or charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. Release may be subject to guarantees to assure appearance for trial.

4. Anyone who is deprived of his liberty by arrest or detention, or believes himself to be in danger of such deprivation, shall be entitled to recourse to a court, in order that such court may decide without delay on the lawfulness of his detention, or threat thereof, and if the detention is not lawful it shall order his release. This recourse may be had by the detained person or by another person acting in his behalf.

Article 6

1. In the substantiation of any charge or accusation against him, or in the determination of his civil rights and obligations, everyone shall be entitled to a fair hearing.

2. Everyone accused of a criminal offense has the right to be presumed innocent until proven guilty according to law. During the trial everyone shall have the right, with full equality, to the following minimum guarantees:

a. To be informed promptly, in a language that he understands and in detail, of the nature and cause of the accusation against him;

b. To have adequate time and means for the preparation of his defense;

c. To defend himself through legal counsel of his own choosing; to be informed, if he does not have legal counsel, of this right; and to have legal counsel assigned to him, if for any reason he does not name his counsel within a reasonable period of time;

d. To obtain, whenever possible, the appearance and examination of witnesses on his behalf, as well as their confrontation with the witnesses against him, and to examine, or have examined, both types of afore-mentioned witnesses;

e. To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

f. Not to be required to testify against himself or to make a confession of guilt.

3. No one shall be tried by special courts of commissions established for that purpose.

Article 7

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed.

Article 8

Everyone has the right to be protected by law against arbitrary or unlawful interference with his privacy, home or correspondence, and against attacks on his honor or reputation.

Article 9

1. Everyone shall have the right to freedom of conscience and of religion. This right shall include freedom to maintain or to change his religion or belief, and freedom, either individually or in community with others, to profess his religion or belief, in public or private.

2. No one shall be subject to coercion that might impair his freedom to maintain or to change his religion or belief.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

Article 10

1. Everyone shall have the right to freedom of thought and expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any other medium of his choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to broader responsibilities, which shall be expressly established by law and be necessary in order to ensure:

a. Respect for the rights or reputations of others, or

b. The protection of national security, public order or public health or morals.

3. The right of expression shall not be restricted by indirect methods or means, such as the use of government and private monopolies of newsprint or of equipment used in the dissemination of information or by any other means tending to block the communication and the circulation of ideas and opinions.

4. Public entertainments may be subjected by law to prior censorship, for the sole purpose of safeguarding public morality and national prestige or security.

Article 11

1. Anyone, if defamed by untrue statements or libeled in the press or in other media of communication, shall have the right to have his rectification or reply published by the same medium.

2. The law shall establish limits and procedures for making use of these rights.

3. The exercise of these rights shall not impair penal action that might result from such publication.

4. For the effective protection of its honor and reputation, every publication or newspaper, motion picture or radio or television enterprise shall be represented by a responsible person who neither is protected by immunities nor enjoys special privileges.

Article 12

The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or for the protection of public health or morals, or of the rights and freedom of others.

Article 13

1. All persons shall have the right to freedom of association.

2. No restrictions may be placed on the exercise of this right other than those prescribed by law and necessary in a democratic society in the interest of national security, public safety or public order, or for the protection of public health or morals, or of the rights and freedom of others.

3. No one shall be obliged to belong to any association.

Article 14

1. The family is the natural and fundamental unit of the State and is entitled to protection by society and the State.

2. The right of men and women to marry and to raise a family, if they meet the conditions required by national law, is recognized.

3. No marriage shall be entered into without the free and full consent of the parties to the marriage.

Article 15

Subject to any general legislative enactments of the State concerned that provide for such restrictions as may reasonably be necessary to protect national security, public safety, public health or morality, or the rights and freedoms of others and as are consistent with the other rights recognized in this Convention:

1. a. Everyone legally within the territory of a State shall have the right to (i) liberty of movement therein and (ii) freedom to choose his residence;

   b. Everyone shall have the right to leave any country, including his own.

2. a. No one may be exiled arbitrarily;

   b. Subject to the preceding subparagraph, everyone shall have the right to enter his own country.

Article 16

All citizens shall enjoy the following rights and opportunities, with the exceptions established by their national laws, which may not abridge the guarantees provided in Article 17 of this Convention:

a. To take part in the conduct of public affairs, directly or through freely chosen representatives;

b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and by secret ballot, which guarantees the free expression of the will of the voters;

c. To have access, under general conditions of equality, to the public service of his country.

Article 17

All persons are equal before the law. The law shall prohibit discrimination and guarantee to all persons equal and effective protection against any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 18

Everyone has the right to effective, simple and prompt recourse to the competent national courts, to protect him against acts that violate his fundamental rights recognized by the constitution or by law.

Article 19

1. In time of public emergency, the existence of which has been officially proclaimed, the States Parties hereto may take measures suspending only to the extent required by the exigencies of the situation, their obligations contracted by virtue of this Convention, provided that such measures do not involve discrimination based solely on the grounds of race, color, sex, language, religion, or social origin.

2. The preceding provision does not authorize any suspension of the rights stipulated in articles 2, 3, 4 (paragraph 1), and 7.

3. Any State Party hereto availing itself of the right of suspension shall immediately inform the other States Parties to the Convention, through the Secretary General of the Organization of American States, of the provisions whose application it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

Chapter II. Economic, social and cultural rights

Article 20

All peoples and all nations shall have the right to self-determination, that is, freely to determine their political, economic, social and cultural way of life.

The right of peoples to self-determination also includes permanent sovereignty over their natural wealth and resources as one of the indispensable means for the effective realization of the rights considered in this Convention.

Article 21

The States recognize the capacity of all their inhabitants to enjoy economic, social and cultural rights.

At the same time they recognize that the exercise of these rights shall be subject only to the limitations imposed by law, to the degree compatible with the nature of such rights, and for the exclusive purpose of advancing the general welfare of a democratic society.

Article 22

Everyone has the right to employment, freely chosen, under just and satisfactory conditions, and to receive such remuneration as will ensure him a standard of living appropriate for himself and his family. The free choice of employment shall be subject to the abilities of the person and to considerations of morality, public health, and security, in accordance with the law.

Article 23

The States shall ensure to workers of all types:

a. The indispensable working conditions of hygiene and safety;

b. Decent and adequate living conditions and treatment, not only for the workers, but also for their families;

c. A reasonable limitation on working hours, the right to periodic vacations with pay, and the free use of leisure time.

