JOURNAL

OF THE
INTERNATIONAL COMMISSION OF JURISTS

Editor: SEÁN MACBRIDE

WINTER 1965 VOL. VI, NO. 2

INTERNATIONAL COMMISSION OF JURISTS - GENEVA

JOURNAL

OF THE

INTERNATIONAL COMMISSION OF JURISTS

WINTER 1965 *Editor:* SEÁN MACBRIDE VOL. VI, NO. 2

INTERNATIONAL COMMISSION OF JURISTS · GENEVA

THE FEDERAL CONSTITUTIONAL COURT OF THE FEDERAL REPUBLIC OF GERMANY

by

DR. GEBHARD MÜLLER *

I. Introduction

The Federal Constitutional Court is the supreme instance in constitutional matters in the Federal Republic of Germany. Its duties and its organisation are laid down in the Basic Law of the Federal Republic of May 23, 1949 (GG) and the Law of March 12, 1951 relating to the Federal Constitutional Court (BVGG). The Court sat for the first time in September 1951; its provisional seat is in Karlsruhe in the *Land* of Baden-Württemberg.[1]

The role of prime importance played by the Court in all matters appertaining to the Constitution reflects the multiplicity of its tasks. Nowadays it is generally acknowledged that the Federal Constitutional Court ranks on an equal footing with the other organs of the federation – Federal Assembly (Bundestag), Federal Council (Bundesrat) and Federal Government.[2] The decisions of the Federal Constitutional Court are binding on all other federal organs and in certain cases they even have the force of law (§ 3, paragraph 2, BVGG). The Court can be considered as a neutral power, but also a moderating and regulatory power; it serves to maintain the system of checks and balances between the various powers in the state.[3] In practice the Court has always maintained its position above state organs and above the daily vicissitudes of political life; it has contributed to the awakening of public concern for fundamental rights and to the stabilising of constitutional issues [4]; indeed its mere existence has come to represent a guarantee of fundamental rights [5]

---

* President of the Federal Constitutional Court.

[1] The Federal Republic is constituted as a federal state; the constituent states are called "Länder". See Bundesverfassungsgerichtsentscheidungen (BVGE) 13, 74 f.

[2] See also § 1, para. 1, BVGG, and Maunz-Sigloch-Schmidt-Bleibtreu- Klein, Bundesverfassungsgerichtsgesetz: Kommentar, Munich-Berlin, 1965, § 1, No. 8 and Smend, in Das Bundesverfassungsgericht, Karlsruhe, 1963, pp. 24 ff. For further comments see Leibholz in idem, p. 73, footnote 21.

[3] See Wintrich, in Bettermann-Nipperdey-Scheuner, Die Grundrechte, Vol. 3, Part 2, Berlin, 1959, p. 648.

[4] See Smend, loc. cit., pp. 31 ff.

[5] Lechner, in Bettermann-Nipperdey-Scheuner, loc. cit., p. 659.

and of the good order of the State. The interpretation now placed on the Constitution is generally that appearing in the case law established by the Federal Constitutional Court. Finally, the Court can also contribute to the evolution of the Constitution itself.[6] In view of all this, the Court can probably be appropriately described as the "supreme guardian of the Constitution" [7], and the system which enables all questions of constitutional law to be centralised in one court for decision can well be said to be the supreme expression of constitutional jurisdiction.[8] On the other hand, the restraint shown in the Court's decisions itself serves to draw the distinction between a system based on the rule of the judiciary and one based on the Rule of Law.

The independence of the Federal Constitutional Court becomes apparent in practice in the very fact that the Court has its own budget and does not come under the budget of the Federal Ministry of Justice. The President of the Court is also himself the administrative superior of its officials and employees.

II. The Organisation of the Court

The electoral procedure by which the sixteen judges of the Court are designated is of special importance for the status of the Federal Constitutional Court. In accordance with section 94 of the Basic Law the Federal Assembly and the Federal Council each elect half the judges. The election by the Federal Council is direct, a two-thirds majority being required (§ 7, BVGG); the election by the Federal Assembly is also based on a two-thirds majority, but is undertaken by a 12-member electoral college appointed by the Federal Assembly and which must reflect the numerical strength of the parties (§ 6, BVGG). It is precisely this requirement of a qualified majority which is intended to guarantee that the judges of the Federal Constitutional Court enjoy the confidence of as large a majority of the public as possible. The fact that the election is partly by the Federal Assembly and partly by the Federal Council, which represents the interests of the Länder (constituent states) of the federation but is itself a federal organ, is intended to ensure that the most divergent viewpoints in a federative system are taken into consideration.

Some of the judges – namely three out of eight in each senate – are selected from among the judges of the federal superior courts,

---

[6] See BVGE 6, 222(240).

[7] Leibholz, loc. cit., p. 63; see also BVGE 1, 184(196); 1, 396 (408) and 6, 304; and also Bachhof: *Grundgesetz und Richtermacht*, Tubingen, 1959, p. 21 and p. 45.

[8] Friesenhahn, *Die Verfassungsgerichtsbarkeit in der Bundesrepublik Deutschland*, Cologne-Berlin-Bonn-Munich, 1963, p. 7.

the Federal Supreme Court, the Federal Administrative Court, the Federal Revenue Court, the Federal Labour Court and the Federal Social Court. The judges are required, in principle, to have served at least three years on the bench of one of these courts. These judges are appointed "for the duration of their office" in the federal superior courts, i.e. as a general rule, until attaining the pensionable age of 68 years (§ 4, paragraph 1, BVGG). The other judges are appointed for a term of 8 years (§ 4, paragraph 2, BVGG) but may be re-elected. The intention in such an arrangement is that the "life" judges shall ensure the necessary continuity in decisions relating to constitutional matters, while at the same time contributing the benefit of their judicial experience in other superior courts, and the judges appointed for a fixed term can apply their specialised knowledge acquired in the exercise of public office. The appropriateness of such an arrangement has been questioned in some respects, but in general the system has given good results in practice.

For election as judge of the Federal Constitutional Court, a candidate must have completed his 40th year, must be eligible for election to the Federal Assembly and must be qualified to hold judicial office.[9] On being elected, judges become subject to the provisions respecting incompatibility (article 94, paragraph 1, third clause, GG; § 3, paragraph 4, BVGG); the only activity compatible with a judgeship in the Federal Constitutional Court is that of university lecturer.[10]

There has been some public discussion of whether it was desirable that the judges be elected by political organs. It was feared in particular that politics would thereby be introduced into judicial decision-making; such fears have by now been largely stilled in view of the carefully weighed decisions of the Constitutional Court. The experience has been that even persons prominently active in politics before their election as judges of the Court have, in their exercise of that office, acted solely as persons with extensive judicial experience or with experience of high-level public administration. On the other hand, election by political organs is precisely what makes the Constitutional Court a genuinely democratic institution. The structure of the Court, the decisions of which have repercussions in the political field and which, in the words of its first President, Höpker–Aschoff, must always weigh the political consequences of its actions [11], can thus leave room, within the legitimate bounds, for

[9] To obtain the necessary qualifications, a course of University studies and a training period, both of at least 3½ years' duration, together with the passing of two state examinations are required (§ 5, Judiciary Act of 8.9.1961). See also § 110, Judiciary Act.

[10] As regards the judges who are elected from among the federal judges, see § 70, Judiciary Act.

[11] Höpker-Aschoff, in *Das Bundesverfassungsgericht,* loc. cit., pp. 3 ff.

the expression of political concepts, without thereby prejudicing the basic obligation to the law itself.

The judges of the Federal Constitutional Court may resign from office at any time (§ 12 BVGG); removal from office is possible only in case of incapacity, of a dishonourable criminal offence, of a sentence of at least six months' imprisonment or of such grave breach of duty that continuance in office is intolerable; such removal from office can be ordered only by the President of the Republic and only when he has been empowered to do so by two-thirds of the members of the Court (§ 105 BVGG).

Another aspect of special significance for the functioning of the Court is its "twin" structure.[12] The Court is composed of two senates (§ 2, paragraph 1, BVGG) which co-exist independently. Judges are elected specifically to one or other of these senates. Changes may not be made by transferring judges from one senate to the other, nor may a judge from one senate deputise for a judge in the other. In instituting such a "twin" system, the aim was to avoid overloading a single senate but it also reflected the fear that a single senate would be too large and consequently too cumbersome. In practice, this solution has not given rise to criticism.

At present each senate is composed of eight judges (§ 2, paragraph 2, BVGG).[13] The President of the Constitutional Court presides over the First Senate and the Vice-President of the Court over the Second Senate. The division of the work of the Court between the two senates is made in accordance with the provisions of the Law relating to the Federal Constitutional Court (§ 14 BVGG) but can be altered by decision of the Court in plenary session, as was done by the Order of October 13, 1959.[14] Even following this redistribution, the First Senate is still primarily responsible for the interpretation of fundamental rights in proceedings involving the control of legislation and in constitutional complaints. If one senate wishes to deviate from a decision of the other senate or from that of the Court in plenary session, the case must be referred to the Court in plenary session (§ 16 BVGG).

III. The Procedure of the Court

The procedure of the Court is based in part on the provisions of the Law relating to the Constitutional Court (§ 17 ff BVGG) which, however, is not definitive in this regard and leaves some procedural matters to the discretion of the Court.[15] The lacunae in

---

[12] See BVGE 1, 19(29).
[13] Up to 31.8.1956 each senate comprised 12 judges, and up to 31.8.1963 10 judges.
[14] *Bundesgesetzblatt* (BGBI, 1959, I, p. 673).
[15] See BVGE 2, 79(84).

the Law are filled by the practice of the Court. The fundamental principles of the procedure followed are that the Court is not limited to the issues raised by the parties and that it has power to explore all matters it deems relevant and to call evidence; the proceedings are public and oral, but – except in case of impeachment of the President or a judge – it is possible to waive an oral hearing and this very often happens in practice. If a constitutional complaint is rejected (§ 93a BVGG) the procedure is written.[16] Constitutional complaints are first examined by a committee of three judges, who can reject them on the grounds that they are patently irreceivable or unfounded, and because of the large numbers that are rejected on these grounds these committees play an important role in practice. The decisions of these committees must be unanimous (§ 93a, paragraph 3, BVGG). If an application is rejected by the Senate as irreceivable or patently unfounded (§ 24, BVGG), then the decision must also be unanimous. In general the decisions of the Senate are, in principle, taken by simple majority and only in exceptional cases is a two-thirds majority required (§ 15, BVGG). In principle, the presiding judge does not have a casting vote; if the voting is equal then a breach of the Basic Law or of other federal legislation cannot be held to have occurred. The law relating to the Court finally also makes provision for interim and interlocutory orders but these are subject to very stringent conditions (§ 32, BVGG). There are in principle no court costs in proceedings before the Court. (§ 34, BVGG).

IV. The Jurisdiction of the Court

The position of outstanding importance which the Basic Law has conferred on the Federal Constitutional Court is particularly characteristic of the general constitutional order of the Federal Republic of Germany. The position of the Court is first revealed in the wide ranging nature of its jurisdiction, which probably exceeds that attributed to any other constitutional court. The closest comparison could probably be drawn with the duties of the Austrian and Italian constitutional courts but even this comparison reveals that the jurisdiction of the German Federal Constitutional Court covers a far wider field than that of the constitutional courts in Austria and Italy.[17]

Even the history of constitutional development in Germany

---

[16] A procedure without oral hearings is also provided for in § 94, para. 5, BVGG.

[17] For a compilation of the constitutional court systems of the most important States see *Die Verfassungsgerichtsbarkeit der Gegenwart*, published by the Max Planck Institute for Foreign Public Law and International Law, Heidelberg, 1961.

contains nothing comparable with the Federal Constitutional Court.[18] While during the period of the Weimar Republic there was indeed a High Court of State, established under section 108 of the Constitution of the Reich and under the Law of July 9, 1921, which was linked organisationally with the Court of the Reich in Leipzig, the functions of this High Court of State were incomparably more limited than those of the Federal Constitutional Court. It dealt only with the so-called "genuine constitutional disputes", i.e. only with disputes relating to the functions and competence of constitutional organs, a field in which the beginnings of constitutional jurisdiction began to appear in the course of the 19th century. Jurisdiction in this field is still included among the functions of the Federal Constitutional Court but even here its competence goes far beyond the functions of the High Court of State.

Outside this field of "genuine constitutional disputes" the Federal Constitutional Court has an additional broad field of jurisdiction in the examination of the constitutionality of laws through its procedure for the control of legislation and in the protection of the individual against excesses by the public authorities through the constitutional complaint. In the present-day constitutional reality of the Federal Republic, it is precisely these two institutions, which have no real precursor in the Weimar period, that have attained particular importance, especially as regards the protection of fundamental human rights.

A. CONSTITUTIONAL DISPUTES AND RELATED PROCEEDINGS

The competence of the Federal Constitutional Court as regards constitutional disputes embraces a wide range of individual functions. A common element in all these disputes is that the aim and duty of the Court in intervening in such cases is to uphold the structure of the State and guarantee the functioning of the institutions of the State. The Court intervenes in disputes affecting the life of the State as the instance of final decision. In addition it protects, in the interests of genuine democracy[19], the State against internal attacks upon its foundations. In all constitutional disputes of this nature the Court serves the aim of maintaining internal peace.[20] "The purpose

[18] As regards the history of constitutional jurisdiction in Germany, see the detailed commentary by Wintrich in Bettermann-Nipperdey-Scheuner; *loc. cit.*, pp. 650 ff; and by Friesenhahn *loc. cit.*, pp. 8 ff.
[19] Friesenhahn, loc. cit., p. 91.
[20] Marcic: *Verfassung und Verfassungsgerichtsbarkeit*, Vienna, 1963, p. 95.

of constitutional jurisdiction of such a nature is to uphold the free, constitutional and democratic order and thereby to guarantee it." [21] Such protection of the State and of the life of the State will finally contribute directly to protecting the fundamental rights [22] which the Basic Law has described as the basis of all "human society" (article 1, paragraph 2, GG).

1. Proceedings in the nature of a prosecution

This type of dispute includes first of all proceedings in the nature of a prosecution, an institution which goes back as far as the 19th century and also came within the competence of the High Court of State during the Weimar period. In contrast to the position during the Weimar period, however, Ministers and Chancellors can no longer be the subject of such proceedings, a position reflecting the parliamentary responsibility of government. On the other hand, proceedings can still be brought against the Federal President, based on a charge of intentional violation of the Basic Law or of any other federal Act. (article 61 GG).

An innovation is that such proceedings can also be brought in the Federal Constitutional Court against judges on the grounds of a breach of the constitutional order (article 98, paragraph 2, GG); this reflects the increased importance of "the third power" in the constitutional system of the Federal Republic.

Of even greater importance is the jurisdiction attributed by the Basic Law to the Court in protecting the system based on freedom and the Rule of Law against the anti-constitutional endeavours of individual parties or citizens.

Proceeding against the federal President and against judges have so far not occurred in the practice of the Court; in contrast, the possibility of taking action against anti-constitutional parties (article 21, paragraph 2, GG) has resulted in two cases which ended with the banning of the parties concerned; by judgment dated October 23, 1952 the Socialist Reich Party [23], and by judgment dated October 17, 1956 [24] the German Communist Party, were declared unconstitutional and dissolved. Both these judgments had a very wide impact in the political field; the fundamental attitude revealed in the judgments is probably more important than the political consequences.

Radical movements of the Right and Left are of no great importance in the Federal Republic. Memories of the National Socia-

---

[21] Marcic, loc. cit., p. 102.
[22] See Lechner, in Bettermann-Nipperdey-Scheuner, loc. cit., pp. 658 ff.
[23] BVGE 2, 1 ff.
[24] BVGE 5, 85 ff. For detailed documentation see: *Der KPD-Prozess,* published by Pfeiffer und Strickert, 1955-1956.

list times and the frightening example of the Soviet Occupied Zone of Germany restrain the vast majority of the people from striking out in such directions. In addition the so-called "5 per cent clause", which makes the allocation of seats in the Federal Parliament dependent on the party concerned having secured at least 5 per cent of the votes at the election, represents an almost insuperable limitation for radical splinter groups of the Right or Left. If the above-mentioned parties were nevertheless declared unconstitutional and dissolved the conclusion may then well be drawn that the new-found democracy of the Federal Republic of Germany has no intention of permitting itself to be weakened from within and of offering a free field of action to a system which pays no heed to human rights. The experience of the Weimar period when Hitler came to power in an absolutely legal way is a warning example.

On the other hand the very possibility of banning political parties reflects the importance attached in the Basic Law to the constitutional position of these parties. Political parties are firmly incorporated in the constitutional fabric by article 21 of the Basic Law; they are even given the attribution of State organs.[25] Consequently it is only logical that proceedings may be taken against them in the same way as against the State organs in the classic meaning of the term.

The position of the individual under the present constitutional system is similar. The fact that article 18 of the Basic Law provides that the Federal Constitutional Court may decree forfeiture of certain fundamental rights – such as, for instance, freedom of opinion and expression, freedom to impart ideas, freedom of assembly – in the case of individuals misusing these fundamental rights with the object of overthrowing the free and democratic order, expresses the extent to which the maintenance of such an order is the task and duty of each individual citizen of the State. That this possibility is indeed a last resort can be seen from the fact that hitherto there has only been one case of this kind (against a former member of the Socialist Reich party), and even then the proceedings did not reach the stage of decision.[26]

2. *Disputes between the Federation and Constituent States*

It is also with a view to the protection of internal peace that disputes between the federation and individual constituent states are submitted to the Federal Constitutional Court (article 3, paragraph 1, sub-paragraphs 3 and 4; article 84, paragraph 4, second

[25] See Leibholz in *Deutsches Verwaltungsblatt*, 51, 2 ff; also BVGE 2, 73 and 4, 27, in which the attribution of state organ for proceedings before the Constitutional Court is acknowledged.
[26] BVGE 11, 282 ff.

sentence, GG). In such cases, the Federal Constitutional Court, as the supreme authority, solves and settles conflicts which result from the federative structure of the republic, in the same way as the High Court of State under the Weimar Republic functioned in disputes between the Reich and its constituent states.