Article 24

The States shall guarantee to all persons the free exercise of the right to organize, according to law, local or national organizations or labor unions, and freely to join labor unions and organizations already established, for the purpose of protecting their economic and social interests.

Article 25

The States recognize the right of all persons to social security, and for this purpose, they shall establish social insurance and social security systems that will protect them in case of declining ability, illness or death, disability or old age, unemployment, and other risks.

Article 26

Everyone has the right to establish a family, and the family has the right to be protected by law and by the State. For this purpose adequate legislative measures shall be adopted designed to:

a. Protect the mother, especially during pregnancy, and during the period of time immediately after the child is born;

b. Bring about conditions of health and hygiene that will reduce infant mortality and provide for the normal development of children;

c. Prevent forced labor of children and supervise working conditions of adolescents;

d. Promote improved housing and create a healthy family atmosphere that will provide children with a moral foundation in the home;

e. Establish conditions favorable to ensuring the necessary medical care, preventive or curative; and

f. Establish family allowances that will help strengthen the family, economically.

Article 27

The States recognize the right of everyone to an education, which shall be based on principles of morality, liberty, tolerance, and human solidarity.

Article 28

1. Elementary education shall be compulsory, and state-provided education shall be free.

2. The States agree to make available to everyone, under equal conditions, access to secondary and technical education, as well as to higher education and professional studies, and they shall endeavor to provide on a gradual basis free education at all levels.

3. Parents and guardians shall have the right to choose for their minor children and wards institutions other than those established by the public authorities, in which they may not be discriminated against because of their scientific, religious, or any other convictions.

4. Private individuals may impart education of all types and at all levels, subject to the minimum requirements prescribed by law, which may not violate the human rights enumerated in this Convention. Academic freedom shall be respected.

Article 29

The States recognize the right of every person to participate in the cultural life of the community, to enjoy it and to benefit from it. The States shall protect the rights of authors of scientific, literary, or artistic works, and the rights of inventors, and shall take care to respect the freedom essential for scientific research and cultural activities.

Article 30

In order to guarantee the right of persons to an education, the States, within their economic resources, shall combat illiteracy and help one another combat it, in accordance with the programs of co-operation approved by the States, inasmuch as the elimination of illiteracy is necessary for the proper functioning of a democratic way of life; and for the improvement of education and culture, they shall promote the exchange of publications and books, study travel, and the establishment of scholarships.

Article 31

The States shall guarantee the right to private property, and its individual or collective use, shall be subject to the interests of society, with respect at all times for the dignity of the individual and the inherent needs of family life.

Expropriation shall be legal in cases of public utility or social interest, in which case compensation shall be made.

Article 32

For the full effectiveness of the rights affirmed in this Convention, the States shall endeavor to promote a steady rate of production and an equitable distribution of goods and services, in both the social and the cultural fields, and to this end, in their respective plans, they should take into consideration their own natural resources, as well as those derived from the co-operation provided for in international agreements.

Article 33

1. No provisions of this Convention shall be interpreted as granting to any State, group, or person any right to engage in activities or to perform acts aimed at the destruction of the rights and freedoms recognized in this Convention.

2. No restriction or lessening of any fundamental human right recognized by or in force in, a Contracting State by virtue of laws, conventions, regulations, or custom shall be permitted on the pretext that the present Convention does not recognize it or does so to a lesser extent.

3. No provisions of this Convention may be interpreted in the sense of limiting in any way the significance of the principles contained in the American Declaration of the Rights and Duties of Man, the Inter-American Charter of Social Guarantees, and the Declaration of Santiago, Chile.

4. The restrictions that may be imposed, under this Convention on the rights and freedoms recognized herein, shall not be applied for any purpose or reason other than that for which they were prescribed.

PART II

ORGANS

Article 34

To ensure the observance of the commitments made by the High Contracting Parties in this Convention, there shall be established:

a. An Inter-American Commission for the Protection of Human Rights, hereinafter referred to as "the Commission"; and

b. An Inter-American Court of Human Rights, which shall be established in accordance with this Convention, hereinafter referred to as "the Court".

PART III

Chapter I. Inter-American Commission for the Protection of Human Rights – Its Organization and Protection of Civil and Political Rights

Article 35

1. The Commission shall be composed of seven members and shall carry out the functions hereinafter provided for.

2. The Commission shall be composed of nationals of the States Parties to the Convention, who shall be persons of high moral prestige and recognized competence in the field of human rights. Consideration shall be given to the usefulness of the participation of persons having judicial or legal experience.

3. The members of the Commission shall be elected and shall serve in their capacity as individuals. They shall represent all the states that ratify or adhere to this Convention and shall act in their name.

Article 36

1. The members of the Commission shall be elected from a list of persons possessing the qualifications prescribed in Article 35 and nominated for the purpose by the States Parties to the Convention.

2. Each State shall nominate three persons who may be nationals of the nominating State or of any other State Party to the Convention.

3. Members of the Commission may be re-elected.

Article 37

1. At least three months before the date of an election of the Commission, other than an election to fill a vacancy in accordance with Article 41, the Secretary General of the Organization of American States shall address a written request to the States Parties to the Convention inviting them to submit their nominations within two months.

2. The Secretary General of the Organization of American States shall prepare a list, in alphabetical order, of all the persons thus nominated, and shall submit it to the Council of the Organization of American States and to the States Parties to the Convention.

3. The Secretary General of the Organization of American States shall request the Council of the Organization of American States to fix the date of the election of members of the Commission and to elect such members from the list referred to in the preceding paragraph, in accordance with the conditions set forth in this part of the Convention. In the voting of the Council referred to in this paragraph, only the representatives of the Signatory States that have ratified or adhered to this Convention may take part.

Article 38

1. At no time may more than one national of any State be a member of the Commission.

2. An absolute majority of states authorized to participate in the voting shall constitute the quorum required to hold these elections, pursuant to the preceding article.

3. The persons elected shall be those who have obtained the largest number of votes provided that they also have an absolute majority of the votes of all the representatives authorized to participate in the voting.

Article 39

1. The members of the Commission shall be elected for a term of four years and they shall be eligible for re-election if renominated. However, the terms of three of the members elected at the first election shall expire at the end of two years. Immediately after the first election the names of these three members shall be chosen by lot by the Secretary General of the Organization of American States.