In this particular field a number of important cases have been brought before the Court, some of which aroused great interest in the German public. As examples we may mention the dispute respecting the structure of the southwest of Germany – the "dispute over the southwest state" [27] –, the dispute between the Federal Republic and the state of Lower Saxony concerning the Reich Concordat of 1933 [28] and a case between the Federal Republic on the one hand and the State of Hesse and the free Hanseatic city of Hamburg on the other hand respecting the establishment of the second German television channel.[29]

In such matters the Federal Constitutional Court has developed the so-called principle of loyalty to the federation [30], which implies an obligation on the part of the federation and of its constituent states to co-operate in a manner appropriate to the nature of a federal state. The judgments in these cases undoubtedly made an important contribution to strengthening the internal structure of the Federal Republic of Germany.

Related to this group of cases are the disputes between constituent states which the Federal Constitutional Court is competent to decide (article 93, paragraph 1, subparagraph 4, GG). No case of this nature has, however, yet been brought before the Federal Constitutional Court.

The Federal Constitutional Court can act within the constituent states themselves if the state concerned transfers to the Federal Constitutional Court the tasks of a state constitutional court (article 99, GG). Only the State of Schleswig-Holstein has availed itself of this possibility, while the remaining States – with the exception of Berlin, which is in a special constitutional position – have themselves instituted constitutional courts and high courts of

---

[27] BVGE 1, 14 ff. For detailed documentation see: *Der Kampf um den Südweststaat, Verhandlungen und Beschlüsse der gesetzgebenden Körperschaften des Bundes und des Bundesverfassungsgerichts,* published by the Institute for Political Science and Politics, Mainz, Vol. 1, 1952.

[28] BVGE 6, 309 ff. For detailed documentation see: *Der Konkordatsprozess,* published by the Institute for Political Science and Politics, Mainz, Vol. 7. 1957-1959.

[29] BVGE 12, 205 ff. For Detailed documentation see: *Der Fernsehstreit vor dem Bundesverfassungsgericht,* published by Zehner, Vol. 1, 1964; Vol. 2, 1965.

[30] For detailed commentaries see Rupp, in *Festgabe für Carlo Schmid,* 1962, pp. 141 ff; Bayer: *Die Bundestreue,* 1961; Gebhard Müller: *Bundestreue im Bundesstaat,* in *Festschrift Kiesinger,* 1964, pp. 213 ff.

state, with at times very wide jurisdiction.[31] In addition the Federal Constitutional Court is subsidiarily competent in all public law disputes arising in the states, if jurisdiction has not already been attributed elsewhere (article 93, paragraph 1, subparagraph 4, GG).

In a broad sense the Court is also competent in disputes between organs of the state (the so-called institutional disputes), which do not involve the constitutional organs of the federation themselves. In such cases the court is called upon to give a decision (article 93, paragraph 1, subparagraph 1, GG). The Court has decided that political parties[32] and parliamentary parties[33], and indeed even individual deputies[34], can be regarded as constitutional organs for the purpose of bringing such disputes before the court. Frequently the matters involved are of fundamental political importance. Thus, for example, the so-called Petersberg Agreement, which represented the first step taken by the Federal Republic towards recovering its sovereignty and taking its place among the community of free peoples, was the subject of a dispute before the Court.[35] The Court has also confirmed the position of the parties, in particular, by giving them the right to seek redress by bringing an institutional complaint when they allege that their constitutional rights in electoral matters have been violated by electoral laws.[36]

Because of the highly political character of all such cases the authorities during the Weimar period were still loath to submit disputes between the supreme organs of the Reich to the High Court of State. The fact that the Basic Law has given jurisdiction in such matters to the Federal Constitutional Court proves the extent to which the authors of the Constitution were desirous of introducing into political life legal precepts and principles which form a part of the constitutional order.

3. *Election Proceedings*

The Federal Constitutional Court functions directly in the political field when it receives complaints in electoral matters. In

---

[31] For the jurisprudence of the constitutional courts of the states see, for example, Bachof-Jesch: *Die Rechtsprechung der Landesverfassungsgerichte in der Bundesrepublik Deutschland*, in *Jahrbuch des öffentlichen Rechtes* NF, Vol. 6, 1957, pp. 47 ff. See also Lechner, loc. cit., pp. 685 ff.

[32] BVGE 1, 223 ff and 4, 27 (decision in plenary session).

[33] BVGE 1, 351 ff and 1, 372 ff.

[34] BVGE 2, 143 (164) and 10, 4 (10).

[35] BVGE 1, 351 ff. See also the institutional disputes concerning the General Treaty and its ancillary treaties and the Treaty of Rome and concerning the compatibility of armed forces and compulsory military service with the Basic Law, BVGE 1, 281 ff and 1, 397 ff.

[36] See also footnote (32) above and BVGE 6, 85 (104); 7, 99 (103); 11, 234 (241 ff); 14, 121 (129).

principle, the examination of election results is the responsibility of the Federal Assembly, which also decides whether any individual deputy in the Assembly has lost his membership (article 41, paragraph 1, GG). When such decisions are taken, there is, however, the possibility of laying a complaint before the Federal Constitutional Court (article 41, paragraph 2, GG). The Federal Constitutional Court similarly decides on complaints respecting referendums [37], which, however, play a very minor role in the parliamentary system instituted by the Basic Law and are provided for only in the case of a re-structuring of the federal territory by changing the borders of the constituent states (article 29, GG). The supervision of elections is an unusually important duty of the Federal Constitutional Court, and its importance is in fact increased by the fact that in such cases the Court also examines whether the electoral law governing the election in question was compatible with the Basic Law. In this connection the Court found that the division into constituencies made on the basis of the 1949 population, the year in which the Federal Republic was founded, gave rise to considerable doubts in connection with the elections in 1961.[38] The federal legislature has drawn the logical consequence from this and has decided on a new division into constituencies which will better respect the equal rights of all citizens.

The functions and duties of the Court in matters of direct political importance have not remained uncontested. There is criticism to the effect that the Court is too much engaged with political matters and can thus distort the free interplay of political forces and limit the activities of the responsible executive organs in their work of social construction.[39] Indeed, matters such as the proceedings relating to the Petersberg Agreement or the statute of the Saar – the latter being introduced not as an institutional dispute but under the procedure for the control of legislation [40] – would at first

---

[37] § 5, para. 4 and §§ 16, para. 3, 32 para. 3 of the Act of 23.12.1955 respecting popular initiative and popular decision in the re-structuring of the federal territory in accordance with article 29, paras. 2 to 6, of the Basic Law in conjunction with §§ 1 and 18 of the Electoral Act of 12.3.1951.

[38] BVGE 16, 130 ff.

[39] On this question see, for example, Leibholz, in *Das Bundesverfassungsgericht*, loc. cit., pp. 61 ff; idem in *Jahrbuch des öffentlichen Rechts*, Vol. 6, 1957, pp. 109 ff, introduction to the memorandum on the status of the Federal Constitutional Court; Maunz-Sigloch-Schmidt-Bleibtreu-Klein: loc. cit., pp. 9 ff; Eichenberger: *Die richterliche Abhängigkeit als staatsrechtliches Problem*, Berne, 1960, pp. 126 ff; McWhinney: Judicial Restraint and the West German Constitutional Court, in *Harvard Law Review*, 75, 1961, pp. 1 ff. In this connection it should be mentioned that the Federal Constitutional Court cannot invoke a "political clause" such as enables the Supreme Court of the United States to refuse to rule on disputes arising out of high politics.

[40] BVGE 4, 157 ff.

sight appear to fall outside the judicial field. The decision appears to be governed purely by considerations of political expediency. In these cases the Court has " on the basis of existing norms, made political matters themselves the subject of judicial decision".[41] In the final analysis, however, this merely gives expression to a basic concept which runs through the whole constitutional system of the Federal Republic to the effect that primacy rests not with the State but with the Law, and that no manifestation of the life of the State can be allowed to go beyond the scope of the law but must be measured against the basic principles of law.

The Federal Constitutional Court has, however, also indicated the limits of its competence in political matters and has repeatedly referred to the fact that decisions relating to questions of expediency are purely a political matter and cannot be the subject of judicial decision [42]; it has declared that the discretion of the legislator, provided that its exercise does not infringe legal provisions, is constitutionally unassailable. In the case relating to the banning of the German Communist Party the Court, through its President, voiced the view that the decision concerning the expediency of such proceedings did not rest with the Federal Constitutional Court.[43] The Court has repeatedly expressed the opinion that there is a presumption that the political organs function in a legally acceptable fashion [44] and has continually asserted that constitutional jurisdiction does not mean the limitation of political initiative but rather the safeguarding of a system of values as the object of political activity. The Federal Constitutional Court has by its own moderation and self restraint greatly contributed to the silencing of criticism of its role in the political sphere.

B. CONTROL OF LEGISLATION

The proceedings relating to control of legislation, which have already been referred to above, are, unlike constitutional disputes, not contentious proceedings in which there are opposing parties but objective proceedings aimed at testing the validity of legislation. The Federal Constitutional Court acts in these cases directly with the object of defending and upholding the law, and not indirectly

---

[41] Leibholz, in *Das Bundesverfassungsgericht*, loc. cit., p. 64, with reference to the "memorandum on status", loc. cit., p. 145.

[42] See also, for example, the decision respecting the statute of the Saar, loc. cit,. p. 168 and p. 178. As regards laws applicable only within states see, for example, BVGE 3, 162 ff; 3, 288 (337); 4, 144 (155); 9, 201 (206); 11, 245 (253); 15, 167 (201 f); 18, 121 (124); 18, 315 (325).

[43] See also *der KPD-Prozess*, loc. cit., Vol. 3, p. 585.

[44] Thus in particular BVGE 4, 157 (168).

through its guarantee of the constitutional order, as happens in constitutional disputes.

The basic object of such proceedings is the protection of the fundamental human rights, even though the over-all scope of the control of legislation extends beyond the rather limited field of fundamental rights. The purpose of the control of legislation is to examine whether legal provisions are compatible with the Basic Law. The decision in this respect is not taken in the course of the proceedings in which the provisions in question are determinant; therefore the decision is not incidental – as is the case, for instance, in the judicial review undertaken by the Supreme Court of the United States – but is rather a decision of the main issue. The introduction of an objective procedure for the control of legislation also represents a great change compared to the Weimar period, to the extent that whereas the High Court of State could, by virtue of article 13, paragraph 2, of the Weimar Constitution, test the compatibility of state laws with the Constitution it could go no further than giving an incidental decision on the compatibility of legal provisions of the Reich with the Constitution, and in so doing it acted not on the basis of a specific attribution of jurisdiction but only by virtue of the jurisprudence established by the High Court of State.

A further particularity is the concentration of judicial competence to rule on the unconstitutionality of ordinary legislative provisions in a central organ empowered to give a decision, the Federal Constitutional Court. Such an arrangement first of all guarantees the consistency of constitutional jurisprudence; it avoids a situation in which different courts place differing interpretations on the Constitution, thus giving rise to uncertainty in questions relating to constitutional law. This monopolisation by the highest court in constitutional matters of the power to give a decision also underlines the increased authority of the Legislature in the constitutional system of the Federal Republic. Only a Court which itself enjoys a special position under constitutional law is given the power to rule that acts of the Legislature are unconstitutional.

1. "Concrete" control of legislation

The most frequent procedure in practice is the so-called "concrete" control of legislation (article 100, paragraph 1, GG). The starting point in such procedure is invariably a specific lawsuit in which the court seized of the matter considers that the legal provision it is bound to apply is unconstitutional. In such a case the court concerned cannot itself rule that the provision is unconstitutional but must suspend the proceedings before it in order to obtain the decision of the Federal Constitutional Court. All courts are

empowered to adopt this procedure; even judges at the lowest instances can do so.

Up to January 1, 1965 1,029 cases of this kind had been brought before the Court. Even though only a very limited number of such cases resulted in a legal provision being declared unconstitutional, the mere possibility of bringing such a case obliges the legislator to examine very carefully whether the law he is creating is compatible with the Constitution. Several decisions pronounced in cases of this kind are also of great importance for the system of fundamental rights. As an example, we may cite the decision given in January 1957 [45] in which the Federal Constitutional Court, in a case dealing with certain provisions of fiscal law, made some fundamental observations on the protection afforded to marriage and the family by the Basic Law (article 6, GG).

The jurisprudence of the Court does not permit proceedings for the control of every type of legal provision. Only laws, in the formal ueaning of the term, enacted during the currency of the Basic Law, are subject to this procedure, whereas delegated legislation [46] or pre-Constitutional laws [47] are not within its scope. These two types of legal provision do not call in question the authority of a post-Constitutional Parliament as legislator, so that the increased protection afforded by concentrating the power of decision in the Federal Constitutional Court is not called for. On the other hand, the possibilities of undertaking concrete control are broadened to some extent in that it is possible to use this form of proceeding to test the compatibility of the statute law of a constituent state with ordinary federal legislation (article 100, paragraph 1, second sentence, GG). If the state law is in conflict with Federal law the provision in the Basic Law that federal law has primacy over state law (article 31 GG) is violated and constitutional order thus prejudiced.

2. *"Abstract" Control of Legislation*

Of rather more rare occurrence but of no less equal importance is the procedure for so-called abstract control of legislation under which the Federal Government, a state government or a third of the members of the Federal Assembly may apply for examination of the constitutionality of laws, without any other specific procedure having first been followed (article 93, paragraph 1, (2), GG). In contrast to the procedure for concrete control of legislation, the procedure for abstract control applies to legal provisions of any

[45] BVGE 6, 55 ff.
[46] BVGE 1, 184.
[47] BVGE 2, 128 ff.

kind, thus also including delegated legislation and pre-Constitutional law.

Of special political importance is the fact that a third of the members of the Federal Assembly can bring proceedings of this kind. This gives the considerable minority which has lost in the political struggle the possibility of appealing to the Constitutional Court against decisions of the majority if it is of the opinion that the actions of the majority violate the Constitution. The parliamentary minority – the Opposition – can thus act as a real guardian of the Constitution and of the values on which it is based. The dispute concerning the statute of the Saar, already mentioned, can be quoted as an example of proceedings of this nature. It is certainly also an example of the caution with which the Constitutional Court proceeds in matters which originated in the political field.

Further politically important examples of the abstract control of legislation were a dispute respecting the compatibility with the Basic Law [48] of laws of the states of Hamburg and Bremen concerning a referendum on the question of atomic armaments for the Federal Republic, and a dispute concerning the constitutionality of tax rebates granted on contributions to political parties.[49] In these cases the applicants were respectively the Federal Government and the state government of Hesse. In both cases the applications succeeded so that these two proceedings can be quoted as examples of decisions by which the Federal Constitutional Court, even though with great prudence, was obliged to intervene creatively in the political sphere.

The procedure for the control of legislation has been subject to much criticism to the effect that it would lead to the collapse of the separation of powers and to the encroachment by the judges upon the competence of the legislator. In fact a decision by the Constitutional Court declaring a law to be invalid has the force of law, both in proceedings for the control of legislation and in proceedings by way of constitutional complaint (§ 31, paragraph 2, BVGG); such decisions are published in the official gazette of the Federal Republic. Nevertheless what is really involved is a judicial act, the subsumption of a factual situation, the action being taken in the one case under a provision of the ordinary law and in the other under the Basic Law. Control of the legality of all acts of the public power, including acts of the legislator, is eminently a judicial function. Because of their great importance for the maintenance

[48] BVGE 8, 104 ff; see also the Federation-States dispute, BVGE 8, 124 ff respecting referendums in communities in the state of Hesse; and also the decisions respecting temporary orders in these disputes, BVGE 7, 367 ff, and 7, 374 ff.

[49] BVGE 8, 51 ff.

and safeguarding of the whole constitutional system, the institutions for the control of legislation have therefore met with overwhelming approval despite all the critism, and similar procedures have even been introduced to some extent abroad.

3. Proceedings for Qualification of Legal Provisions

Related to the procedures for the control of legislation are the so-called qualification proceedings in which the Constitutional Court – its decision having the force of law in this case also – gives a binding ruling on the validity of specific provisions of law. The Basic Law makes provision for such proceedings in cases in which the issue is whether a general maxim of public international law has been incorporated into Federal law and directly produces rights and obligations for the individual (article 100, paragraph 2, GG). A similar position obtains when the Constitutional Court rules on the question of whether pre-Constitutional law continues in effect as federal law (article 126, GG).

4. Preservation of the Uniformity of the Law

Finally this group of questions also includes, in the broad sense, a further power designed to ensure that uniformity is preserved in matters of constitutional law, in the same way as the procedures for control and qualification serve this purpose. The Federal Constitutional Court is also called upon to give a ruling in cases where a state constitutional court, in interpreting the Basic Law, wishes to depart from a ruling given by the Federal Constitutional Court or a ruling given by another state constitutional court (article 100, paragraph 3, GG).

C. CONSTITUTIONAL COMPLAINTS

While the jurisdiction of the Federal Constitutional Court in constitutional disputes and in the control of legislation serves primarily to protect the organisation of the State and to uphold constitutional uniformity of the law, thus also serving indirectly to protect the individual and his human rights, the constitutional complaint is directly concerned with the fundamental rights of the individual. Naturally, such complaints also indirectly serve to protect the whole legal order [50], so that the interaction of the various fields of jurisdiction of the Constitutional Court reveals the extensive guarantees provided for the protection of the values on which the constitutional system is founded.

---

[50] Lechner, loc. cit., p. 669; see also Friesenhahn, loc. cit., p. 7.

In contrast to the various fields of jurisdicion of the Court [51] described above, the constitutional complaint was not instituted by the Basic Law itself but by provisions of the ordinary law (§§ 90ff, BVGG). Such a complaint is always available when anyone raises a prima facie case that his fundamental rights have been violated by the public power; the subject of such proceedings is not limited to the fundamental rights listed in articles 1 to 19 of the Basic Law but can include various other rights of a similar nature, namely protection against special courts (article 101 GG) and the right to a fair hearing (article 103, paragraph 1, GG); the maxims of *nullum crimen, nulla poena sine lege* (article 103, paragraph 2, GG) and *nec bis in idem* (article 103, paragraph 3, GG); the legal guarantees provided under the Basic Law in case of wrongful arrest (article 104 GG) and also the decisive provisions of the law respecting public office and service (article 33 GG) and the basic principles of the electoral laws (article 38 GG). On the other hand constitutional complaints can be brought not only in respect of judicial decisions and acts of the executive but also against acts of the legislator if the individual's rights are directly violated by a provision of the law. But even if the action is brought only against an executive act or judicial decision based on the law, the legal provision on which such act or decision is based must be abrogated if it is unconstitutional. Thus a breach of other provisions of the Constitution suffices, even though such provisions are not included in the list of fundamental rights and their observance cannot be made the object of a constitutional complaint by an individual; nevertheless, once a constitutional complaint has been brought, such provisions must, in accordance with the jurisprudence of the Constitutional Court, be taken into consideration.[52] The wide-ranging importance of the system of constitutional complaints is in no way restricted by the fact that in general such complaints can only be brought when all other remedies provided by the law have been exhausted; in exceptional cases they are immediately receivable if the issue is of general importance or if the individual would otherwise suffer serious and inevitable prejudice (§ 90, paragraph 2, BVGG). This system is, therefore, very comprehensive and provides the individual citizen – including legal persons in so far as they can enjoy constitutional rights (article 19, paragraph 2, GG)

[51] With the exception of the areas of competence (already referred to) under the Act respecting popular initiative and popular decision (see above, footnote 37).

[52] See particularly BVGE 12, 362 ff. Such competence is generally deduced from the interpretation of articles 2 and 101 of the Basic Law (see also below, footnote 76).

– with extensive protection against excesses on the part of the powers of the State.[53]

The constitutional complaint naturally plays a preponderant part in the practice of the Court. The vast majority of all cases so far brought before the Court have been constitutional complaints. Up to October 31, 1965 they numbered almost 14,000; each month about 100 new complaints are lodged with both senates. By far the greater part of such complaints are unsuccessful. In many cases the applicant lacks the requisite legal knowledge, and the power to bring a constitutional complaint is often abused. Many applicants see in the Federal Constitutional Court a sort of super Court of Appeal which can still decide all lawsuits after the ordinary legal procedures have been exhausted. And yet it repeatedly and clearly appears from the jurisprudence of the Court that proceedings before in do not represent merely another instance but are, rather, something new and separate, namely an examination based on the provisions of the Basic Law and on that alone.[54]

About nine out of ten complaints fail at the stage of preliminary examination, at which they can be rejected by a committee of three judges on the grounds that they are patently irreceivable or unfounded (§ 93a, paragraphs 2 and 3, BVGG), or by the senate itself if it is considered that the proceedings will not serve to clarify an issue of constitutional law and that rejection will not entail serious and unavoidable prejudice to the applicant (§ 93a, paragraph 4, BVGG). Even of the complaints which have been received and on which the senate has given a ruling, only a very small proportion have so far succeeded.

On the other hand it should not be overlooked that proceedings based upon constitutional complaints have resulted in a series of very important decisions, serving in particular to safeguard the system of fundamental human rights under the constitution and also illustrating the importance of this form of proceedings as a guarantee of fundamental rights. This is particularly the case in matters relating to freedom of opinion, freedom to follow a profession and the right to a fair hearing. Provisions of the Penal Code, of the road traffic laws and of the fiscal laws have had to be amended as violating the Basic Law. Special mention may be made of decisions relating to the law on municipal elections[55] and on appointments

---

[53] Local authorities are also entitled to bring constitutional complaints on grounds of violation of their right to self-administration under article 28 of the Basic Law (§ 91 BVGG).

[54] Thus already in BVGE 1, 4 and 1, 5. See also BVGE 11, 343 (349), and Smend, in *Das Bundesverfassungsgericht,* loc. cit., p. 30.

[55] BVGE 11, 266 ff; see also BVGE 11, 351 ff; 12, 10 ff; and the interlocutory orders, BVGE 11, 102 ff and 11, 306 ff.

to judicial office.[56] In many cases in which the constitutional complaint failed clarification was nevertheless given on contested and important constitutional issues, such as, for example, in the course of constitutional complaints relating to the law on compulsory military service.[57] Even the fact that a constitutional complaint may result in establishing the constitutionality of a legal provision which had been attacked is of considerable value for maintaining uniformity and stability in the law; it also protects these provisions from further attack and contributes to a definitive interpretation of the Basic Law.

Furthermore the institution of the constitutional complaint protects the fundamental rights of all, since holders of public office must in their actions always bear in mind the possibility of legal proceedings and are thus compelled to take the constitutional implications of their actions into account. The fact that this legal institution of the constitutional complaint is well established in the public consciousness is of great importance for the success of the system of fundamental rights.[58] It can be demonstrated that the system of constitutional complaints has made a considerable contribution towards inculcating the concept of a fundamental democratic order into the consciousness of the population and that this system has made the basic decisions of the authors of the Constitution known among wide circles of the population.[59] The importance and the extent of the protection afforded to fundamental rights in the jurisprudence of the Federal Constitutional Court is best illustrated by a brief review of its work in the field.[60]

Article 1 of the Basic Law affirms the inviolability of human dignity and the respect and protection thereof are made an obligation for all the powers of the State. Human rights are described as being inviolable and unassailable and are acknowledged as being the foundation of all human society, of peace and of justice. All three powers of the State are directly bound to respect fundamental rights. The Constitution therefore bases itself on a scale of values in which fundamental rights are deduced from a positive concept of human dignity and are not legitimised as concessions on the part of the State. Thus fundamental rights are no longer merely valid

---

[56] BVGE 17, 294 ff; see also BVGE 18, 65 ff.

[57] BVGE 12, 311 ff; see also on this point BVGE 12, 45 ff. For the importance of unsuccessful constitutional complaints in the clarification of questions of constitutional law, see also Lechner, loc. cit., p. 669.

[58] See Gebhard Müller, in *Das Bundesverfassungsgericht,* loc. cit., p. 19.

[59] See Smend in idem, p. 30.

[60] For a review of the jurisprudence of the Federal Constitutional Court see, for example, Maunz-Sigloch-Schmidt-Bleibtreu-Klein, loc. cit., § 90, No. 52 ff; Engler, in *Das Bundesverfassungsgericht,* loc. cit., pp. 87 ff, and Zehner in idem, pp. 195 ff.

within the framework of the law, as was the case formerly, but the position is reversed and laws are valid only in the framework of fundamental rights.[61]

The Federal Constitutional Court has repeatedly affirmed this privileged position accorded to a higher scale of values. "This scale of values, centred on the free development of human personality within the social community, and the dignity of man, must be regarded as a fundamental provision of constitutional law applicable to all aspects of the law." [62]

"This fundamental order is based on the concept embodied in the provisions of the Basic Law respecting constitutional policy, to the effect that man is accorded his own individual value in the order of creation and that freedom and equality are lasting fundamental values for the unity of the State. Consequently the fundamental order is an order linked to a scale of values. It is the opposite of the concept under which the State is supreme and, as the exclusive ruling power, rejects human dignity, freedom and equality." [63]

The basic obligation on the State and on every power of the State to respect and protect human dignity represents, therefore, in the jurisprudence of the Federal Constitutional Court, a guideline for the interpretation of all other fundamental rights. The late second President of the Court, Wintrich, consequently described article 1 as "the supreme constitutional principle".[64] In conjunction with article 19, paragraph 2, of the Basic Law, which protects every fundamental right "in its very essence", a sphere is thus acknowledged in which the State cannot intervene [65], because the "human-dignity content" itself is at stake.[66]

Under such a system of values fundamental rights are of importance not only in the relationships between the public powers and the citizen but the effects of this basic constitutional standpoint also affect the relations between individual citizens themselves. Even apart from the fact that provisions of private law which are ruled unconstitutional are thereby annulled, the scale of values reflected in the Basic Law provides a general guideline for the interpretation

---

[61] Herbert Krüger: *Grundgesetz und Kartellgesetzgebung,* Göttingen, 1950, p. 12.
[62] BVGE 7, 198 (205).
[63] BVGE 2, 1 (12). Similarly BVGE 12, 45 (53): "The Basic Law regards the free human personality and its dignity as the supreme value in law".
[64] Quoted from Maunz-Dürig: *Grundgesetz: Kommentar,* Munich-Berlin, 1964 /65, article 1, Nos. 4 and 14. See also BVGE 6, 32 (36).
[65] Maunz-Dürig, loc. cit., Nos. 45 and 81 with reference to Wintrich, and Bayer in *Verwaltungsblätter,* 1957, p. 140.
[66] Wintrich, in idem.

and application of rules of private law.[67] These effects of the fundamental rights are of great importance in the sphere of private law, in particular as regards the legal relationships between the individual and the large associations and other intermediary powers. In our day, it is often no longer the supreme power of the State which is opposed to the rights of the individual – a concept reflecting the liberal interpretation of fundamental rights as being defensive rights[68] – but individual private groups which are specially active in the internal life of the State. This naturally is most clearly illustrated in the labour and economic fields. The First Senate of the Federal Labour Court has, in particular, drawn very extensive consequences in this field from the so-called triple effect of fundamental rights[69] – and not without some objections. The Federal Constitutional Court itself shows more restraint in this respect, but it has, in principle, affirmed that fundamental rights can also affect civil law and that the civil judge must take them into consideration, in particular when interpreting general clauses of civil law.[70]

It may further be mentioned that article 1 of the Basic Law has repeatedly been prayed in aid by the Federal Constitutional Court not merely as a general yardstick in interpretation and assessment but that, in particular as regards the possibilities of intervention by the State, direct inferences have frequently been drawn from this article.[71]

Article 2 of the Basic Law is of fundamental importance equal to article 1; paragraph 1 of article 2 affirms the right of every individual to the free development of his personality, provided that he does not thereby violate the rights of others or come into conflict with the constitutional order or public morals. In conjunction with the human dignity clause of article 1, the significance of a provision which guarantees the free development of personality thus becomes apparent. Article 2 is thus regarded as a "principal freedom",[72] serving as a background to all the other freedoms in the list of

---

[67] See BVGE, 7, 198 ff.

[68] BVGE 7, 198 (204 f). For a detailed commentary on the evolution of fundamental rights see Leisner: *Grundrechte und Privatrecht,* Munich, pp. 3 ff.

[69] See BArbG 1, 191 ff (decision of the Federal Labour Court). For the doctrine concerning the triple effect of fundamental rights, see, for example, Ramm: *Die Freiheit der Willensbildung: zur Lehre von der Drittwirkung der Grundrechte und der Rechtsstruktur der Vereinigung,* Stuttgart, 1960; Leisner, loc. cit., particularly pp. 373 ff. Reference may also be made to Maunz-Dürig, loc. cit., p. 64, footnote 1.

[70] BVGE 7, 205 ff. Similarly, BVGE 7, 230 ff; and BVGE 12, 113 (124); 13, 318 (325) and 18, 315 (328) for matters relating to penal and revenue law.

[71] See, for example, BVGE 1, 97 (104) and 1, 332 (343). See also BVGE 18, 146 f.

[72] Maunz-Dürig, loc. cit., article 2, No. 6.

fundamental freedoms.[73] In the so-called "chemists case" decided by the Federal Constitutional Court, which contained fundamental observations on the right to freedom in the fields of choice and exercise of a profession [74], the Court, for instance, described a free human personality as the supreme value in the general outlook incorporated in the Basic Law [75] and drew from it its conclusions on the right to choice and exercise of a profession.

The jurisprudence of the Federal Constitutional Court has further increased the importance of article 2 by the interpretation it has given to it. In the opinion of the Court, article 2 is always violated if a law, in content and in origin, is in conflict with the principles of the Constitution and thus with "the constitutional order".[76] Article 2 is thus given such a comprehensive interpretation as to place it on a level with the principle of the Rule of Law, the importance and consequences of which for the general order of the State have repeatedly been indicated by the Court.[77] The postulate of justice [78], the postulate of certainty of the law [79], the guarantee of a regulated procedure for determining the law [80], the requirement of clarity in the law [81], the principle of foreseeability [82], the need for unequivocal provisions governing interventions by the executive power [83] – all these flow from the principle of the Rule of Law and, in the final analysis, serve only to promote and guarantee the free development of the personality and to ensure that it is subject only to the limitations necessarily imposed by "constitutional order" – in other words only by acts of the public power which are within the framework of the Basic Law.

On the other hand it is also to be understood from article 2 that man and his capacity for development are not to be regarded

---

[73] See idem, No. 6 ff.
[74] BVGE 7, 377 ff.
[75] BVGE 7, 377 (405).
[76] Thus in principle BVGE 6, 32 ff. See subsequently, for example, BVGE 7, 111 (119); 9, 3 (11); 9, 83 (88); 10, 89 (99); 10, 354 (363); 11, 105 (110); 12, 296 (303); 14, 288 (306); 15, 235 (239); and 17, 306 (315 f).
[77] In accordance with BVGE 3, 225 (237) the principle of the Rule of Law is included "in the fundamental decisions incorporated in the Basic Act". For details see the following footnotes.
[78] BVGE 3, 225 (237).
[79] BVGE 2, 383 (403); 13, 261 (271); 18, 70 (81); 18, 135 (142) and 18, 224 (241).
[80] BVGE 2, 383 (403).
[81] BVGE 1, 14 (45); 5, 25 (31); 9, 137 (147 and 149); 17, 67 (82); and 17, 306 (314).
[82] BVGE 9, 137. A logical consequence is that the principle of the Rule of Law prohibits to a limited extent the retroactive effect of laws: BVGE 11, 139 (145 f); 13, 206 (212 ff); 13, 261 (271); 13, 274 (278); 14, 288 (297 ff); 15, 167 (207); 16, 254 (275); 18, 70 (80); 18, 135 (143 f); and 18, 224 (240).
[83] BVGE 7, 282 (302).

as free of restriction, but that the individual remains bound to the community and to the dictates of public morals. The Federal Constitutional Court has expressed this principle as follows: "The concept of man as envisaged in the Basic Law is not that of an isolated sovereign individual; the Basic Law has, rather, resolved the friction between the individual and the community in the sense that the individual remains bound to the community and has obligations towards it, without, however, the value of the individual being thereby adversely affected" [84]. This also serves to illustrate the position of the individual in the general order represented by the Rule of Law. This, however, also indicates quite clearly the solution adopted in the Basic Law as regards the dialectic friction between the freedom of the individual and the order of the State.

The jurisprudence of the Federal Constitutional Court on the individual freedoms is an expression of these general basic features. Among such rights and freedoms the Basic Law includes the right to life and physical integrity (article 2, paragraph 2, first sentence, GG), to freedom of person – in particular freedom from wrongful arrest (article 2, paragraph 2, second sentence; article 104, GG), the right to freedom of belief, of conscience and of confession (article 4 GG), the right to free expression of opinion, including freedom of the Press and freedom of arts, science, research and teaching (article 5 GG) the right to freedom of assembly (article 8 GG), to freedom of association (article 9 GG), to freedom of movement (article 11 GG), to freedom of profession (article 12 GG), and to inviolability of the home (article 13 GG) and the right to privacy of correspondence and the mails (article 10 GG). In the framework of these individual provisions, which in the opinion of the Federal Constitutional Court are in the same relationship to article 2 of the Basic Act as is *lex specialis* to *lex generalis* [85], the authors of the constitution have introduced a system of graded reservations, to the elucidation of which a large part of the jurisprudence of the Court is devoted. Thus, for example, freedom of belief is guaranteed without any legal restriction, whereas freedom of assembly can, in the case of open-air assemblies, be limited by law or on the basis of a law (article 8, paragraph 2 GG).

As regards the way in which these legal reservations are graded and by way of illustration of the manner in which the Federal Constitutional Court co-operates in determining the limits of such reservations, the jurisprudence on the fundamental right to freedom

---

[84] BVGE 4, 7 (15 f).