2. Elections at the expiration of a term office shall be held in accordance with the preceding articles of this part of the Convention.

Article 40

In the event of the death or the resignation of a member of the Commission, the Chairman shall immediately notify the Secretary General of the Organization of American States who shall declare the seat vacant from the date of death or the date on which resignation takes effect.

Article 41

1. When a vacancy is declared in accordance with Article 40, the Secretary General of the Organization of American States shall notify each State Party to the Convention which, for purposes of election to fill the vacancy on the Commission, shall, if necessary, complete within one month its list of available nominees so as to total three persons.

2. The Secretary General of the Organization of American States shall prepare a list, in alphabetical order, of the persons thus nominated and submit it to the Council of the Organization of American States and to the States Parties to the Convention. The election to fill the vacancy will then be held in accordance with Articles 37 and 38.

3. The person elected to replace a member whose term of office had not expired shall hold office for the remainder of that term. However, if such term of office should expire within six months after the declaration of the vacancy in accordance with Article 40, no nomination shall be made and no election shall be held to fill that vacancy.

Article 42

1. Subject to the provisions of Article 40, each member of the Commission shall remain in office until a successor has been elected. However, if prior to the election of such successor, the Commission should have started the examination of a case, the outgoing member, rather than his successor, shall continue to act in the matter.

2. A member of the Commission elected to fill a vacancy declared in accordance with Article 40 shall not act in any case in which his predecessor has acted, unless the quorum provided for in Article 47 cannot be obtained.

Article 43

The members of the Commission shall receive emoluments on such terms and under such conditions as the Council of the Organization of American States determines, having regard for the importance of the Commission's functions.

Article 44

1. The Secretary of the Commission shall be a high ranking official of the Pan American Union, elected by the Commission from a list of three names submitted by the Secretary General of the Organization of American States.

2. The candidate obtaining the largest number of votes and an absolute majority vote of all the members of the Commission shall be declared elected.

3. The Secretary General of the Organization of American States shall provide the necessary staff and facilities for the Commission and its members. The staff shall form part of the Pan American Union.

Article 45

1. The Secretary General of the Organization of American States shall convoke the initial meeting of the Commission at the Pan American Union.

2. After its initial meeting, the Commission shall meet:

   a. As many times as it deems necessary;

   b. When any matter is referred to it under Articles 48 and 49; and

   c. When convened by its Chairman or at the request of not less than four of its members.

3. The Commission shall meet at the seat of the Organization of American States, or in any other American capital city, as decided by an absolute majority vote of all its members.

Article 46

Every member of the Commission shall, before entering upon his duties, make a solemn declaration in an open meeting of the Commission that he will exercise his powers impartially and conscientiously and as a representative of all the member States of the Organization of American States that have ratified this Convention.

Article 47

1. The Commission shall elect its Chairman and Vice Chairman for the period of one year. They may be re-elected. The first Chairman and the first Vice Chairman shall be elected at the initial meeting of the Commission.

2. The Commission shall establish its own rules of procedure, but these rules shall provide, *inter alia,* that:

a. Five members shall constitute a quorum;

b. Decisions of the Commission shall be made by a majority vote of the members present; if the votes are equally divided the Chairman shall cast the deciding vote; and

c. The Commission shall hold its hearings and meetings in closed session.

Article 48

1. If a State Party to the Convention considers that another State Party thereto is not complying with any of the provisions of Part I, Chapter I of the Convention, it may, by written communication, bring the matter to the attention of the other State. Within three months after the receipt of the communication, the receiving State shall provide the complaining State with an explanation in writing concerning the matter, which should include, to the extent possible and pertinent, references to domestic procedures and to the remedies taken, or pending, or available with respect thereto.

2. If a matter is not adjusted to the satisfaction of both Parties within six months after the receipt of the initial communication, by the State complained against, either State shall have the right to refer the matter to the Commission by means of written notification addressed to the Secretary of the Commission, and to the other State.

3. Subject to the provisions of Article 50, in serious and urgent cases the Commission may, at the request of the complaining State, deal expeditiously with the matter on the receipt of such request in accordance with the powers conferred on it by this Part of the Convention and after notifying the States concerned.

Article 49

1. The Commission may receive petitions addressed to it by any person or group of persons, or associations or corporations legally recognized by the public authorities in which a violation by a State Party to this Convention of any of the rights recognized in Part I, Chapter I thereof, is alleged to have been suffered.

Alternative A

2. Every State may, when it deposits its instrument of acceptance of this Convention, declare that it does not accept in whole or in part, the rules governing petitions provided for in the foregoing paragraph. In such a case the provisions of Articles 49 and 51 and the pertinent parts of Articles 52, 53, 56 and 74 insofar as they refer to petitions, shall not apply to that State.

Alternative B

2. Every State may, when it deposits its instrument of acceptance of this Convention, declare that it accepts, in whole or in part, the rules that govern petitions provided for in the preceding paragraph.

The Commission shall accept petitions only when the State against which the complaint is lodged recognizes the competence of the Commission to receive such petitions.

3. Such declarations, which may be made during a specific period, shall be deposited in the Pan American Union, which shall transmit copies of them to the signatory States to this Convention, and publish them.

4. The Commission shall exercise the powers provided for in this article when at least six of the ratifying States have committed themselves by their declarations made in accordance with paragraph 2.

Article 50

1. Except for those cases in which justice has been denied, the Commission shall take cognizance only of matters submitted to it after all domestic remedies have been applied and exhausted, in accordance with generally recognized principles of international law, and within six months of the date of the final decision of the domestic authorities.

2. If the Commission should have knowledge that the petitioner was arbitrarily denied access to judicial remedies by the authorities of his country, the Commission may accept the complaint submitted to it.

Article 51

1. The Commission shall not act on any petition submitted under Article 49, in the event that:

a. It is anonymous;

b. It is substantially the same petition as one previously examined by the Commission or already submitted to another international procedure of investigation or pacific settlement, and it contains no new facts.

2. The Commission shall consider inadmissible any petition submitted under Article 49 when it considers such petition to be incompatible with the provisions of the present Convention, manifestly groundless, or an abuse.

3. The Commission shall reject any petition referred to it that it considers inadmissible under Article 50.

Article 52

When a case has been presented to the Commission in accordance with the provisions of Article 48 or when the Commission has acted upon a petition made in accordance with Article 49:

a. It shall, with a view to ascertaining the facts, undertake, with prior notice to the representatives of the parties, a critical examination of the subject matter or of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;

b. It shall place itself at the disposal of the interested parties with a view to reaching a friendly settlement of the matter on the basis of respect for human rights as defined in this Convention.