[85] Thus for example BVGE 6, 32 (37); and also 1, 264 (274); 4, 52 (57); 9, 63 (73); 9, 73 (77); 9, 338 (343); 10, 185 (199); 11, 234 (238); 17, 232 (251). For further details. See also BGH Opinion of 28.4.1952, DVBI, 53, 472 and BGH 24, 78 and Maunz-Dürig, loc. cit., article 2, Nos. 6 ff.

of profession is particularly instructive. The Court made some fundamental observations on this point in the "chemists case" already mentioned. It stated, inter alia, that article 12 related both to the choice of a profession and the exercise of a profession, but that the regulatory power of the State did not apply with equal force to both. The competence of the State is correspondingly wider when the issues relate purely to the exercise of a profession and more limited in issues relating to the freedom to choose a profession. This theory of graded reservations embraces even further distinctions. The freedom to exercise a profession may be limited by regulations aimed at serving the common good in so far as such regulations are appropriate and relevant; the personal qualifications for choice of a profession (education and training) may, however, be regulated only with a view to protecting the interests of society and only to the extent that is reasonably necessary to that end, while any external limitations on admission (such as making it conditional on need for further members) must be subjected to the most rigorous scrutiny. Such external limitations on admission would only be permissible to avoid grave danger to outstandingly important community values. Furthermore, regulation at any degree would only be permissible if regulation at the preceding level could not attain the required object.[86] These principles have been further developed and refined in various more recent decisions of the Federal Constitutional Court.[87]

Similar nuances are, finally, also to be found in the jurisprudence on the right to other freedoms; in the background there is always the endeavour to resolve any possible contradictions between the sphere of the individual and that of the State in a spirit which will ensure the greatest possible degree of freedom to the individual without prejudicing important interests of the community. Judged on the basis of constitutional complaints received, disputes most frequently arise, after those concerning freedom of profession, in connection with freedom of opinion, including freedom of the Press and freedom of the arts, science, research and teaching. The Court has in various decisions underlined the importance of this "fundamental right to intellectual freedom" [88], which it has designated as one of the "most sublime human rights" and as the "basis of all freedom".[89] Freedom of political opinion is repeatedly described as a constituent element in any free and democratic State.[90] In this

[86] BVGE 7, 377 ff.
[87] See, for example, BVGE 11, 30 ff and 168 ff; 13, 97 ff and 181 ff; 16, 147 ff; and 17, 232 ff.
[88] BVGE 5, 85 (205).
[89] BVGE 7, 198 (208).
[90] BVGE 5, 85; 7, 148 (208); 10, 118 (121); 12, 113 (125).

field the Federal Constitutional Court has also frequently dealt with questions relating to the freedom of the Press and has underlined its decisive importance in forming political opinion.[91] On the other hand, the Court has also had to deal with the limitations on this freedom and to draw the line between freedom of the Press on the one hand, and the protection afforded by the criminal law to the reputation of persons referred to in press reports on the other. In this connection the Court has emphasised the solemn obligation on the Press to respect the freedom of the individual by respecting the truth in its reports.[92]

In addition to these freedoms, the Court's interpretation of which it has been possible to illustrate only in outline, the Basic Law also contains various provisions guaranteeing the institutions of private or public life. Thus, article 6 protects marriage and the family, article 14 protects property and inheritance rights.[93] The jurisprudence on these two provisions is also very extensive. On article 6 the Federal Constitutional Court has ruled that this provision contains more than a classic fundamental right to the protection of the specifically private sphere – that it is more than a mere guarantee of the institution – and that it is, rather, a basic provision, a binding value judgment applicable to the whole sphere of private and public law.[94] Similarly, the Court has described property as an elementary fundamental right and the recognition of the right to property as a value judgment of special importance for a welfare state under the Rule of Law.[95] In a whole series of decisions the Court has indicated how these basic guarantees apply in detail.

In the public sphere the Basic Law protects and guarantees the nature and existence of the educational system (article 7 GG), the nature and existence of the public service and its regulation (article 33 GG) and the main features of judicial procedure in accordance with the Rule of Law (articles 101 and 103 GG). Furthermore, the Basic Law also guarantees the basic rights of citizens, including the rights to vote and to stand for election (article 38, paragraph 2, GG), and the right of petition (article 17 GG); in a broader sense, it also provides protection against deprivation of citizenship and against the extradition of German citizens

---

[91] For example BVGE 8, 104 (112); 10, 118 (121); 12, 205 (260). Basic to questions arising out of the law on broadcasting are BVGE 12, 207 ff.
[92] See on this point BVGE 7, 198 (208 f); 12, 113 (124 ff); 15, 77 (78).
[93] Article 15 of the Basic Law contains special provisions for compensation to be paid in case of socialisation of land and property, natural resources and means of production. Under the present social and economic system this provision is, however, of no practical importance.
[94] BVGE 6, 55 (72). Similarly, BVGE 9, 231 (242).
[95] BVGE 14, 263 (277).

(article 16, paragraphs 1 and 2, first sentence, GG). Finally, mention should also be made of the right to asylum, which again is related to protection against loss of citizenship and extradition (article 16, paragraph 2, second sentence, GG). In all this many-sided field, the provision contained in article 103, paragraph 1, of the Basic Act has attained special importance in the practice of the Federal Constitutional Court. A very large number of constitutional complaints relate to violation of the right to fair hearing; in point of fact, the Federal Constitutional Court has in several cases had to annul the rulings of other courts because of a violation of this principle.

Finally, of particular importance is article 3 of the Basic Law which guarantees the principle of general equality and its various manifestations – equality of man and women, prohibition of discrimination based on descent, race, language, home and origin, beliefs and religious or political views. It is through this very principle of equality which prohibits any arbitrary procedure and is closely related to the principle of justice itself, that the whole system of fundamental rights is given the finishing touch. Article 3 is consequently of practically the same importance as articles 1 and 2. The Federal Constitutional Court has affirmed that the principle of equality is among the most essential principles of the Constitution.[96] Moreover, the Court is of the view that equality before the law is so bound up with the basic elements of the constitutional order that it would have been necessary to enshrine it in positive law if this principle of equality had not been made constitutional law by its incorporation into article 3.[97] This principle is binding on all three powers of the State. Of particular consequence is its binding effect on the legislator. This makes clearly apparent the close link between the principle of equality and the general postulate of justice. A law is thus only constitutional if the distinctions drawn in it are appropriate and justified.[98] Consequently, all obviously inappropriate, and in particular all arbitrary, legal regulations are prohibited. This jurisprudence naturally provides a very wide scope in the field of the control of legislation. The legislator's judgment is subjected to the limitations imposed by the demand for justice.

In this field, however, the prudent self-restraint shown by the Federal Constitutional Court in relation to decisions based on expediency or involving the exercise of discretion in the political field again becomes apparent. In many of its rulings the Court has repeatedly emphasised that the judgment of the legislator violates

---

[96] See also Engler, in *Das Bundesverfassungsgericht*, loc. cit., p. 104.
[97] BVGE 1, 208 (233).
[98] See, for example, BVGE 1, 14 (52); 1, 208 (247); 4, 144 (155); 11, 245 (253); 14, 142 (150) and 221 (238); 17, 122 (130) and 199 (203).

legal principles only if it oversteps the bounds of law or is misused in a way conflicting with the general principles of justice.[99] Other rulings state that a legal provision can only be annulled if its partiality is evident.[100] The Federal Constitutional Court has in this respect repeatedly applied the principle of so-called pro-constitutional interpretation, i.e. it has not held a law to be unconstitutional as long as its wording can in any way be interpreted in a manner consistent with the Constitution. In so doing the Court has contributed to maintaining the free play of forces within the democratic order of the State, while at the same time indicating the limits, together with all their implications, which the general principles of law, in particular the principle of justice, impose on the sphere of the individual.

In connection with constitutional complaints, it may finally be stated that these cannot be based on a violation of the European Convention for the Protection of Human Rights dated November 4, 1950.[101] This Convention is indeed applicable as ordinary federal law [102], and in addition enjoys increased protection against amendment under international law; this instrument does not, however, contain constitutional provisions, the violation of which could be made the subject of proceedings before the Federal Constitutional Court. The extensive guarantees contained in the Basic Law have, however – as Dürig writes – "more material content for the protection of values" [103] than the provisions of the European Convention on Human Rights. The great importance which has been attributed to fundamental rights in the jurisprudence of the Federal Constitutional Court probably confirms the accuracy of this assertion.[104]

5. *Conclusion*

Constitutional jurisdiction in Germany is an experiment. Experience in recent years has to a large extent confirmed the success of the experiment. The Federal Constitutional Court has become a unifying factor and, through the authority and objective content of its decisions, has greatly contributed to the reconstruction of the fabric of the State, which lay in ruins at the end of the Second World

---

[99] See on this point BVGE 1, 14 (52); 3, 58 (135 f); 3, 288 (337); 4, 7 (18); 4, 219 (244); 4, 352 (356); 12, 326 (337 f); and 341 (348); 13, 181 ff; 14, 13 (17); 15, 167 (201); 17, 210 (216 and 222); 17, 319 (330); and 18, 315 (325).

[100] BVGE 12, 326 (333); 18, 121 (124).

[101] See also BVGE 10, 271 (274); and Friesenhahn, loc. cit., pp. 78 f; Federer, loc. cit., p. 48; Maunz-Dürig, loc. cit., section 1, No. 59; Maunz-Sigloch-Schmidt-Bleibtreu-Klein, loc. cit., § 90, No. 51.

[102] See OVG, Münster of 25.11.1955, DOEV 1956, 438.

[103] Maunz-Dürig, loc. cit., No. 60.

[104] For details, see idem, Nos. 61 ff.

War. The Federal Constitutional Court is often at the centre of severe tension between the law as written and the law as applied, between freedom of the individual personality and the order of the community, between political forces and basic legal decisions. Throughout the years of its existence the Court has endeavoured to resolve this tension in a spirit of justice and with respect for human rights and the fundamental principles of the Rule of Law.

SOUTHERN RHODESIA AND THE RULE OF LAW

by

LEO S. BARON *

"Our enemies take full advantage of the fact that Government will act constitutionally and observe the Rule of Law . . ."

The Minister of Law and Order, Southern Rhodesian Parliament, June 10 1965.

It is trite that a society cannot claim to function within the Rule of Law merely because the executive acts strictly in accordance with the law; the law itself must be adequate to "protect the individual from arbitrary government and to enable him to enjoy the dignity of men". Yet there is a widely held assumption – by no means confined to laymen – that the Rule of Law requires no more than strict legality. The primary purpose of this paper is therefore to examine the substantive content of the law of Southern Rhodesia and the extent to which, either by omission or express authorization, it falls short of the requirements of the Rule of Law.

It is, of course, possible for an executive to make good, by its conduct, the shortcomings in the law; it is therefore proposed to examine also the extent to which, and the manner in which, the Southern Rhodesian executive has made use of these shortcomings.

A. THE SUBSTANTIVE CONTENT OF THE LAW

Normally, to compare the substantive content of the written law of a country with the requirements of the Rule of Law it would be sufficient to examine the constitution. In the case of Southern Rhodesia, however, the enquiry must go further because of the existence of section 70, whereunder pre-existing legislation, repugnant to the Declaration of Rights, is saved.

---

* LL.B. (London), Attorney, Bulawayo, Southern Rhodesia. One of the first actions of the Rhodesian Government after its unilateral declaration of independence on November 11 1965 was to take Mr Baron into custody under a detention order made in accordance with the powers it assumed by a declaration of emergency on November 5 1965. He had already been restricted to the Bulawayo area for some months by an order made under the Law and Order (Maintenance) Act in 1965.

1. The 1961 Constitution [1]

Southern Rhodesia has enjoyed internal self-government since 1923. Following a conference which ended early in 1961 the country was granted a new constitution whereunder Britain relinquished virtually all her reserve powers in return for assurances that Rhodesia would enter a new phase in political and social development; it was to be the first step towards ultimate majority rule, while the entrenched Declaration of Rights was to ensure the elimination of discrimination, equality before the law and the protection of the rights and liberties of the individual.

In the event, there has been no new phase in the sense contemplated; instead, the country has moved rapidly in the opposite direction. Immediately the conference was over the Prime Minister, Sir Edgar Whitehead, presented the Constitution as the charter which would ensure that government would remain in white hands for the foreseeable future. This turnabout, seen by the African nationalists as a betrayal, was a major reason for their rejection of the Constitution and their refusal to participate in elections thereunder. But the final reason was the failure in fact to extend the franchise; Africans were to be given fifteen seats on a B roll, but the qualifications to register on the A roll, which returned fifty members, remained as high as before, and gave no hope for majority rule for generations to come. In spite of this, the extreme right-wing Rhodesian Front was able to exploit the bogey of majority rule and was returned to power at the 1962 elections with an overall majority, gained entirely on the A roll and by virtue of the European vote.

It has been argued that had the attitude of the African nationalists been different the attitude of the government towards the Constitution, and its administration within its framework, would equally have been different. But this – even if it were true – is hardly the issue. In considering the merit or otherwise of any constitution it is not relevant to consider it against the background of a benevolent administration; if the constitution, and in particular the Declaration of Rights, is ineffectual in the hands of a totalitarian or otherwise hostile administration, then it has failed in its purpose. The failure of the 1961 Constitution does not, however, stem entirely from its own inherent inadequacy; no legal document, however well drawn, is proof against violation of its terms. To the extent therefore that the failure is due to illegal action by the administration neither the politicians nor the draughtsmen can be held responsible; on the other hand, to the extent that the failure is due to the ability of the administration to circumvent the terms

[1] The appointed day, on which the majority of its provisions came into effect, was November 1 1962.

of the Constitution or to act contrary to its spirit without violating either its own provisions or any other law, the Constitution has truly failed.

The Constitution includes a Declaration of Rights whereunder most, but not all, of the traditional human rights are ostensibly protected; notable omissions are the right to freedom of movement and the right to work and to free choice of employment. Those protections included have, however, been rendered largely illusory by a number of careful and far-reaching exceptions and qualifications. It is not proposed to attempt an exhaustive analysis of the Declaration, but certain sections merit individual attention:

(1) Saving of Pre-existing Legislation – Section 70

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of any of the provisions of sections 57 to 68.[2]
>
> .....
>
> .....
>
> b. if the law in question was in force immediately before the appointed day and has continued in force at all times since that day; or
>
> c. in the case of a written law, to the extent that it repeals and re-enacts any provision which has been contained in a written law at all times since immediately before that day.

"Law" includes "any provision of any instrument having the force of law made in the exercise of a power conferred by the Legislature", and "any unwritten law... other than African customary law".

Undoubtedly section 70 is the most important single reason for the failure of the Declaration of Rights to do what, on the face of it, it was intended to do; and here the British politicians must accept full responsibility. One can only speculate as to what assurances were given to Britain to persuade her to introduce this saving, but she must clearly have been led to believe that, under the guidance of the Constitutional Council, the whole of the Statute Book would be examined and purged of everything repugnant to the new Constitution (one of the early drafts submitted to the conference indicated that this operation would be completed within five years). Stringent security measures, highly repugnant to the new Constitution, were already on the Statute Book, and it is inconceivable that Britain can have contemplated that these measures would remain permanent features of the law; one does not frame a comprehensive and detailed charter of human rights and proceed in the next breath to destroy it – for this is what, in large measure, section 70 achieves.

---

[2] The sections setting out the various rights and freedoms.

This view is strengthened by section 87, which empowers the Constitutional Council to examine any Act or statutory instrument in force on the appointed day and "make a report in regard to any such Act or instrument which, in the opinion of the Council, would be inconsistent with the Declaration of Rights if such Declaration applied thereto". The Council is required to send such report to the Governor and to the Speaker and the Speaker is in turn required to lay the report before the Legislative Assembly. The Constitutional Council has only certain limited delaying powers in relation to Bills, and no power whatever in relation to pre-existing legislation,[3] but the very existence of section 87 and the terms in which it is framed indicate, it is submitted, a clear contemplation and intention that the legislature would bring the statute law into line with the Declaration of Rights.

As we shall see below, the power to ban political parties and other organisations, to control meetings, to prohibit individuals from attending or addressing meetings, to ban publications, were all in existence prior to the appointed day, and it is these powers which are largely responsible for the successful erosion of most of the important rights and freedoms expressed to be protected by the Constitution – the right to personal liberty, freedom from deprivation of property, freedom of expression, freedom of assembly and association.

(2) Right to Personal liberty – Section 58

58 1. No person shall be deprived of his personal liberty save as may be authorised by law.

2. No law shall authorise any person to be deprived of his liberty save in the following cases, that is to say:
(here follow a series of standard exceptions, until we come to sub-clause (k))

k. to such extent as may be necessary for the execution of a lawful order requiring that person to remain within a specified area within Southern Rhodesia or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable

i. for the taking of proceedings against that person relating to the making of such an order; or

ii. for restraining that person during any visit which he is permitted to make to any part of Southern Rhodesia in which, in consequence of such an order, his presence would otherwise be unlawful.

The precise meaning of Section 58(2)(k) may well fall to be decided by the Privy Council in an appeal at present pending, and it is not proposed to comment. It seems clear, however, that sub-

[3] See para A. 1(b). infra.

section (2)(k) assumes a power in the legislative to restrict movement in normal times.[4] This view is strengthened by the absence from the Declaration of Rights of a section dealing expressly with freedom of movement.

(3) Freedom from Deprivation of Property – Section 61
Protection of Privacy of Home and Property – Section 62
Freedom of Conscience – Section 64
Freedom of Expression – Section 65
Freedom of Assembly and Association – Section 66

These sections are drawn in fairly standard terms, save in one respect. In each, sub-sections are included which give the legislative power to derogate in normal times from the rights and liberties in question for stated purposes (e.g. the exercise of the "police powers"), and then give the courts a power of review in respect of any such law as may be the subject of a challenge. Section 66(3), for instance, reads:

> If in any proceedings ... a certificate in writing is produced to the court signed by a Minister ... that in the opinion of the Minister the law in question is necessary on such of the grounds ... as is specified in the certificate ... that law ... shall be deemed to be so necessary unless the court decides as a result of hearing the complainant that in a society which has a proper respect for the rights and freedoms of the individual the necessity of that law on the grounds specified in the certificate ... cannot reasonably be accepted without proof to the satisfaction of the court.

The protection afforded by this power of review is of questionable value. The procedure is of necessity lengthy and expensive, since it involves two stages; at the first hearing the court must decide whether the applicant has been hindered in the enjoyment of his rights, and if so (and the Minister has filed a certificate) whether or not the court should require proof to its satisfaction that the law is necessary. If the court holds in favour of the applicant on both these issues a rule nisi issues calling upon the Minister to show cause why the law should not be declared invalid, and the final question, namely whether or not the proof supplied by the Minister is sufficient to satisfy the court, is determined at the second hearing.[5]

Delays and expenses apart, these provisions are objectionable in terms of the Rule of Law because, although in theory there is

---

[4] The way in which this power has been used is discussed in para. B. 1. (1) infra.
[5] *Maluleke* v. *Minister of Law and Order* 1963(4), S.A.L.R. 206 at 209.

provision for the court to substitute its own discretion for that of the Minister, in practice the individual is still likely to find himself blocked and quite helpless in the face of ministerial privilege. The Minister, in adducing proof that the law is necessary, would obviously set out his view of the social and political circumstances which gave rise to it, and if this view were one which might come as a surprise to the ordinary well-informed man, the Minister, in order to satisfy the court, would be obliged either to set out in detail the information on which his view is based or to say that his belief is bona fide and based on information the nature and sources of which, in the interests of security, he is unable to divulge.

In the nature of things, and particularly since the second stage in the inquiry is unlikely to have been reached unless the circumstances in question were *not* known to the ordinary well-informed man, the Minister's proper course would be the second of the above alternatives. Normally, in the face of such a statement, it is virtually impossible to challenge the exercise of a discretion; does the working of this section give the court significantly greater scope?

There is a further objection based on the very far-reaching implications of the provision; the procedure gives rise to a situation which, it is submitted, is invidious and highly undesirable. There can be no doubt that the judiciary is better qualified than the legislative to be the judge of the character of a society "which has a proper respect for the rights annd freedoms of the individual"; but to give full effect to this power of review the judiciary must substitute its own discretion for that of the legislative on political questions. Any decision must inevitably be unpopular with a section of the community, and a belief of that section, however unjustified, that the decision was politically motivated can hardly fail to damage the judiciary's image of impartiality.

(4) Protection from Discrimination – Section 67

Sub-Section 4 of this section makes such inroads into the protection as to render it quite worthless. Not only is pre-existing discriminatory legislation saved under section 70, but in terms of this proviso new legislation is authorised provided it is no more discriminatory than the existing – a limitation which, in view of the state of the law on the appointed day, will hardly have caused concern in even the most extreme circles.

(5) Saving for Periods of Public Emergency – Section 69

Serious inroads into individual liberties must be acepted as a necessary evil during periods of public emergency.[6] But to satisfy

[6] Why it was thought necessary to suspend, during an emergency, the freedom of conscience and religion (section 64) is obscure.

the Rule of Law, the emergency must be real; it must not be a circumvention of the inability of the executive in normal times to override the entrenched rights and liberties of the individual. Where a constitution gives the executive a complete discretion as to what circumstances constitute an emergency,[7] there must always be a danger that the rights of the individual may be subjugated; particularly in relation to powers of this kind, the efficacy of the provision must be examined strictly on the assumption that the administration is hostile. Successive re-statements of the requirements of the Rule of Law have stressed the necessity to place limitations (and preferably universally) on these powers by defining, inter alia, the conditions under which an emergency may be declared.

In the Rhodesian context it is unnecessary to examine too closely the problems which a universal definition will present.[8] The discretion given to the legislative by the Constitution fails on any definition to satisfy the Rule of Law, and this is particularly so against the background of an economic structure and electoral laws which effectively place legislative power in the hands of a racial minority; in these circumstances the requirement of a report to the Legislative Assembly (and a resolution for extensions) is meaningless.[9]

It is convenient to touch here on three aspects of the use made of the wide powers granted by section 69. The Emergency Powers Act is quoted elsewhere;[10] it permits the declaration of an emergency on the ground of action "immediately threatened", it permits the declaration of local emergencies, and it permits detention without trial. In the event, emergencies have been declared in remote and sparsely populated areas in circumstances of comparative quiet; the Minister of Law and Order made it clear [11] that "the incidence of violence and intimidation at the present moment is insignificant and I stated that there is clear evidence that the leaders in restriction are making plans to build it up; the real danger and threat lies in what is being planned by the few top leaders within the restriction areas".

Following the declarations of states of emergency several people

---

[7] The definition of a "period of public emergency" contained in section 72 (2) requires no more than a report to the Legislative Assembly in respect of the initial period (which must not exceed three months); extensions may be declared only on a resolution of the Assembly.

[8] It must, for instance, be accepted that internal violent opposition to constituted authority may asume such proportions as to warrant special measures; at what point, if at all, does such an insurrection pose a threat to the life of the nation? Or should it fall within the definition of some lesser "emergency".

[9] If the failure of the opposition to prevent the passage of the Preventive Detention (Amendment) Act; see paras A. 2. (3) and B. 1. (2) infra.

[10] Para A. 2. (3) infra.

[11] Hansard 10th June, Col. 26.

have been detained.[12] In this connection another extract from the Minister's speech is illuminating [13]. "There is one very important aspect of a state of emergency, however, which cannot be overlooked by those charged with the duty of maintaining law and order, and that is the powers which are thereby given to detain any person whose arrest or detention appears to the Minister to be expedient in the public interest".

It may not be out of place to suggest a limitation on legislative and executive powers based on the distinction between a threat to the nation as a whole, and internal factional lawlessness. Any such definition would require the formulation of degrees of "emergency", related in turn to the permissible degrees of interference with human rights. It would go a long way to ensuring that extreme powers were used only in extreme circumstances if the complete abrogation of entrenched rights – and particularly the right to personal liberty – were permissible only in circumstances of true national emergency as distinct from local insurrection.

(6) Functions and Powers of Constitutional Council – Sections 83 to 87

The generally accepted belief is that the Constitutional Council, a multi-racial body appointed to act as a watchdog, provides a reasonably effective curb on the legislature. On closer examination, however, one sees that, once again, the protection is entirely illusory.

Immediately after a bill has been given its final reading it is sent to the Constitutional Council which is enjoined to report within thirty days whether or not any of the provisions of the bill are inconsistent with the Declaration of Rights; if the provision is repugnant to the Declaration, but is saved by section 70, the report says so, but is nevertheless a non-adverse report for the purposes of section 71(6) (dealing with the financing of test cases). A provision on which the Council has reported adversely may be passed immediately by the Assembly by a two-thirds majority, and it is only in the absence of such majority that the bill cannot be presented for a period of six months.[14]

But even these very limited powers may be overriden by the Prime Minister irrespective of the size of his majority. Section 85(1) provides that:

---

[12] See para B. 3. (1) infra.

[13] Hansard 10th June, Col. 25.

[14] The Constitutional Council reported adversely on the Preventive Detention (Temporary Provisions) Amendment Act at a time when the government did not have a two-thirds majority in the House. The opposition did not oppose and the necessary majority was obtained without difficulty. See also B. 1 (2) infra.

> If after a bill has been given a final reading by the Legislative Assembly and before it is submitted to the Constitutional Council ... the Prime Minister certifies ... that the bill is so urgent that it is not in the public interest to delay its enactment ... it shall be lawful for the Governor to assent forthwith to the bill.

The only real power vested in the Constitutional Council is to finance litigation in any case which in its opinion "constitutes a proper and suitable test case for determining the validity" of the law or provision in question.[15] The necessary certificate will only issue if the Council has reported adversely on the measure.

* * * *

Manifestly the Declaration of Rights, on an objective reading of its efficacy to limit the power of the legislative arbitrarily to derogate from the rights and liberties of the individual, falls woefully short of the requirements of the Rule of Law. The full extent of the shortcoming, however, cannot be appreciated without an examination of the pre-existing legislation saved by section 70.

2. Other Legislation

In the main, the legislative has not found it necessary to introduce new legislation; apart from certain amendments to the existing law, which have made the powers even more draconian than before, the three enactments now to be considered were all part of the law on the appointed day. The examination will be confined to the security legislation[16]; discriminatory legislation has been omitted for the sake of brevity.

(1) Unlawful Organizations Act (May 15, 1959)

Section 3, gives the Governor[17] power to declare any organization to be an unlawful organization if it appears to him –

> a. that the activities of such organization or of any of the members of such organization

---

[15] Section 71(6).

[16] It would be illuminating, but rather beyond the scope of this paper, to trace the history of the security legislation in Southern Rhodesia and to observe how, little by little, greater and greater inroads have been made into individual liberties over the past few years. And it is particularly depressing to read some of the speeches made in Parliament in opposition to the earlier bill and to compare them with the attitude of members today (which indeed reflects the attitude of the people who put them there).

[17] i.o. The Governor in Council.

i. are likely to endanger public safety, to disturb or interfere with public order, or to prejudice the tranquillity or security of Southern Rhodesia; or
ii. are dangerous or prejudicial to peace, good order or constitutional government; or
iii. are likely to raise disaffection among the inhabitants of Southern Rhodesia or to promote feelings of ill will or hostility between or within different races of the population in Southern Rhodesia; or

b. that such organization is controlled by or affiliated to or participates in the activities or promotes the objects or propagates the opinions of any organization outside Southern Rhodesia which is named or described either specifically or generally in Part II of the Schedule.

Sub-section (b) is particularly interesting. The following organizations are listed in Part II of the Schedule:

The World Federation of Trade Unions
The World Peace Council
The World Federation of Democratic Youth
The Women's International Democratic Federation
The International Union of Students
The African National Congress of the Union of South Africa.

Section 6 gives the Governor power to order any person who was an office-bearer or officer of an organization declared unlawful in terms of section 3:

a. to resign, within such period as may be specified in the notice, as an office-bearer, officer or member of any organization or class of organization specified in the notice;
b. not to become an office-bearer, officer or member of any organization or class of organization specified in the notice during such period, not exceeding three years, as may be specified in the notice.

Section 8 gives a police officer very wide powers of entry and search, including the power to do so without warrant if he "believes on reasonable grounds that delay in obtaining a warrant under this section would defeat the object of the search".

Section 9 is discussed in detail in para. B.2.(2) infra.

Section 11 creates certain statutory presumptions. A person is presumed "until and unless the contrary is proved" to be a member of an unlawful organization if he attends a meeting thereof or if any books, documents, insignia, etc., are found in his possession or under his control. This type of provision, and more particularly provisions placing the onus on the accused, have been a feature of the amendments to the security legislation introduced during the past few years.

Section 13 provides that if the Minister "has certified that he considers that any proceedings in any court of law in respect of any matter arising under this Act should be held behind closed doors, the court may direct that such proceedings shall be so held".

(2) Law and Order (Maintenance) Act (December 2, 1960)

Section 4 reads:

> for greater clarification of existing law, it is hereby declared
> a. that the freedom commonly called the Freedom of Public Assembly does not confer on any individual a right to be at any place situated on land belonging to or vested in the Crown or a local authority or any other person;
> b. .....

This provision is far from innocuous, since in the African urban areas halls, playing fields and similar places which might be expected to be used as meeting places are the property either of the local authority or some such organization as the Rhodesia Railways or the Wankie Colliery.

Part I of the Act deals with processions, gatherings and meetings. Section 6 provides for the control of public processions by a regulating authority (usually a senior police officer in that area). The form of subsection (2) is particularly significant; this requires any person who wishes to form a procession to make application to the regulating authority "and if such authority is satisfied that such procession is unlikely to cause or lead to a breach of the peace or public disorder he shall, subject to the provisions of section 10, issue a permit" specifying inter alia such conditions as the regulating authority may deem 'necessary.' The way in which this section is framed clearly gives the regulating authority what amounts in practice to a complete discretion whether or not to issue a permit.

Section 7 has been amended since the appointed day, and has been held not to be saved by section 70 of the Constitution.[18] It prohibits the convening on a Sunday or other public holiday of public gatherings save those of a class described in the first schedule to the Act or those in respect of which the Minister has granted a permit. The first schedule excludes from the operation of the section gatherings for a host of religious, educational, recreational, social, agricultural and industrial purposes (including gatherings held by registered trade unions for bona fide trade union purposes) but repeatedly prohibits gatherings for political purposes. For instance, meeting of farmers are permitted "for purposes which are non-political"; again, luncheons, dinners or dances given or held by any clubs, associations or organizations "which are not of a political nature" are permitted; and more far-reaching still, the exemption does not apply to gatherings held by any club etc., "which is of a political nature and at which the discussions and matters dealt with are of a political nature".

---

[18] See Maluleke's case, para B. 3. (2) infra.

Sections 8, 10 and 11 give District Commissioners and regulating authorities very wide powers to prohibit or control public gatherings and processions; and sections 12 and 13 give the Minister even wider powers on similar lines but including the power to prohibit individuals from attending gatherings.

Section 17 empowers a police officer "for the proper exercise of his preventive powers and the proper execution of his preventive duties" to forbid any person at a gathering from addressing such gathering and to enter and remain on any premises, including private premises, at which three or more persons are gathered "whenever he has reasonable grounds for believing that a breach of the peace is likely to occur or that a seditious or subversive statement is likely to be made". "Premises" does not, for the purpose of this section, include a private domestic residence, but "private premises" means premises to which the public have access (whether on payment or otherwise) only by permission of the owner, occupier or lessee. This section was invoked to invade an executive meeting of an African political party in private premises; on the refusal of the police to leave, the committee was forced to repair to a private house.

Part II of the Act deals with printed publications. Section 18 gives the Governor power, if he is of the opinion that "the printing, publication, dissemination or possession of any publication or series of publications is likely to be contrary to the interests of public safety or security", to declare such publication to be a prohibited publication; in the case of any newspaper which was registered as such on December 2 1960, any such order requires to be authorized by a resolution of the Legislative Assembly.[19]

Section 20 gives the Postmaster General, or any other officer of the Ministry of Posts authorised by him, or any officer of customs, or any other person authorised by the Minister, power to detain, open and examine any package or article "which he suspects to contain any prohibited publication or extract therefrom".

Part III of the Act (sections 21 to 48) creates a wide range of offences in many of which the onus is cast on the accused. The total effect is very far-reaching and the penalties severe; in many cases there is no option of a fine and in others a minimum sentence. However, it is proposed to examine only a few of the offences.

Section 26 creates, inter alia, the following offences:

> Any person who, without lawful excuse, the proof whereof lies on him –
> a. ....
> b. persistently follows some other person about from place to place;

[19] See the African Daily News case, para B. 2. (1) infra.

c. ....
d. does any act or behaves in a manner which is likely to compel or induce some other person to do some act which such other person is not legally obliged to do;
e. does any act or behaves in a manner which is likely to compel or induce some other person to refrain from doing some act which such other person is legally entitled to do;
f. demands that any person should join or refrain from joining a political party or political organization or a particular such party or organization or endeavours to compel a person to do so;
g. demands from some other person the production of any document, badge or other thing whatsoever signifying that such other person is a member of any particular political party or political organization[20];

shall be guilty of an offence and liable to imprisonment for a period not exceeding ten years.

In terms of subsections (d) and (e) it is an offence to invite anyone to do anything he is not legally obliged to do (e.g. to come to tea) if the invitation is accompanied by an element of intimidation or unlawful compulsion; and if the offence is committed for "political motives" there is a minimum sentence of three years imprisonment.[21] There have been some distressing results; in one case a woman was convicted, and the minimum sentence imposed, for having kicked over the beermugs of certain persons at a beer hall and shouted "This is not the day to drink beer" (Joshua Nkomo was on trial at that time).

Section 32 is worth quoting in full:

Any person who uses any opprobrious epithet or any jeer or jibe to or about any other person in connexion with the fact that such other person has
a. undertaken, continued, returned to or absented himself from work or refused to work for any employer; or
b. undertaken any duties as a member of any police reserve or of any Government department;

shall be guilty of an offence and liable to a fine not exceeding one hundred pounds or to imprisonment for a period not exceeding one year.

Section 34 makes it an offence to act at a public meeting "in a disorderly manner for the purpose or which has the effect of preventing the transaction of the business for which the meeting was called together"; the penalty – one hundred pounds or one year.

Sections 39 and 41 deal respectively with undermining the authority of the police and undermining the authority of public officers. Inter alia, it is an offence to say or do anything which is likely to expose a police officer, the police or any section thereof to

[20] One observes again the emphasis on political activities.
[21] Section 59.

contempt, ridicule or disesteem, and similar provisions exist in relation to a public officer or class of public officer. Under section 39 a man who, in the course of a speech, had referred to the police officers present as "little boys" was sentenced to four months imprisonment; on appeal the conviction was upheld but the sentence suspended.[22]

Section 44 dealing with subversive statements and publications has been instrumental in curtailing considerably freedom of speech. There are eight definitions of a subversive statement, two of which in particular have formed the basis of charges against many African nationalists:

> a statement which is likely
> i. .....
> ii. to excite disaffection against ... the Government or constitution of Southern Rhodesia ... or the administration of justice therein;
> .....
> v. to engender or promote feelings of hostility to, or expose to contempt, ridicule or disesteem, any group, section or class in or of the community on account of race, religion or colour;
> .....

Subsection (2) sets out the offences and contains a proviso whereunder the accused escapes conviction if he satisfies the court that the statement was made in good faith and with the intention

> i. of showing that the Government has been misled or mistaken in any measure; or
> ii. of pointing out errors or defects in the Government or constitution or in the administration of justice, with a view to the reformation of such errors or defects; or
> iii. of urging any person to attempt to procure by lawful means the alteration of any matter by law established
> and that it was made in good faith, temperately, with decency and respect and without imputing any corrupt or improper motive.