Article 53

If a State has referred a matter to the Commission under Article 48, or has submitted a petition in accordance with Article 49, such State, the State complained against, and any State Party to this Convention and the petitioning individual or nongovernmental entity, may present statements in writing to the Commission and shall have the right to be represented at the hearings on the matter and to make oral statements.

Article 54

The Commission is empowered to request of the interested States any information it deems pertinent to the matter under examination.

Article 55

If a friendly settlement has been reached in accordance with Article 52.b, the Commission shall draw up a report, which shall be transmitted to the States concerned and then communicated to the Secretary General of the Organization of American States for publication. This report shall be confined to a brief statement of the facts and the solution reached.

Article 56

1. If a solution is not reached, and not later that 12 months after the receipt of the communication referred to in Article 48 or of the petition referred to in Article 49, the Commission shall draw up a report on the facts and state its conclusions. If the report does not represent in whole or in part the unanimous opinion of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with Article 53 shall also be attached to the report.

2. The report shall be transmitted to the States concerned, which shall not be at liberty to publish it.

3. In transmitting the report, the Commission may make such proposals as it sees fit.

Article 57

1. If the matter is not submitted to the Court and its jurisdiction accepted, in accordance with Article 74 of this Convention, within three months from the date of the transmittal of the report of the Commission, to the States concerned, the Commission shall decide by an absolute majority vote of its members as to whether the State complained against, or against which a petition has been presented has violated the obligations contracted under this Convention.

2. In the affirmative case the Commission shall prescribe a period during which the State Party concerned is to take the measures required by the decision of the Commission.

3. If the State Party concerned has not taken satisfactory measures within the prescribed period, the Commission shall decide by the majority provided for in the preceding paragraph to publish its report.

Chapter II. Protection of economic, social, and cultural rights

Article 58

1. The States Parties hereto agree that, in order to guarantee the observance of the economic, social, and cultural rights set forth in this Convention, it is proper to adopt the following measures, apart from others provided for in international law in force in the Americas:

a. Data or reports;

b. Requests for information;

c. Observations and recommendations;

d. Studies and research, including *in loco;*

e. Provision of technical assistance;

f. Meetings, including those on a regional level;

g. Agreements and conventions for co-operation in the economic, social, and cultural fields;

h. Publicizing of measures adopted.

2. Without prejudice to the competence of other international organizations, the Commission shall have competence to:

a. Adopt the measures provided for in subparagraphs a, b, c, d, and h of the preceding paragraph. For the effective carrying out of studies and research *in loco*, the interested States shall provide all the necessary facilities, after exchanging views with the Commission.

b. To request, suggest, or recommend to the competent organs of the Organization of American States or of the United Nations the adoption of any of the measures provided for in subparagraphs e, f, g, and h of the preceding paragraph.

3. The directly interested States Parties and the specialized organizations may present to the Commission, or to institutions to which it has addressed itself, in accordance with subparagraph b of the previous paragraph, their comments or observations on the recommendations made by the Commission, or on any other measure it has adopted or suggested without prejudice if such should be the case to the carrying out of such measures. [Translation error corrected in paragraph 3 – Editor.]

Article 59

1. The States Parties hereto bind themselves to inform the Commission, by means of periodic reports, of the measures adopted in order to guarantee the observance of the economic, social, and cultural rights set forth in this Convention.

2. The intervals between these reports, which shall not be less than six months or more than one year, shall be fixed by the Commission; and for their preparation the appropriate specialized organizations of the Organization of American States shall provide technical assistance to the States that request it, to the extent of their ability within their respective programs.

3. Through prior consultation with the competent specialized organizations, the Commission may permit the afore-mentioned reports to be submitted in parts, in accordance with an established program.

4. Every State that belongs to specialized organizations shall send to these organizations a copy of the afore-mentioned reports, or of the parts pertaining to the matters in which they are competent.

5. In the case of reports that are to be presented originally to specialized organizations, the States Parties hereto shall send a copy to the Commission, or if this is not possible, shall send to them the necessary data in order to identify the reports in the files of the afore-mentioned specialized organizations.

Article 60

Without prejudice to the periodic reports referred to in Article 59, the Commission may request specific information from any of the States Parties hereto that agree to act on the request within the indicated period; and if it should be insufficient, to act on the request within the shortest possible time, in order not to nullify, through delay, the purpose of the request for information.

Article 61

1. The Commission may bring to the attention of international organizations in the fields of technical co-operation or assistance, or of any other qualified international organization, any question deriving from the reports referred to in the previous articles of this Convention in order that such organizations may decide, each one within its own field of competence, on the advisability of adopting international measures that will contribute to the gradual application of the present Convention.

2. The Commission shall request the above-mentioned organizations to transmit to it the result of the studies carried out as well as the measures that those organizations adopt on their own initiative on the basis of the reports in question.

Article 62

On requesting, suggesting, or recommending to the competent organizations the measures that they should take, in accordance with Article 58.2.b, the Commission shall be as explicit as possible in stating the reasons for and the purposes of its request.

Article 63

When it considers it advisable the Commission shall give publicity to the measures that it has adopted or the request it has made of other organizations, for the purpose of permitting the formation of national and international public opinion thereon.

Article 64

With respect to the protection of economic, cultural, and social rights, the Commission shall adopt rules of procedure that shall guarantee to the parties the possibility of sustaining and proving their allegations.

PART IV

INTER-AMERICAN COURT OF HUMAN RIGHTS

Article 65

The Inter-American Court of Human Rights shall consist of a number of judges equal to that of the States that have ratified this Convention. No two judges may be nationals of the same State.

Article 66

1. The members of the Court shall be elected by the Council of the Organization of American States, by majority vote, from a list of persons nominated in the manner prescribed in Articles 36, 37 and 38 of this Convention.

2. As far as applicable, the procedure provided for, in article 41 shall be followed in order to complete the membership of the Court in the event of further ratifications or adherences to this Convention, and in order to fill any vacancies that occur.

3. The candidates shall be of high moral character and either possess the qualifications required for appointment to high judicial office in their respective countries or be jurists of recognized competence.

Article 67

1. The members of the Court shall be elected for a period of nine years and they may be re-elected. However, the terms of one third of the judges elected at the first election shall expire at the end of three years, and the terms of another third of the judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot by the Secretary General of the Organization of American States immediately after the first election has been completed.

3. The provisions of Articles 41.2, and 42 of this Convention shall be applicable to the judges of the Court.

4. The judges of the Court shall make the declaration provided for in Article 46 of this Convention.

Article 68

The Court shall elect its President and Vice President for a period of three years. They may be re-elected. It shall appoint its Secretary in the manner prescribed in Article 44 of this Convention.

Article 69

The members of the Court shall receive for each day of duty a compensation to be determined by the Council of the Organization of American States.

Article 70

1. In the event that the Court should reach a membership of more than nine judges, there shall be established, for the consideration of any matter brought before it, a Chamber of nine judges, of which the judges who are nationals of any interested state shall form a part. The other judges shall be chosen by lot by the President before the opening of the case.

2. Without prejudice to the provisions of Articles 41 and 67.3 of the present Convention, the number and nationality of the judges who have started the examination of a case shall not be altered, even though one or more States should accept this Convention after the examination has begun.

3. The Court may meet and function in any American Capital it considers appropriate.

4. The Secretary shall have his office at the Pan American Union, subject to his duty of attending the sessions of the Court.

Article 71

The States that have ratified or adhered to this Convention, as well as the Commission on Human Rights, the latter represented by a member or members appointed therefor, may be parties to a case before the Court.

Article 72

Alternative A

1. The Court shall have compulsory jurisdiction in all cases concerning the interpretation and application of Part I, Chapter I of the present Convention that the High Contracting Parties or the Commission submit to it, in accordance with Article 74.

2. Nevertheless, any of the States Parties hereto may at any time declare that it does not recognize as compulsory the jurisdiction of the Court, in whole or in part, in accordance with paragraph 1 of this article.

Alternative B

1. The Court shall have jurisdiction in all cases concerning the interpretation and application of Part I, Chapter I of the present Convention that the High Contracting Parties or the Commission, submit to it in accordance with Article 74.

2. Any of the States Parties hereto may declare at any time that it recognizes as a matter of law, and without the need for a special convention, the jurisdiction of the Court on all matters relating to the interpretation and the application of this Convention.

3. The declarations referred to in the preceding paragraph shall be presented to the Secretary General of the Organization of American States, who shall transmit copies of them to the States Parties hereto and to the Secretary of the Court.

3. The declarations referred to in the preceding paragraph may be made unconditionally or on the condition of reciprocity on the part of several or certain other contracting parties, or for a specific period.

4. The declarations referred to in the preceding paragraph shall be presented to the Secretary General of the Organization, who shall transmit copies of them to the States Parties hereto and to the Secretary of the Court.

Alternative C

The Court shall have compulsory jurisdiction in all cases concerning the interpretation and application of Part I, Chapter I of the present Convention that the States Parties hereto or the Commission submit to it, in accordance with Article 74.

Article 73

The Court may deal with a case only after the Commission has acknowledged that it has not been possible to reach a settlement, and the case shall be presented within the period of three months provided for in Article 57.1.

Article 74

The Court may act at the request of the Commission, of a Contracting State of which the complaining individual or entity is a national, of the Contracting State that has referred the case to the Commission, or of the Contracting State against which the claim or petition has been lodged.

Alternative A

2. In order that the Court may exercise its jurisdiction it is necessary that the High Contracting Party against which the complaint has been directed, should not have made the declaration provided for in Article 72.2, or that it not be applicable to the case, or if applicable, that the afore-mentioned Contracting State consent to the Court's exercising jurisdiction in the case submitted to it.

Alternative B

2. In order that the Court may exercise its jurisdiction it is necessary that the High Contracting Party against which the complaint has been directed, should have made the declaration provided for in Article 72.2, or that it be applicable to the case, or if not applicable, that the aforementioned Contracting State consent to the Court's exercising jurisdiction in the case submitted to it.

Alternative C

(no paragraph 2)

Article 75

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by decision of the Court.

Article 76

If the Court finds that a decision taken or a measure ordered by a legal authority or any other authority of a Contracting State, is completely or partially in conflict with the obligations arising from the present Convention, and if the domestic law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall provide, if according to law, that just compensation be paid to the injured party.

Article 77

1. Reasons shall be given for the judgment of the Court.

2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.

Article 78

The judgment of the Court shall be final, and may not be appealed. In case of disagreement as to the meaning or scope of the judgment the Court shall interpret it at the request of any of the parties.

Article 79

The Contracting States undertake to abide by the decision of the Court in any case to which they are parties.

Article 80

The judgment of the Court shall be transmitted to the Council of the Organization of American States.

Article 81

The Court shall formulate regulations for the exercise of its functions. It shall draw up, in particular, its own rules of procedure.

PART V

GENERAL PROVISIONS

Article 82

The States Parties to the present Convention undertake to provide, at the request of the Commission, the explanations as to the manner in which their domestic law ensures the effective application of all the provisions of this Convention.

Article 83

The expenses of the Commission and of the Court shall be apportioned in the manner and under the conditions determined by the Council of the Organization of American States.

Article 84

In the exercise of their duties, the members of the Commission and of the Court shall enjoy diplomatic privileges and immunities.

PART VI

SPECIAL CLAUSES

Article 85

1. This Convention shall be open for signature by and for the ratification or adherence of any member state of the Organization of American States.

2. Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the General Secretariat of the Organization of American States. As soon as seven States have deposited their instruments of ratification or adherence, the Convention shall enter into force. With respect to any State that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence.

3. The Secretary General of the Organization shall inform all members of the Organization of the entry into force of the Convention and of the deposit of each instrument of ratification or adherence.

Article 86

1. Any State may at the time of the deposit of its instrument of acceptance of this Convention, make reservations if a Constitutional or legal provision in force in its territory should be contrary to any provision of this Convention, or if its legislation should not permit of the enforcement of such provision. All reservations should be accompanied by the text of the laws referred to.

2. If reservations should be made, it shall be considered that the Convention has entered into force between the State that presented the reservations and the other Contracting Parties that accept such reservations, with respect to all the provisions of the Convention, except those that have been the subject of the said reservations. Consequently, the reservering State may not invoke, with respect to any other High Contracting Party, those provisions that were the subject of its reservations.