It was by no means easy for an African politician to make a speech critical of the government without being caught by this section. He would not be alive to the distinction between the party in power and government in the sense of an organized entity; references to "white men" were difficult to avoid in any speech about Rhodesia, and would frequently lead to a conviction unless the reference was held to be in effect a reference to the ruling party; and any excess in the choice of words destroyed the protection of the proviso.

Many of the offences in this part of the Act are ones in respect of which bail cannot be granted pending appeal; and a general

---

[22] Under this section there is no option of a fine.

provision appears in the Criminal Procedure and Evidence Act whereunder neither an accused person nor a convicted person pending appeal may be admitted to bail "if the Attorney General certifies that it is likely that public security would be prejudiced".

Part IV contains sundry miscellaneous provisions, and in particular section 50, under which large numbers of people have been restricted in various parts of the country. This section in its original form read:

1. If at any time the Minister considers that for the purpose of maintaining law and order in any part of Southern Rhodesia it is desirable to do so, he may ... make an order against any person for all or any of the purposes mentioned in subsection (2).
2. An order may be made in terms of sub-section (1) for all or any of the following purposes, that is to say
   a. for securing that, except in so far as may be permitted by the order or by a written permit issued by the Minister, the person named in the order shall not be in the area in Southern Rhodesia specified in the order during such period, not exceeding three months, as may be specified;
   b. for securing that, except in so far as may be permitted by the order or by a written permit issued by the Minister, the person named in the order shall remain in such area within Southern Rhodesia as may be specified in the order during such period, not exceeding three months, as may be specified;
   c. for requiring the person named in the order to notify his movements in such manner, at such times, to such authorities and during such period, not exceeding three months, as may be specified in the order.
3. An order may be made in terms of paragraph (a) of sub-section (2) against any person who is outside the specified area.
4. .....
5. .....
6. An order made in terms of this section shall come into force immediately it is delivered or tendered to the person to whom it relates, and if at the time of such delivery or tender such person
   a. in the case of an order mentioned in paragraph (a) of subsection (2), is within the area specified in the order, he may be removed therefrom; or
   b. in the case of an order mentioned in paragraph (b) of subsection (2), is outside the area specified in the order, he may be removed thereto

   by any police officer and shall while being so removed be deemed to be in lawful custody.

   Such order shall contain a statement informing the person of his right to object and to make representations in writing to the Minister within seven days from the date of the delivery or tender thereof. If any representations in writing are received within seven days of the delivery or tender of the order, the Minister shall consider the representations and either revoke the order or notify the person to whom it relates of his refusal to do so.
7. .....
8. .....

This section was introduced a few weeks before the appointed day. There may be no significance whatever in the timing; on the other hand it may be that the legislature at least feared that the section would be repugnant to the Declaration of Rights (the terms of which were, of course, already known). After the appointed day (by Act 12 of 1964) the period of three months was extended to one year, and it was under the section in that form that the first restriction case was argued.[23] Following the Appellate Division ruling that the Preventive Detention Act was no longer in force,[24] a further amendment was passed extending the period from one year to five years. It will be noted that there is nowhere in the section any reference to restriction; this is a term which has been used for convenience in the judgments and is used in this paper on the same basis.

What is the proper construction of this section, whether it is inconsistent with the Declaration of Rights, and in particular section 58(2)(k), and whether the amendment from three months to one year was a material modification, are all matters which will shortly be argued before the Privy Council; comment would therefore be improper. It can, however, be said that whatever be the proper constructions of this section and section 58(2)(k), there is here a serious abrogation of the fundamental rights of the individual.

Section 56 gives the police wide powers of search and seizure.

1. A police officer may stop and, without warrant
   a. search any person or vehicle entering or leaving Southern Rhodesia and any person in or upon such vehicle; and
   b. seize any thing as to which he has reasonable grounds for believing that it will afford evidence as to the commission of an offence under any law.
2. .....
3. If the Governor is of the opinion that it is desirable in the interests of the public safety to do so, he may by notice in the Gazette declare that during such period as may be specified in such notice, police officers may, without warrant, exercise the powers conferred by subsection (1) in respect of vehicles and persons in or upon such vehicles anywhere in Southern Rhodesia, and thereupon such powers may be so exercised.

In fact, the necessary declaration in terms of subsection (3) has been made, and the provisions of subsection (1) have been in force for some considerable time in relation to all persons and vehicles in the country and not merely persons or vehicles entering or leaving.

---

[23] See First Restriction case para B. 1. (1) infra.
[24] See Detention case para B. 1. (2) infra.

(3) Emergency Powers Act (December 2, 1960)

This Act was passed on the same day as the Law and Order (Maintenance) Act. Section 3 reads:

1. If at any time it appears to the Governor that any action has been taken or is immediately threatened by any persons or body of persons of such nature and on so extensive a scale as to be likely
   a. to endanger the public safety;
   b. to disturb or interfere with public order; or
   c. to interfere with the maintenance of any essential service;
   in Southern Rhodesia or in any part of Southern Rhodesia, the Governor may by proclamation (hereinafter referred to as a proclamation of emergency) declare that a state of emergency exists in Southern Rhodesia or in any part of Southern Rhodesia, as the case may be.
2. No such proclamation shall be in force for more than three months without prejudice to the issue of another proclamation at or before the end of that period if the Legislative Assembly by resolution so determines.
3. .....

Section 4 empowers the Governor to make such regulations as appear to him to be necessary or expedient, and in terms of subsection (2) such regulations may inter alia make provision "for the summary arrest or detention of any person whose arrest or detention appears to the Minister to be expedient in the public interest."

* * * *

It is clear that the substantive content of the written law, read as a whole, permits the most serious abrogation of every basic right of the individual. It remains to examine the manner in which, and the extent to which, the executive has made use of these powers.

B. ACTIONS OF THE EXECUTIVE

In the legislative context outline above the extent to which Southern Rhodesia may be said to function within the Rule of Law may be measured by the extent to which its very comprehensive and far-reaching powers are regarded by the administration as inadequate for its purposes. Its actions have sometimes been within the strict letter of the law, and sometimes not. But strict legality, as such, is not the issue; a more appropriate classification for the present purpose is:

1. Action which is illegal, either in terms of the Constitution or of some other law;
2. Action which offends against the letter of the Constitution;
3. Action which offends against the spirit of the Constitution.

Politically, the spirit of the 1961 Constitution was that it would encourage African political development and lead smoothly to majority rule, that it would protect the rights and liberties of the individual, and that it would remove discrimination. Legally, it is difficult to argue that anything which is within the letter offends against the spirit. However, for reasons already advanced, the existence of section 70 makes the Southern Rhodesian Constitution a special case; the document cannot be read, so far as its spirit is concerned, as if all pre-existing repugnant legislation were incorporated. And it is in the same sense that "letter of the Constitution" is here used, i.e., with the exception of section 70.

1. Illegal Action

(1) The First Restriction Case

In February 1964 the government set about removing from contact with their fellows almost every African political leader and organizer at national and regional level. Large numbers were sent to restriction areas under section 50 of the Law and Order (Maintenance) Act, quoted above. At the same time, the Minister created protected areas encircling the restriction areas by orders made under section 5 of the Protected Places and Areas Act, which permits him to declare an area to be a protected area if it appears to him "to be necessary or expedient that special measures should be taken to control the movements and conduct of persons" in the area.

The effect of the two orders, and the manner of the administration of the order relating to the protected area whereunder the Minister deemed himself to have an absolute discretion as to what persons were permitted to enter the protected area,[25] was that no one was permitted to see the restrictees without the written authority of the Minister. (It is interesting to note that in his affidavit the Minister conceded that his motive in creating these protected cordons was to limit and regulate access to the restrictees by members of the public, since "without such regulation the whole purpose of the restriction might be defeated".)

---

[25] The Minister certainly exceeded his powers under that Act also, since he regarded himself as able to prohibit entry and passing through, whereas on a proper construction of the section his powers were only to regulate such entry and passing through – see *Minister of Justice* v. *Musarurwa and Others* 1964 (4) S.A.L.R. 209 at 225.

The facts are best presented in the words of Beadle, C. J.[26]

> The first group of respondents, confined in Wha Wha Restriction Area, are confined in a fenced area five acres in extent, the boundaries of which are patrolled by police and police dogs; the second group of respondents, confined in Gonakudzingwa Restriction Area, are confined in an area 110 acres in extent, situated in a game reserve in a very remote area. The respondents are not permitted to receive any visitors, except with official permission, the granting of which permission is entirely within the discretion of the Minister. The respondents have been permitted to receive some visitors, but have been refused permission to receive many others. It is not possible for the respondents to obtain any form of employment, or to support themselves within the area; but the Government supplies them with accommodation and essential foodstuffs. The adequacy of this accommodation and of the food supplied is, however, a matter in dispute between the parties. It is admitted, however, that the accommodation provided is not suitable for the accommodation of the respondents' families; and, in fact, some of their families are living with them. There are no facilities in either area for the purchase of food or other commodities; although there is a canteen outside Wha Wha camp from which the police do at times buy articles for the respondents at their request; but the police regard the providing of this service as a favour. The respondents are free to move within the areas, and are not subjected to the rigid discipline usually associated with internment or detention camps; but that they are subjected to a form of discipline is clear from the fact that privileges are withdrawn if they do not observe the instructions given to them. This appears from extracts from two affidavits of those respondents confined in Wha Wha, which read:
>
> > 'Furthermore, even the daily rations are not always supplied. Twice during our restrictions our rations have been withheld from the whole camp (and at the same time no food was brought for us) because the roll call which we are made to attend each morning at 7.30 a.m. was not attended satisfactorily.'
> > 'Our food was withheld from us on two occasions; once when we asked for some beans instead of peas which we had been unable to cook, and once when we did not come to the gate as ordered by the policeman'.
>
> From this outline of the facts it will be seen that the respondents confined in Wha Wha are confined in a relatively small area which is completely fenced and guarded. Those confined in Gonakudzingwa are, it is true, confined in a larger area, and one that is not fenced; but its remoteness, and the fact that it is surrounded by 60 square miles of protected area, isolates it from the rest of the Territory as effectively as if it were an island; and, so far as the inmates are concerned, they are confined and isolated within its boundaries as effectively as if the area were fenced and guarded in the same way as the Wha Wha area.

These restrictions were challenged by way of application to the High Court on Notice of Motion. The application was upheld on the ground that, on the facts, the liberty of the individual had been reduced almost to vanishing point and that this result was not

---

[26] *Minister of Justice* v. *Musarurwa and Others* supra at 211.

permissible in terms of section 50. On appeal by the Minister, the Appellate Division found it unnecessary either to uphold or differ from the court a quo in its findings concerning the liberty of the individual und unanimously dismissed the appeal on other grounds. The Chief Justice held that it was not permissible to use together for an unlawful purpose powers delegated under two Acts, notwithstanding that the power conferred under each Act, taken separately, was lawfully used for the purpose for which it was conferred. The concurring judgments of the other two Judges of Appeal each added separate reasons which turned on the individual Acts.

The last word on this case has not yet been spoken; the Minister has been granted special leave to appeal to the Privy Council.

(2) The Detention Case [27]

Judgment in the first restriction case was delivered on August 13, 1964. The Minister immediately issued fresh orders under section 50; the restriction areas were extended, and the protected cordons were not, of course, repeated. There was consequently free access by the public, and rapidly increasing numbers of people began to visit the restrictees. It is not unreasonable to conclude that this was the reason for the action now under review.

In October 1964 the Governor detained Joshua Nkomo and sixteen of his leading supporters in Gwelo Prison. The action was taken under the Preventive Detention (Temporary Provisions) Act 1959, the effect of which was that the detainees were in all respects subject to prison regulations and discipline save for forced labour. It is unnecessary to consider the provisions of the Act, save to say that it authorized detention without trial for a period up to the life of the Act.

The Act was originally passed on May 15, 1959 and in terms of section 24(1) was expressed to continue in force for five years from that date "and shall then expire". Early in 1964 the Minister introduced an amending Bill whereunder the period was to be extended to ten years. The Constitutional Council reported adversely on the Bill, stating in terms that the original Act was repugnant to the Constitution and that the proposed amendment was a material modification which was therefore not saved by section 70. The government did not at that time command a two-thirds majority in Parliament, but the opposition supported the Bill and the amendment was duly passed prior to May 15.

---

[27] *Nkomo and Others* v. *Minister of Law and Order* 1965 (1) S.A.L.R. 498.

The detentions were challenged by way of Notice of Motion direct to the Appellate Division in terms of section 71 of the Constitution. Counsel for the Minister made a somewhat half-hearted attempt to argue that the principal Act was not repugnant to the Constitution, but his real submission was that the amendment did not constitute a material modification. The court was unanimous in rejecting both submissions. In this case also an appeal is pending before the Privy Council.

The case is of particular importance in providing an insight into the attitude of the government (and, incidentally, the so-called opposition). The government had been told, by the very body set up to act as watchdog, not only that the Act was repugnant to the Constitution, but that to invoke its provisions would be illegal. The government chose to ignore the opinion of the lawyers on the Council; but more significantly, it chose to ignore also the recommendations relating to the rights of the subject.

2. Action Offending against Letter of Constitution

(1) On August 26, 1964 the African Daily News (the only daily paper widely read among the African people) was banned under an order issued in terms of section 18 of the Law and Order (Maintenance) Act.[28] The order was challenged on the ground that the section under which it was made is repugnant to section 65 of the Constitution and ultra vires.

It is clear from the report [29] that no attempt was made by the Minister to argue that section 18 was not in fact repugnant to the Constitution; the argument turned entirely on whether it was saved by section 70. The Appellate Division (the Chief Justice presiding) held that it was so saved, having come into force on December 2, 1960 and, except for minor amendments, having remained in its original form ever since.

(2) The next case to be considered has not been the subject of litigation and is included here because, even if the Minister's action be legal, it is nonetheless contrary to the letter of the Constitution.

On August 26, 1964 the P.C.C. (Peoples Caretaker Council, led by Mr. Joshua Nkomo) was declared an unlawful organization under the Unlawful Organizations Act; immediately thereafter the police seized a number of jeeps and other vehicles under section 8 of that Act, and subsequently confiscated and disposed of them under section 9. Both sections 8 and 9 have been amended since the appointed day, but it is sufficient for the present purpose to quote

---

[28] See para. A. 2. (2) supra.

[29] *African Newspapers (Pvt.) Ltd., and Another* v. *Lardner-Burke and Another 1964* (4) S.A.L.R. 486

section 9(3) in its original and amended forms; prior to the appointed day it read:

> If after the lapse of three months from the date of the seizure of any article, moneys or thing, no person other than an unlawful organization or an office-bearer, officer or member of such an organization has satisfied the Minister that such article, moneys or thing does not belong to any unlawful organization or is not in any way connected with any such organization, he shall order that such article, moneys or thing be confiscated to the Crown, destroyed or disposed of in such other manner as he may specify.

By Act 9 of 1963 this subsection was repealed and the following substituted:

> If after a lapse of three months ... no person has satisfied the Minister that such article, moneys or thing does not belong to the organization *or has not been used in any way for or in connection with the purposes or activities of the organization before or after it was declared to be an unlawful organization,* the Minister shall order ... (italics added).

The Constitutional Council considered this amendment and in its report stated that the subsection was repugnant to section 61 of the Constitution. However, the report was non-adverse, and was silent on the question whether the amendment introduced a material modification of the pre-existing provision; the Council must, therefore, have taken the view that there was no material modification.

It is submitted that such a conclusion cannot be supported. The section as it now reads gives the Minister power to confiscate a vehicle which, six months or a year before the organization was declared unlawful, was lent to a member of that organization for the purpose of attending a meeting – a purpose which was perfectly lawful at the time. Again, the Minister now has power to confiscate from a bona fide purchaser for value a vehicle which was sold by the organization while it was still lawful. It is submitted that no such construction could conceivably have been placed on the section in force prior to the appointed day, and it is submitted in particular that the legislature could never be construed to have intended to vest in the Minister retrospective penal powers of this kind.[29a]

[29a] The view here expressed has now been upheld by the Appellate Division (see *Johanna Nkomo v. D. W. Lardner Burke N.O. and another,* Judgment No. A.D. 164/65). The Court, Sir Vincent Quenet, the Acting Chief Justice, presiding, held that in so far as the new sections made provision for the seizure and confiscation of property which belonged to the organization before it was banned, they introduced a fundamental, far-reaching and material change in the existing law and were therefore not saved by section 70 of the Constitution. The Court held that it was not necessary for the purposes of this case to decide whether sections 8 and 9 were wholly invalid and contented itself with holding that the words "before or" were invalid.

It must be said in fairness that the Minister had the support of the Constitutional Council for the proposition that his action was legal; on the other hand, he had been told that his action was contrary to section 61 of the Constitution.

3. Action Offending Against Spirit of Constitution

The submission made earlier as to the spirit of the 1961 Constitution – the encouragement of African political development and the smooth advance to majority rule, the protection of human rights and liberties, and the removal of discrimination – would not be accepted (certainly not in its entirety) by the reactionary white supremacist. But these particular aspects have not been plucked arbitrarily out of thin air; they reflect public statements made by both British and Rhodesian politicians at the time of the 1960/61 conference, and they reflect also the recent re-statement of Britain's position by the Secretary for Commonwealth Relations (House of Commons, July 30, 1965). But more importantly, they reflect the very minimum requirements of the Rule of Law as applied to a country still struggling under the yoke of minority rule – and indeed it may be going too far to attempt to reconcile such a situation with the right of the members of a society to elected responsible government. Be that as it may, it is certainly clear that to argue that the stated features do not reflect the spirit of the Constitution is to concede at once that that spirit offends against the Rule of Law.