Article 87

1. The Contracting States may denounce the present Convention at the expiration of a five-year period starting from the date of its entry into force, and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall so inform the other Contracting Parties.

2. Such a denunciation shall not have effect of releasing the Contracting State concerned from the obligations contained in this Convention in respect of any act that, being capable of constituting a violation of such obligations, has been performed by that State prior to the effective date of denunciation.

Article 88

1. Any State Party to this Convention may propose an amendment and present it to the Secretary General of the Organization. The Secretary General shall thereupon communicate the proposed amendment to the States Parties to the Convention, with a request that they notify him whether they favor the convocation of a Conference of the States Parties hereto, for the purpose of considering and voting upon the proposal. If at least one third of the States declare themselves in favor of such action, the Secretary General of the Organization shall convoke a conference under the auspices of the Organization of American States. Any amendment adopted by a majority of the States present and voting at the conference shall be subject to the procedure set forth in the following paragraphs.

2. Such amendments shall enter into force when they have been approved by a two-thirds majority of the States Parties to this Convention, in accordance with their respective constitutional processes.

3. When such amendments enter into force, they shall be binding on those Parties that have accepted them, the other Parties continuing to be bound by the provisions of the Convention and by any earlier amendment that they have accepted.

4. The Court may suggest to the governments of the States Parties hereto, through the Council of the Organization of American States, the advisability of proposing amendments to the provisions of Parts III, IV and V, of this Convention.

(Approved at the Third Plenary Session, September 8, 1959).

BOOK REVIEWS

La Proteccion juridica de los Derechos Humanos y de la Democracia en América. Los Derechos Humanos y el Derecho Internacional. By Pedro Pablo Camargo. [Mexico 1, D.F.: Excelsior S.C.L., Publishers, 1960.]

In the first editorial review published in the Journal (Vol. 1, No. 1) reference was made to one of the classic conflicts in International Law, viz, the clash between national jurisdiction and international order in connexion with the legal protection of the individual. The book under review clearly sets forth this problem in respect of the countries of the Western Hemisphere that make up the Inter-American System.

It is interesting to point out that the first experiment in the recognition of international jurisdiction for the solution of national questions was carried out in Latin America. In effet, the Central American Court of Justice was created through the Convention signed in Washington, D.C., on December 20, 1907, by the representatives of Costa Rica, Guatemala, Honduras, Nicaragua and El Salvador. The same countries established in 1951 the Organization of Central American States, within the framework of the Organization of American States. The Central American Court of Justice existed until 1918.

This book is divided into three parts. The first refers to human rights and international law. In this chapter a study is made of the various measures that have been adopted by the United Nations in its policies aimed at the protection of Human Rights and Basic Freedoms from which the Commission of Human Rights and the European Court of Human Rights originated. In the second part of the book the author goes into the heart of the matter dealing concretely with the problem of the legal protection of human rights in America.

The subject which is of long standing in the field of international law in America could not be more timely in its present treatment. The Inter-American System is the oldest among the existing international systems in force. Ten international conferences of the Americas held since 1898, three extraordinary conferences, eight consultative meetings of Ministers of Foreign Affairs, the Inter-American Defence Board, the Inter-American Treaty on Mutual Assistance which brings together the nations of the Hemisphere in a pact of mutual defence, the Inter-American Development Bank, etc. are a few samples of what the Inter-American System

was able to bring about in the field of international relations and law. One point, however, has lagged behind and that is the effective safeguarding of human rights by international law.

The American Declaration of Human Rights and Obligations, was approved at the International Conference of the Americas held in Bogota in 1948. But just as the Universal Declaration of Human Rights of the United Nations it is nothing more than a declaration. These ideas need to be carried forward and given concrete form in an inter-American convention on human rights which should establish the bodies necessary for adequate jurisdictional protection.

The state of development of the Inter-American System in addition to the experience collected by the European Court of Human Rights warrants the opinion that the establishment of such jurisdictional institutions by the states of the American Continent may serve as the necessary instrument for the attainment of the effective protection of human rights on that continent. Furthermore, notwithstanding considerable differences between one country and another, there does exist a true community, both cultural and of legal principles. This ideological community appears not only in the written constitutions of each and everyone of the American republics – most of which have known more than 150 years of independent life – but also in the social, political and economic events which are taking place in those countries at the present time. The birth of political parties, labor unions, and financial institutions that seek to coordinate their policies throughout the Hemisphere, serves to emphasize and at the same time to promote this slow but firm process toward continental unity. An Inter-American Court of Justice might well be the beginning and the guiding factor of this process insofar as the safeguarding of human rights is concerned.

The third and last part of the book is devoted to a study of the means of safeguarding representative democracy in America.

It is not possible to make a detailed exposé of the book's contents; we merely wish to point out that the study remains, at all times, on juridical and doctrinary grounds. We quite agree with the autor of the preface, Luis Recasens Siches, when he states that "the juridical component even though it is the basic one does not by itself make for an examination of all aspects of the problem; a sociological study of the actual situation is necessary in order to seek out the most efficient means of obtaining the strict observance of and compliance with existing rules". It is obvious that for a full and proper understanding of the basic problems of Latin America in respect of its juridical institutions, be they national or international, a sociological country by country survey of the entire Western Hemisphere is indispensable. We believe the work we have just reviewed to be from a legal point of view, a real contribution

to the understanding of one of the fundamental matters connected with the complex of international problems of the Americas.

HORACIO H. GODOY

Bibliothèque de Droit privé. General Editor: Professor Henri Solus, Faculty of Law and Economic Science, Paris. [Paris: Pichon et Durand-Auzias, 1961. Volume XXV: Nicole Catala, *La Nature juridique du paiement,* pp. 353. Volume XXVII: Gabriel Roujou de Boubée, *Essai sur l'acte juridique collectif,* pp. 328. Volume XXVIII: Jean Pelissier, *Les Obligations alimentaires, unité ou diversité,* (pp. 495).]

This collection consists of some of the best studies of the various aspects of private law made each year by young French jurists. The name of the general editor, Professor Henri Solus, is a guarantee of the value and original nature of these works. In her study of the juridical nature of payments, Miss Nicole Catala makes a very perceptive distinction between the two aspects of payment: on the one hand, the method of discharging the obligation, on the other, the method of extinguishing the obligation. Referring mainly to the latter aspect and following the works of German and Italian authorities, the author makes a unitary analysis of payment as a legal act independent of the will of those concerned, since the law attaches the value of full legal extinction of the *de facto* situation arising through satisfaction of the creditor.