In the event, African nationalist opposition has been crushed, and to do this the government has eroded almost to extinction the rights and freedoms the Constitution was designed to preserve. This has been achieved, in addition to the methods already examined, by the use of discretionary powers vested in the Governor, the Minister or in junior officials such as District Commissioners and Regulating Authorities. To deal comprehensively with this subject would be a monumental task; it is proposed to do no more then touch on certain more important aspects.

(1) The Right to Personal Liberty

The major examples of the deprivation of liberty are the present restrictions (in the process of being challenged), and the detentions under local emergencies. The restrictions are at present the subject of litigation, and certain facts are in dispute; comment would be improper.

Comment can, however, be directed to one aspect of these (and other) orders under section 50 of the Law and Order (Maintenance) Act on which there is no dispute of fact and which in any event is

not an issue in the case. The orders contain various reasons for their being made; in the early days the narrative might be "a belief that you have actively associated yourself with acts of violence and intimidation in . . ."; later the narrative became vaguer, until the standard reason became simply "a belief that you have engaged in subversive activities". It is clearly impossible to meet such an allegation; representations to the Minister must of necessity be in general terms. But the Minister's discretion cannot be challenged, and the persons concerned are deprived of their livelihoods and condemned for periods up to five years to live on basic rations supplied by the government. There is no provision for the maintenance of dependents, as there was under the Preventive Detention Act.

This section demolishes two pillars (at least) of the Rule of Law. The individual has no knowledge, save perhaps in completely general terms, of the allegations against him, has no right to be heard, and no remedy; and fundamental human rights are abrogated by means of delegated legislation.

The same applies to the use of local emergencies. On May 28, 1965 the Governor declared states of emergency in two remote areas, the one (Nuanetsi) embracing the restriction area in which Nkomo and some five hundred of his supporters are confined. Regulations were framed by virtue of the powers conferred by section 3 of the Emergency Powers Act; section 19(1) reads:

> If it appears to the Minister that the detention of any person *found within the area*[30] is expedient in the public interest, he may by order under his hand direct that such person be detained, and thereupon such person shall be arrested and detained

and sub-section (3) provides that the detention shall be "in such prison or other place as the Minister may direct and in accordance with instructions issued by the Minister."

Three categories of men have been detained under this provision. The first, men who were in restriction prior to the declaration of the state of emergency; the second, men who were sent to the restriction area after such declaration. Both categories, and particularly the second, may be forgiven for complaining that they were in the emergency area against their will and cannot properly be said to have been "found within the area".

But the case of Edward Bhebe, the third category, deserves special and detailed mention.[31] Bhebe was served in Bulawayo with a restriction order, under section 50 of the Law and Order (Maintenance) Act, early on July 9 1965, and driven immediately to

[30] Italics added.

[31] The facts are as given by Bhebe supported, as to the dates and times of the service of the orders, by the documents themselves.

Nuanetsi Police Camp,[32] a distance of some 275 miles, arriving at about 2.00 p.m. He was held at the police camp until about 1.30 p.m. on the following day, when he was served with a detention order which recited that it was based on "a belief that you are likely to do, in the area [33] or in any portion of the area, acts which are likely to endanger the public safety, disturb or interfere with public order or interfere with the maintenance of any essential service". The order had been signed by the Minister in Salisbury on the 9th, and immediately following its service Bhebe was driven back to Bulawayo and lodged in prison.[34]

To suggest that Bhebe, who was both legally and physically in the custody of the police from the moment of the service of the restriction order in Bulawayo until his handing over to the prison authorities, was "found within the restriction area" is to do violence to language.

It should be noted also that there are two other restriction areas elsewhere in the country, neither of which is within an emergency area.

(2) Freedom of Expression. Assembly and Association

On the freedom of expression, the case of the African Daily News has already been considered. The banning of political parties and trade union organizations (under section 3 of the Unlawful Organizations Act, which is saved by legislation [35]) interferes not only with the freedom of assembly and association but even more importantly with the freedom of expression. Both freedoms are abrogated also when individuals are banned from addressing or attending meetings.[36] The Law and Order (Maintenance) Act provides, as we have seen, for the most stringent control of meetings and processions, and these arbitrary powers, exercisable by junior officials, have been used to the full; where permission is granted, conditions are laid down the breach of any of which may lead to an order to disperse. In practice, permission to hold meetings has so frequently been refused that applications from African organizations are now rarely made.

---

[32] The Police Camp is only just within the emergency area and some 100 miles from the camps in which the Gonakudzingwa restrictees live. From Nuanetsi to the nearest boundary of the restriction area is some 60 or 70 miles as the crow flies.

[33] The Nuanetsi Emergency Area.

[34] There have been other similar cases, but the exact number is not known.

[35] See para. A. 1. (1) supra.

[36] Law and Order (Maintenance) Act, section 13. See para. A. 1. (2) supra.

In addition, no political or trade union meeting may be held on a Sunday or public holiday (Sunday was the popular day for such meetings) without the Minister's permission. This provision [37] was challenged by Maluleke, the President of the Motor Traders and Allied Workers Union. The section was held not to be saved by section 70, and an order was made calling on the Minister to show cause why the section should not be declared ultra vires the Constitution. The case went no further, apparently through lack of funds.

The potential difficulties facing an applicant in such cases have already been discussed.[38] They apply to several of the basic human rights, and in Maluleke's case, the only challenge of its kind, the Minister, by filing his certificate, invoked the full protection of the sub-section to legalize his use of legislation repugnant to the Constitution. There is no reason to suppose that the Minister will not do so again if necessary .

(3) Generally

No examination of the actions of the administration would be complete without the specific inclusion of the failure to bring the Statute Book into line with the Declaration of Rights. However, this matter has already been discussed in para. A 1.(1) supra, and nothing further need be added here.

* * * *

Demonstrably, it is submitted, the most serious inroads into the Rule of Law have been made in Southern Rhodesia, and continue to be made. The reason is self-evident; only by so doing can the government maintain itself in power with any degree of social order. Inroads into the Rule of Law are understandable – if regrettable – in young countries in the process of social and economic stabilization; but even in such circumstances, inroads are acceptable only if the trend is a diminishing one.

Where a country which has been self-governing for forty-two years manifests ever increasing erosions, both in severity and in character, of human rights and liberties, the conclusion is inescapable that the government cannot claim to express the will of the people. And the further conclusion is equally inescapable: that the increasing erosions of the Rule of Law reflect the mounting opposition of the people.

---

[37] Law and Order (Maintenance) Act, section 7.
[38] See para. A. 1. (3) supra.

COMPARATIVE LAW IN EASTERN EUROPE

by

JÁNOS TÓTH *

I. COMPARATIVE LAW AND THE COMPARISON OF LEGAL SYSTEMS WITH DIFFERENT CONCEPTS OF LEGALITY

A. Methodological problems

1. *Theoretical Bases for the Comparison of Legal Systems with Different Concepts of Legality. The Case of Eastern Europe*

The emergence of a Marxist social and economic system in the Soviet Union after World War I and in countries of Europe and Asia after World War II has given rise to the question whether the legal systems of "capitalist" and "socialist" societies, as they are called in Marxist terminology can be usefully compared. Soviet legal scholars claim that their system is entirely new, unique, a higher type of law. This claim raises serious difficulties for comparative study, which generally can only be made between phenomena of the same category. It may also be asked whether the two legal systems are understood well enough for jurists in either of them to undertake a comparison.

Before embarking on a survey of the state of comparative law in Eastern Europe, it is useful to outline the position of Western comparative legal science on the possibilities of comparison between legal systems with different concepts of legality, more particularly between systems based on a "market economy" and on a "centrally planned economy", as they are called in the economic organs of the United Nations.

The Theoretical Possibility of Comparison

The Marxist tenet of the "opposition of the two legal systems" limits comparison to the enumeration of the advantages of socialist law as opposed to the shortcomings of capitalist law. Comparative

* Dr. Jur., Dr. rer. pol., *Privat-docent,* University of Geneva, Legal Officer for Eastern Europe, International Commission of Jurists.

legal science outside the communist orbit rejects this approach with the argument that it projects the existing opposition of political systems into legal science, a step which should be avoided. On this basis there has recently been in the West an increased interest in the "comparison of legal systems based on different economic theories" [1]. Arguments advanced in these studies showed that historical materialism as taught by Marx does not bar the application of the comparative method for analysing socialist and non-socialist legal systems. It is therefore argued that although the two systems differ in their evaluation of legal institutions, the yardsticks employed, the *method* of comparison is invariable.

The necessary conditions for comparison exist: comparative legal science has elaborated a suitable terminology and frame of reference so as to enable Western scholars to analyse Eastern European legal institutions in the context of their socio-economic reality. In the West comparative study of the legal systems of Eastern Europe had provided sufficient material to permit examination of the theoretical bases, the history and the codes of these legal systems. Specialized institutes have been set up in many parts of the world to carry on research into the law and government of communist countries. A considerable literature has been published in English, German, Japanese and French. Standard textbooks and texts of legal codes have been translated, analysed and debated. Research is active and vigorous even though carried on under the handicap of lack of co-ordination. Teaching, however, lags far behind. The lack of courses at law schools is responsible for the widespread ignorance of Eastern European law among jurists. At the specialist level, in comparative law, however, research on Eastern European law is firmly established and renders fruitful comparison possible [2].

The socio-economic trends of our time are also working towards the development of wider bases for comparison. In the words of Kazimierz Grzybowski:

> The structural alterations in the Soviet society, the functions of organised social groups in the public life of socialist countries, the social and moral ills of modern man within the socialist orbit – all bear striking resemblance to the developments and problems on our side of the world.[3]

---

[1] Colloquia of the International Association of Legal Science, 1958, 1961.
Dietrich A. Loeber: Rechtsvergleichung zwischen Ländern mit verschiedener Wirtschaftordnung (Comparison of legal systems with different economic systems) *Rabels Zeitschrift*, 1961, pp. 201-229.
Kazimierz Grzybowski: *Soviet Legal Institutions*, 1962, Ann Arbor, Michigan.
O. W. Jakobs: Zur Methodik der Zivilrechtsvergleichung zwischen Rechten aus verschiedenen Wirtschaftsordnungen (Methodology of comparative civil law of different economic systems), *Osteuropa-Recht*, January 1963.

[2] I. Zajtay: *L'Association internationale des sciences juridiques*, 4e. ed. 1963, p. 32.

[3] Grzybowski, *op. cit.*, p. 6.

The Case of Eastern Europe

The communist orbit or, as communist leaders and scholars often call it, the socialist commonwealth, includes Asian as well as European countries: in Asia, the People's Republics of Mongolia, China, Korea and Vietnam; in Europe, those countries which to-day are collectively referred to as Eastern Europe. The differences between the Asian and European parts of this commonwealth are well known. The Asian countries are at an earlier stage of their social, economic and legal development. The countries of Eastern Europe have arrived at a more complex stage. Legal thinking is also very different: in Asia, law has a subordinated role in social life and social traditions give a very different context to the basic political and legal institutions taken over from the Soviet Union [4]. In Eastern Europe, the communist system was super-imposed on an existing European continental legal system which drew heavily from its Roman heritage. These different conditions should be taken into account in the study of these legal systems. Comparative research of Asian socialist legal systems is bound to be a long range undertaking which may yield tangible results in the remote future, perhaps in the next generation [5].

Conditions for research in Eastern European law are more favorable. The progress of industrialization and the burgeoning economic reforms in Eastern Europe tending to introduce a socialist market economy make comparison between the two types of European legal systems increasingly challenging. In this domain the question may be raised, as Professor Hazard has put it: "whether problems of modern industrial society, which have much uniformity in all developed countries, are approached differently because of a difference of the economic systems in the society concerned?" [6]

The prevailing school of thought among Western comparative lawyers asserts that the institutions of Eastern European law are part of the legal tradition of Europe. The formulation given by Dr. Grzybowski is categorical:

> Soviet legal order... may be analysed in terms of response to the challenge of social change, a response which has retained the formal aspects of modern European law [7].

---

[4] The Dynamic Aspects of the Rule of Law in the Modern Age, Report on the Proceedings of the South-East Asian and Pacific Conference of Jurists, Bangkok, Thailand, 1965, p. 31 ff. Syong Choon Hahm, The Rule of *What* Law? The Korean Conundrum. Infra, p. 278.

[5-6] J. N. Hazard: Comparative Law and Economic Systems, *The Asian Comparative Law Review,* 1963, Vol. I, No. 1-4, pp. 85-87.

[7] K. Grzybowski: *op. cit.*, p. 5; citing J. N. Hazard: Settling Disputes in Soviet Society, 1960, pp. 478-479. See also: S. Braga: Das Sowjetische Zivilrecht und das europäische Privatrecht. (Soviet Civil Law and European Private Law). *Jahrbuch für Ostrecht,* 1960, Bd. I, pp. 69-84.

Concerning Eastern Europe the field is sufficiently cleared for detailed and intensive comparative legal research. Knowledge of the law in Eastern Europe is of increasing importance and is beginning to take its due place in comparative law everywhere in the world. For lawyers trained in the European civil law system, the research in Eastern European law offers the attraction of representing a special variant stemming from a common origin. Comparative research in the laws of Europe – East and West – is, moreover, opening possibilities for increasing understanding by decreasing ignorance and ideological rigidity.

These considerations have led the author of the present paper to limit the scope of his survey to Eastern Europe.

Aspects of Comparison

The main problems which comparative research has to examine arise from the functional structure of law. For the purpose of the present paper they can be grouped under three headings:

1. What ideals and general principles do the legal systems to be compared promote?
2. How do their legal techniques compare? What institutions and procedures are used to implement the ideals and principles aimed at? Did a new economic system necessitate new legal techniques?
3. Which areas offer most suitable subjects for comparison and for co-operation among jurists belonging to different legal systems?

2. *The Comparative Method in Eastern Europe*

(a) The Period of Isolation

In Soviet legal science the study of Western "capitalist" law was for a long period limited to a bare minimum by ideological tenets and policy considerations. Western legal systems were regarded as historically inferior and ideologically dangerous. Translations of works written by Western scholars were rare. The basic attitude was expressed in a telling manner by D. M. Genkin, an acknowledged authority on Soviet civil law, in his Preface to the translation of Ennecerus' famous Commentary on German Private Law:

> The research into civil law of capitalist countries has its importance in that it shows the basic opposition of capitalist legal systems to the socialist one. Research into civil and commercial law of capitalist countries should reveal its exploiting character dictated by a class. Such an analysis can only be performed by the scientific method of Marxism-Leninism, the only scientific method [8].

[8] D. M. Genkin: *Preface to Ennecerus,* Moscow, 1949, quoted by Loeber, *op. cit.* (footnote 1).

An attitude of superiority coupled with distrust of everything foreign has led to crude oversimplifications and to the subordination of legal comparison to current political slogans. It should be recalled that whereas the claim of superiority dates back to the first years of Soviet legal science, it was developed and reigned supreme during the period of Stalin's personal dictatorship under which it reached its extreme limits and revealed its hollowness and distorting character. As Leonard Schapiro put it, law reached the worst stage that it is capable of descending to in a totalitarian State: "the constant and systematic practice of the most flagrant illegality, accompanied by a carefully-drilled, obedient and sycophantic chorus of public men, including practising and academic lawyers, boasting that the most perfect legality in the world was to be found in the Soviet Union" [9]. This approach showed that comparison which is restricted by rigid ideological tenets ceases to be comparison and becomes a series of propaganda allegations.

In other countries of Eastern Europe the political regimes followed the Soviet example and disregarded the scientific comparative approach.

(b) Law Reforms and Co-existence

Law reforms initiated after Stalin's death in 1953 have become one of the major characteristics of social development all over Eastern Europe. These legal reforms tended to reshape the entire legal systems of the respective countries, to eliminate terror and to improve the legal position of the citizen [10].

These reforms, of course, have limitations inherent in the political and economic system of these countries. Moreover, there were contrary trends tending to re-establish centralized bureaucratic controls. Nevertheless the reforms have ushered in a new period in the legal history of Eastern Europe [11] and have also brought about a modified approach to comparative law.

Another factor contributing to the development of a new approach was the Soviet policy of peaceful co-existence. A voluminous literature has already been published on this controversial term; for the present purpose may it suffice to recall that this policy was officially defined by the 1961 Programme of the Communist

[9] Leonard Schapiro: Prospects for the Rule of Law, Law and Legality in the USSR, *Problems of Communism,* March-April 1965, p. 5.

[10] János Tóth: Recognition of Human Rights in Eastern Europe, *International Colloquium on the European Convention of Human Rights,* Vienna, 18-20 October 1965; cf. *Bulletin of the International Commission of Jurists,* No. 24, December 1965.

[11] Reinhart Maurach: Versuch einer Periodisierung der sowjetischen Rechtsgeschichte, (Attempt to fix periods in Soviet legal history), *Jahrbuch für Ostrecht,* Bd. I/2, October 1960, pp. 107.

Party of the Soviet Union at its 22nd Congress as "peaceful competition between socialism and capitalism on an international scale" and as "a specific form of class struggle" intended to triumph eventually over all adversaries or enemies of world communism [12]. It involves the renunciation of the doctrine of the inevitability of war between socialist and capitalist countries which has become the stumbling bloc in Sino-Soviet relations.

The legal reforms referred to above have created a more favourable atmosphere for scientific work. Legal science was encouraged to contribute its share to the evolution. A new formula was looked for which would reconcile the claim that Soviet law was superior with the need for increasing scientific comparison.

Professor Romashkin, then Director of the Institute of State and Law of the Academy of Science of the USSR, has explained that modified attitude as follows:

> Soviet jurists who together with bourgeois scholars are taking part in activities of organizations in the field of comparative law have as their task to state and explain the Soviet concept of law, to demonstrate the superiority of Soviet law as the highest historical type of law. They should not find similarities and identities between socialist and bourgeois law, which unfortunately still sometimes happens [13].