Mr. Gabriel Roujou de Boubée undertakes a general study of the collective legal act, which had hitherto been neglected in France. As his terms of reference he takes the act resulting from the combination of concordant decisions aimed at the fulfilment of a common purpose. He first of all defines the scope of the collective act under private law, including on the one hand acts leading to the constitution of a body corporate, an association or a company, and on the other hand decisions by its board meetings. He goes on to examine the system common to the various categories of collective acts, stressing the ways in which these differ from contracts. Considering the collective act with regard to its constitution and its effects, the author draws on the methods applied by French writers on the subject, themselves inspired by the works of German and Italian theorists, with particular reference to Maurice Hauriou's theory of the institution.

Mr. Jean Pelissier's study of alimentary obligations, unity or diversity, deals in the fullest scope with a subject commonly discussed with regard only to family obligations. The fact is that, parallel to these traditional obligations, many countries today have a body of "social alimentary obligations". Despite their diversity of origin, all alimentary obligations correspond to common rules, but

the system applied is deeply marked by the basic principle underlying them. The author introduces a fundamental distinction between different alimentary obligations: those responding to an idea of solidarity at the level of the family or of society, which are attached to the quality of man (family member or citizen); and those resulting from legal acts or situations, based on the activity of man. It is in the light of this distinction that the author studies the sources and the structure of alimentary obligations.

Although these three books deal with three very distinct subjects, they have the common characteristic of applying a new spirit and rigorous methods of analysis to classic problems of private law, reaching original conclusions and injecting new elements into fields that might well have been regarded as worked out.

PHILIPPE COMTE

L'ordre public et les contrats d'exploitation du droit d'auteur. By André Huguet. [Paris: Pichon et Durand-Auzias, 1962. pp. 231. 26.70 NF.].

This book, which has the sub-title of "Study of the Act of March 11, 1957", is a new addition of the *Bibliothèque de Droit privé,* the General Editor of which is Professor Henri Solus, of the Faculty of Law, Paris (see review of other books in the series, above). It makes a useful contribution to recent French copyright legislation, particularly in the practical field of publishing. Those concerned (authors, editors, agents) will particularly appreciate the explanations concerning publishing contracts. Mr. René Cassin, Vice-President of the European Court of Human Rights, has often expressed his conviction that the rights of authors and artists should have their place among Human Rights. The Universal Declaration of Human Rights, adopted in 1948 by the General Assembly of the United Nations, states in Article 27 (2) that: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." How and to what extent is the principle laid down in this Article observed ? Mr. Huguet answers this question by referring to recent French legislation. He believes that the "moral and material interests" of the author are specially safeguarded under the Act of 1957; this Act provides an example of optional private law being superseded by compulsory public law. "Public order protects moral rights (of the author) by making them *inalienable subject to exceptions,* whereas pecuniary rights are *alienable subject to restrictions in public interest* . . . Regulations are based in both cases (i.e., moral and pecuniary rights) on the same intention of protecting authors." (p. 33) This method of interpretation seems

particularly suitable. It brings out the idea of protection expressed through the Universal Declaration. It is valuable above all for the regulations concerning moral rights, which are rights attached to the person. This is the point from which the author views texts concerning personal consent as an element in the right of publishing works, the personal relationship between the author and the publisher and the relations between authors in the case of joint authorship. The wealth of French case law and doctrine, which have so greatly contributed to the development of authors' moral rights in the international field, are here presented in a convenient and precise manner. Regarding pecuniary rights, the author severely criticizes the solution adopted by the Act of March 11, 1957, concerning proportional remuneration of the author. When it comes to the controversial question of the choice between lump-sum or proportional remuneration, the author's arguments themselves become open to discussion. In this debate conducted with such passion beyond national and ideological frontiers and with so little apparent prospect of a quick solution, the author has adopted a definite position. However this may be, this lucid and balanced work deserves broad distribution.

JÁNOS TÓTH

Le Régime foncier à Madagascar et en Afrique. By Victor Gasse. [Carqueiranne (Var): Librairie Ch. Beaudoux, 1961. pp. 351. Post free: 30 NF.]

France has borrowed from the German tradition of the *Grundbuch* and the Australian model of the Torrens Act a system of registration of land-holding which, although unsurmountable practical difficulties have prevented its application in Metropolitan France, has been applied in most of the overseas territories to which France's influence extended, in particular North Africa, tropical Africa and Madagascar. Mr. Victor Gasse, at present Procureur Général of the Central African Republic, makes the first detailed study of such legislation, whose practical importance is obvious. He first analyzes the Decree of February 4, 1911, reorganizing the system of land tenure in Madagascar, and goes on to compare these provisions with those of the various systems in Tunisia, Morocco and the French-speaking States of Western and Equatorial Africa which have not yet been affected by the political changes of recent years. He then goes on to consider foreign legislation underlying the system of registration, with particular reference to Germany and Australia. While referring to the specific question of Malagasy law, the author is thus enabled to present a synthesis of the various solutions

achieved through positive law, drawing on very full documentation. The problems of regulating land ownership will undoubtedly assume increasing importance in the new States of Africa and in Madagascar, as the traditional forms of collective ownership develop towards the modern forms of individual property. This book by Mr. Gasse will therefore be of great practical value for all concerned with these problems.

P. C.

Die Leiden eines Volkes. Die Tragödie Tibets und der tibetischen Flüchtlinge. With a preface by Heinrich Harrer and contributions from different authors. Edited by the Organisation of Swiss Aid to Tibetans. [Solothurn: Veritas-Verlag, 1961. 118 illustrations, 4 maps, 284 pp.]

The publisher of this work is a non-governmental organization aimed at helping and supporting Tibetan refugees, especially children. In co-operation with other Swiss and international relief agencies this organisation has up to May 1961 contributed 135,000 Swiss Francs for effective aid to Tibetan refugees. The net proceeds of the sale of this book will be devoted to this same aim. This financial aid has for instance been given to refugee camps and so-called self-help centres, mostly situated in India, or to the children's village called Pestalozzi at Trogen (Switzerland) where 20 young Tibetans have been given a new home.

Though not concerned with legal matters, the book gives the reader an excellent introduction into the history, religion and sociology of the Tibetan population and a description of the subjection of Tibet to communist Chinese foreign rule.

In the first part of the book entitled "Tibet as a Center of Buddhist Culture" and in the following part "Religion and Piety of the Tibetans" the reader is introduced to a new, strange and sometimes mysterious world. A number of articles written by different authors complement one another and provide an insight into the mentality of the Tibetan people based on their culture and religion which makes the resistance to Chinese communists easier to understand. One chapter, for instance, is devoted to a comparison of Christianity and Buddhism and points out the common features and differences of both religions. The third part of the book, called "Tibet under the Communists", starts with an excerpt from the book *Tibet – Lost Fatherland* by Heinrich Harrer reproducing a short biography of Thubten Dschigine Norbus, the eldest brother of the Dalai Lama.

This part contains a chapter in which Emil Wiederkehr comments on two reports of the International Commission of Jurists

on the events in Tibet (*The Question of Tibet and the Rule of Law*, published in 1959 and *Tibet and the Chinese People's Republic*, published in 1960).

The fourth and fifth part of the book are really the most moving; they give by means of statistics short reports of eye-witnesses and photographs a touching picture of the refugees' misery and especially of the sad fate of the children. Also described is the assistance which has been and continues to be extended to them.

RUDOLF TOROVSKY

1961 Seminar on the Protection of Human Rights in the Administration of Criminal Justice. A report published by the Secretariat of the United Nations. [New York: 1961. 158 pp.].

At the invitation of the Government of New Zealand, the Secretariat of the United Nations organized a Seminar on the Protection of Human Rights in the Administration of Criminal Justice, which was held at Wellington (New Zealand) from February 6 to 20, 1961. The details of the questions to be discussed were fixed by a group of experts during a preparatory meeting at Tokyo from May 4 to 6, 1960. All the countries within the territorial area of the Economic Commission for Asia and the Far East were invited to send representatives, and several non-governmental organizations sent observers. The Secretariat of the United Nations recently published the report on the work of the Seminar, in the form of a roneoed document. This document reproduces the conclusions adopted on each of the subjects on the agenda and a summary of discussion. The broad terms of reference had been split up into ten questions: of these, the first group dealt with the more general questions of the organization of the Judiciary and the Bar; the next group related directly to criminal procedure at the stage of prior investigation and at the stage of public hearings; the programme also included consideration of the personal liability of the accused, forms of appeal and compensation for judicial error; the final item was the organization in each country of protection of human rights on the official and on the private level. Jurists from a score of countries engaged in the debates. Most of them were members of their governments, judges of a high grade, university professors or high officials. The extent and diversity of their experience confer particular authority on the conclusions they reached. The great majority of participants were from countries where the influence of Common Law is predominant. The questions which led to the most lively discussion included the subject of detention without trial, the principle of which was formally branded as "fundamentally undesirable". Regarding prior investigation, most participants believed that per-

sons held in custody should be assisted by counsel from the earliest stage and that investigation should be by the police or a magistrate. It was also held that legal aid should be granted very liberally in all criminal proceedings. The unanimous belief was expressed that preventive detention should be of exceptional nature, the principle being that the accused should remain at liberty until a final verdict was reached, and that criminal investigation should be conducted with the utmost speed. It was also agreed that hearings should be held in public in all cases. The right of the public prosecutor to appeal *a minima* or in the case of acquittal was questioned by several participants. The right of persons wrongly prosecuted or sentenced to obtain just compensation from the State was unanimously recognized. Interesting details were given with regard to certain institutions established to defend Human Rights, in particular the "civil liberties division" in the Japanese Ministry of Justice, which has branches in 49 territorial districts and 8,000 "civil liberties commissioners", who are entirely independent of the Administration.

P. C.

Yearbook of the European Convention on Human Rights, 1960. (European Commission and Court of Human Rights, 1960). [The Hague: Martinus Nijhoff, 1961. pp. 773).]

The International Commission of Jurists previously reviewed the first two volumes of this *Yearbook,* which covered the years 1955 to 1959 (see *Journal of the International Commission of Jurists,* Vol. II, No. 2, p. 232, and Vol. III, No. 2, p. 133). The third volume, which came out in December 1961, deals with 1960 only. It follows the same plan as the previous volumes. The first part deals with the basic texts and general information on the European Commission and Court of Human Rights. The second part gives a selection of findings by the Commission and Court. The third part deals with the Convention within the domestic order of Member States of the Council of Europe, with regard to parliamentary work and legal decisions. The fourth part introduces the innovation of describing the effects of the Convention outside the area of the Council of Europe.

The second part is by far the largest and makes the *Yearbook* a true collection of international case law from the date of the application of the Convention. So far ten States out of the fourteen signatories to the Convention have recognized the competence of the Commission to judge individual requests. The bulk of the Commission's activities are at present concerned with hearing such individual requests. During 1960, 291 individual requests were made to the Commission, and it gave 265 verdicts. Twenty decisions of principle are

reproduced *in extenso*. The chapter ends with a summary giving a methodical classification of the substance of verdicts, in order to facilitate research. 1960 also marks the initiation of activities by the European Court, which gave its first verdict. A chapter is therefore devoted to analyzing the *Lawless* and *De Becker* cases, the first cases brought before the Court, together with the verdict on the *Lawless* case of November 14, 1960, which is given in full. Eight States have so far accepted compulsory jurisdiction of the European Court.

The fourth part is of great documentary interest. The European Convention has inspired many legislative and constitutional studies outside continental Europe. The *Yearbook* reproduces two documents in this connection: Part II of the Constitution of the Republic of Cyprus and Chapter III of the Constitution of the Federation of Nigeria. Marginal notes show the way in which these texts correspond to the Convention. The second of these extracts is followed by the text of an Order by a High Court of Justice in Nigeria concerning application of constitutional provisions corresponding to Articles 9 to 11 of the European Convention.

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 Intenational 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 Phillippines, Singapore, and the Soviet Union
Book Reviews

Volume III, No. 2 (Winter 1961):

This *Journal* concludes the series on Preventive Detention with articles on Argentina, Brazil, Canada, Colombia, Ghana, and Malaya. There is also an article on Emergency Powers and a document on the European Court of Human Rights. This issue is complemented with 22 pages of 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

Number 13 (May 1962): This *Bulletin* deals with aspects of the Rule of Law and legal developments in Albania, Cuba, Dahomey, Ghana, Portugal, South Asia, South Korea, Tibet 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, Postcript, 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

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