This directive recognized the existence of international comparative legal research, and the need for Soviet legal scholars to participate in it, but tried to limit the participation to a duty to give and a prohibition against taking.

The Warsaw Colloquium, 1958

The first important encounter of jurists from Eastern Europe and their colleagues "nurtured in systems of law existing in or originating from Western Europe" – as Professor Hamson has put it – was the Warsaw Colloquim of the International Association of Legal Science, held in 1958 [14]. Highly qualified representatives of the legal disciplines in countries of Eastern Europe delivered reports on the state of legality in their respective countries. The reports served to compare different methods of implementing Socialist Legality: the first aim was a comparison of legal systems based on

---

[12] Edward McWhinney: *Peaceful Co-existence and Soviet-Western International Law*, 1964, reviewed by Ivo Lapenna, *International and Comparative Law Quarterly*, July 1965, Vol. 14, part 3, p. 1047.

[13] Romashkin, P. S.: Zadachi instituta prava ANSSR v svete reshenii XXI sezda KPSS (Tasks of the Institute of Law, in the light of the 21st Congress of the CPSU), *Sovetskoe Gosudarstvo i Pravo*, 1959, No. 2, p. 144.

[14] Le concept de la Légalité dans les pays socialistes: Colloque de l'A.I.S.J. 10-16 septembre 1958, (The Concept of Legality in Socialist countries) *Zeszyty Problemowe Nauki Polskiej*, Cahiers de l'Académie Polonaise des Sciences, Warsaw 1961.

a similar concept of legality. The second aim was to present and explain the concept of Socialist Legality to numerous Western participants, which inevitably involved a comparison of legal systems of societies with different economic systems and concepts of legality. The purpose was therefore in line with the new approach.

Common Principles. Western participants found that legal theory in the West and in Eastern Europe had much in common. The fundamental aim of the legal system in Eastern Europe, as formulated by Professor Tshikvadze (USSR), namely, "the complete well-being and all-round development of all members of society, the flowering of all forces and creative gifts of personality" was found to be identical with the basic aim of their own legal system. A considerable number of common general principles were also put forward, on the basis of which some Western participants even went so far as to express an optimistic view about a possible long-range synthesis of the two legal systems. Against such visions, jurists from Eastern Europe took a firm stand.

It was admitted that the comparative method is well suited to undertaking an interrelated study of the legal systems of societies with different economic systems. The existence of common basic principles and similarities in form between legal institutions was also recognized. On the other hand jurists from Eastern Europe were keen on stressing the limitations of any such comparison: without taking into consideration the opposing socio-economic and political backgrounds of legal institutions, comparison becomes a mere play with empty forms devoid of substance.

Most Eastern European participants, with the exception of the Yugoslavs, stressed differences rather than similarities. Jaroszynsky from Poland expressed this attitude in the following terms:

> Our work here should aim at clarifying by scientific analysis the most essential features of the two legal systems; then we have to compare them, discover and state their basic differences [15].

Pjotr Nedbajlo of Kiev, USSR, also admitted similarities, but only formal ones. The essential difference is in the character of State power; whether it is held and exercised by the working class, or by industrial or financial monopolies [16].

Imre Szabó (Hungary) stressed the importance of the theoretical basis of comparison. The Marxist categories of form and content also determine the concept of legality. In the Marxist theory content is primordial, form remaining secondary. Accordingly, in regard to law, its purpose is what matters; the method of its application, the techniques utilized for its implementation remain of

[15] *op. cit.* p. 329
[16] *op. cit.* p. 352.

secondary importance [17]. Therefore, he added "we hold it to be erroneous to look for formal similarities between the two types of legality while overlooking their fundamental differences".

To demonstrate the opposing character of the two legal systems, the different role allotted to social and economic rights in each of them was studied. Jivko Stalev of Bulgaria underlined that in a socialist state the citizen's social, economic and cultural rights are not only proclaimed, but implemented through social institutions, whereas in a capitalist system only formal equality and formal legal protection are provdied [18].

This basic argument advanced to uphold the thesis of "opposition in principle" was challenged by Professor Colliard (France) who asserted that such a juxta-position could have been justified only in the case of a hypothetical early 19th century liberal state, but certainly not in the case of a modern welfare state of contemporary industrial society [19].

The Comparison of Legal Techniques was also undertaken by the Colloquim. Western participants were eager to know how the general principles referred to above are applied in practice and what legal institutions exist to safeguard the rights of the citizens. The legal techniques in two branches of law were studied: the control of administrative action and criminal procedure. One basic difference in the utilization of legal techniques was noted by M. Letourneur (France): the preference given in Eastern Europe to "popular control" over judicial safeguards, the latter being regarded as essential in the West [20].

The notion and practice of "popular control" in Eastern Europe, through the activities of "elected" councils working under the leadership of the Communist party, was explained by Stefan Rozmaryn (Poland) [21]

Similarities, even identities, in legal techniques of Eastern and Western Europe were recognized and admitted to exist. These were explained by communist scholars by the historical succession of the socialist legal system to the capitalist one. At the higher stage of development, they argued, it is reasonable to retain those methods and techniques which can be usefully adapted from the former system. The use of similar techniques can even be broadened in the future, and the example of the Polish Bill on the judicial review of administrative action was cited in this respect.

The confrontation of ideas revealed some areas of law in which,

---

[17] *op. cit.* p. 401.
[18] *op. cit.* p. 27.
[19] *op. cit.* p. 363.
[20] *op. cit.* pp. 337-338.
[21] *op. cit.* pp. 344-347.

ideological differences notwithstanding, comparison seems to be possible and useful and which may offer a *ground for co-operation* among jurists belonging to different legal systems. The highly technical branches of administrative law and criminal procedure seemed to be such areas. The central factor which emerged from the discussions was a common interest in the protection of human rights.

Stanislav Ehrlich of Poland maintained that the difference in political systems does not lead necessarily to a different catalogue of civil rights. Indeed, in both systems the same rights can be recognized as fundamental. In his view, socialism even offers a possibility of increasing the number of human rights. He considered the protection of human rights as one of the promoting factors of socialism: the basic aim of socialism, he argued, is the full self-assertion of the individual; self-assertion encourages individual initiative which speeds up the construction of socialism. Radomir Lukić of Yugoslavia also asserted the emergence of new human rights in a socialist society, the most important of these new rights being the right to self-management in undertakings and institutions. He shared the view that human rights constitute a common element in both systems, the protection of which is increasingly realized in Yugoslavia by techniques common to both systems.

In the field of comparison of socialist legal systems, P. S. Romashkin thought he could perceive unanimity in the formulation of Socialist Legality:

> I am glad to point out that the discussion strikingly confirmed the complete unanimity of the representatives of legal science in the USSR and in the people's democracies concerning the concept of socialist legality.[22]

In the field of possibilities and limitations in the comparison of economically different legal systems the views were much more at variance. The majority of the participants from Eastern Europe underlined the differences rather than the similarities. Others were inclined to look for and discover new fields for comparison.

The Chairman of the Colloquium, Professor Rozmaryn, saw its decisive importance in its *achievement in co-operation*:

> If we expected – and I think this was the intention – to bring competent people together in order to foster their knowledge about methods, principles and legal institutions and to promote mutual understanding and mutual respect, then we can certainly be satisfied with our achievements. If it was a dialogue, let's hope that it will go on in the same friendly manner as between men who feel mutual respect for each other and at the same time have strong political convictions of their own.[23]

---

[22] *op. cit.* p. 364.
[23] *op. cit.* p. 408.

Writing from the distance of a few years, M. Marc Ancel, a leading French comparative lawyer, shared this assessment entirely. The Warsaw Colloquium has proved that differences between the political systems do not bar mutual understanding and active collaboration among jurists [24]. After a long period poisoned by name-calling, this is a great achievement indeed.

From the point of view of our present study the Colloquium can be regarded as the beginning of the re-establishment of the comparative method in Eastern Europe as a genuine research method having its own rules, sub-ordinated to the general principles of Marxism.

B. Policy problems. The importance of comparative law as a means of persuasion and ground for co-operation

1. Comparison of Comparative Legal Science in Eastern Europe and in the West

Besides the basic methodological problems discussed above, the comparison of legal systems with different economic systems also raises policy problems which were referred to in the closing speech of the Warsaw Colloquium.

The science of comparative law itself in the relevant areas should also be compared. The comparative method should be applied not only to legal institutions and legal systems, but to this special branch of legal science itself. What is the function of comparative jurisprudence in the respective systems? This raises policy questions.

In *Western Europe* comparative law can look back to a history of a century; indeed, it was in Western Europe that this new branch of legal science was founded. At present it is in the stage of adjustment to contemporary circumstances and is becoming world-wide in scope [25]

Legal scholars hold divergent views on the proper definition and function of Comparative Law. On one basic thesis they all agree: the comparative method can be efficiently used for a variety of practical and scholarly purposes [26]. The practising lawyer and the judge apply the comparative method to disentangle legal problem cutting across territorial limits and legal systems. The legislator uses it to improve the municipal law of his country. The international

---

[24] Marc Ancel: Valeur actuelle des études de droit comparé. (Present value of research in comparative law) *XXth Century Comparative and Conflicts Law,* Legal Essays in honour of Hessel E. Yntema, Leyden, 1961, p. 24.

[25] David René: *Les grands systèmes de droit contemporain,* Paris, 1964, pp. 7-8.

[26] Ngô Bá Thành: *De quelques applications du droit comparé,* Saigon, 1964, pp. 5-13.

lawyer regards it as a method of ascertaining the "general principles of law recognized by civilized nations" as a source of international law [27]. In legal education it widens the horizons so that the student may appreciate the role of law in society. Comparison will help him discover that the solution given by the law of his own country is not the only one that is possible [28] Legal scholars engaged in the study of jurisprudence use the comparative method to analyse those concepts which legal systems develop for the protection of certain social interests [29]

The prevailing view is that legal systems have certain elements in common. Besides the term employed in Article 38 (c) of the Statutes of the International Court of Justice, referred to above, similar terms, such as a "common core of legal systems" or "common law of mankind" have become current in scholarly discussion. As Professor Schlesinger puts it: "the existence of some kind of common core is hardly challenged today " [30]. The task now consists in exploring the nature and extent of this common core by systematic comparative research.

In *Eastern Europe* comparative legal science does not yet exist. As S. L. Zivs put it in 1964, "until this day the role and essence of comparative jurisprudence as a special research method and its place in the system of scientific concepts are not defined" [31]. Thus the comparison of comparative law in the Eastern and Western half of Europe is limited, since in Eastern Europe scholars are still at the stage of stock-taking, of attempting to justify the need for special comparative research in legal science and of criticising Western comparative law.

The criticism of western comparative law is based on the classical Marxist tenet of a "general crisis of capitalism". This crisis, it is argued, brings about a decomposition of bourgeois ideology and is producing, instead of a comprehensive and constructive ideology, a negative and barren anti-communist propaganda, which is becoming more and more the main ideological weapon to prolong the existence of the capitalist regimes.

The majority of western comparative lawyers are criticized for

---

[27] Rudolf B. Schlesinger: *Comparative Law,* 1960, p. 18 and The common core of legal systems, an emerging subject of comparative study; *XXth Century Comparative and Conflict Law;* Legal essays in honour of Hesse E. Yntema, Leyden, 1961, p. 65.

[28] John N. Hazard: Comparative Law and Economic Systems; *The Asian Comparative Law Quarterly,* Vol. 1, No. 1-4, pp. 83-94.

[29] Paton, George W.: *A Textbook of Jurisprudence,* Oxford, 1946, pp 31-32.

[30] R. B. Schlesinger, *ibid.*

[31] Zivs, S. L.: O metode sravnitelnogo issledovaniya v nauke o gusudarstve i prave (The method of comparative research in Jurisprudence) *Sovetskoe Gosudarstvo, i Pravo,* 1964, No. 3, pp. 23-35, also V. Knapp: *Bibliography of Czechoslovak Legal Literature,* Prague 1959.

"serving any and all ideological trend of international reactionary imperialism". Distinction is made, however, in favour of those scholars, who "though adversaries of Marxism-Leninism, are advocating peaceful coexistence and disarmament, and support the stand of socialist countries in the most important international problems". Specialized institutes for the study of the communist system, including the institutes for research into the legal systems of Eastern Europe, are globally labelled as anti-communist propaganda centres.

The reproach is further made that western comparative law is furnishing "scientific tools for neo-colonialism to impose the capitalist legal system on newly independent countries", for the integration of Europe and for the preparation of a world law.[32]

Freedom to criticise is one of the fundamental principles of academic freedom in the West. Milton's famous dictum is appropriate in this respect: "If people are free to express opinions, truth will triumph over falsehood in free encounter". Such free encounter places assertion and criticism into proper perspective; errors can thus be corrected.

Professor Zivs formulates the policy aims for the future use of the comparative method in communist jurisprudence as "to contribute to the information of the world public (mirovoe obshchestvennost), the working people of all countries, on the successes of socialism, on the advantages of a socialist political organisation of society". It should play a part in the research of the legal systems of newly independent countries, make known the socialist system there and contribute to the unification of legal institutions in the countries of COMECON [33].

This definition may be compared with another, used in Western jurisprudence. The Yale school of thought, founded by Professors Laswell and McDougall, defines jurisprudence as "a value-oriented science" which should contribute to the discovery of policy alternatives fostering the emergence of a minimum public order in the world mainly built by consent and avoiding the fratricidal destructions of general war [34]. This aim should be achieved, among other

[32] Krasnov, I. M.: American Research Centres at the Service of Anti-Communism, *International Affairs,* Moscow 1963, No. 8.
Novoseltsev, Y. N.: West German Ostforschung, *International Affairs,* 1963, No.8.
Kunina, A.: Anti-communism and Imperialist Foreign Policy. *International Affairs,* 1963, No. 7.
Tumanov, V. A.: What is hidden behind the slogan "Rule of Law"? *Sovetskoe Gosudarstvo i Pravo* (Soviet State and Law), 1963, No. 9, pp. 50-61.
Zivs, S. L. *op. cit.* pp. 34-35.

[33] Zivs, *op. cit.* p. 33.

[34] Harold Laswell: Introduction, Universality versus Parochialism; in M. S. McDougall, F. P. Feliciano: *Law and Minimum World Public Order;* The legal regulation of International Coercion, Yale University Press, 1961, pp. xix, xxiv.

methods, by an appropriate "ideological strategy oriented toward the influencing of the attitude of large groups" by "symbols to be circulated in the target audience and by the establishment of centres and channels of communication through which the symbols chosen are put into circulation" [35].

Thus the most activist school of thought in contemporary Western jurisprudence claims for jurisprudence, as do jurists in Eastern Europe, the role of a major instrument of science and policy. Jurisprudence should – and here there is an identity of views – inform as big a "target audience" as possible, called in Eastern Europe: "the working people of all countries", in Western terminology: "world public opinion".

The aims of the comparative method in jurisprudence, as defined in Eastern Europe, include the persuasion of the largest possible audience of the superiority of the communist legal system. Obviously, those who do not share this view, including many socialist lawyers, are entitled to express a counter view and to propound the tenets of their jurisprudence; and to do this without being called "neo-colonialists" or "imperialists".

Genuine criticism should seek to demonstrate scientifically whether western comparative law is "good enough" or not. From this point of view one cannot but welcome Professor Zivs' further elaboration of methods to be used for the criticism of Western comparative law, based on the well-established traditions of comparative jurisprudence. The comparative method, he says, should proceed by analyzing the arguments advanced, assessing them and refuting those which seem illfounded or weak. This is the correct approach. Only after having followed argument by argument the propositions of the adversary, and by furnishing support for one's own arguments, can a forceful counter-proposition be advanced and carry weight.

In matters of jurisprudence and of comparative law, scientific research, logic and reason should be the criteria used in discussion. The use of emotionally loaded slogans or the description of criticisms as "libellous" is neither convincing nor appropriate to serious discussion – on either side.

In Article 28 of the Universal Declaration of Human Rights the General Assembly of the United Nations promised to humanity the right to "a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized". The task of comparative jurisprudence both in Eastern Europe and in the West is to participate in the elaboration of such a world order by offering to the growing population of the world the best organizational methods that can be devised. This implies mutual informa-

[35] *op. cit.* p.317.

tion and persuasion; in other words, co-operation by jurists in the implementation of this vast undertaking.

2. *Comparative Law and International Organizations*

United Nations. – In order to save succeeding generations from the scourge of war, the Charter of the United Nations required international co-operation to promote and encourage respect for human rights and fundamental freedoms for all. The implementation of this task involves a considerable use of the comparative method on a world-wide scale. The natural common interests of jurists belonging to different political and legal systems in human rights has found an institutionalized meeting ground in the U.N. Commission of Human Rights, which was the first international body to undertake practical work in this field and which worked out the Universal Declaration of Human Rights and subsequently the draft international covenants on human rights.[36] While work is continued in this field, a new programme has been developed since 1956 which lays emphasis on the value of the exchange of knowledge and experience in promoting human rights. The three main features of this programme are:

1. a system of periodic reporting by governments on human rights,
2. a series of studies of specific rights or groups of rights, and
3. a programme of advisory services.

Scholarships in the form of advisory service fellowships are granted, and the Division of Human Rights of the United Nations Secretariat organizes seminars on various human rights problems, so that by an exchange of experience each country may benefit from the achievements of the others.[37]

In 1947 the Commission of Human Rights established a Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to make studies and recommendations on the subject. This body, in which members serve in their capacity as individuals and not as representatives of their governments, has become a stable and fruitful body for the meeting of minds in the comparative work of the United Nations human rights programme.[38]

---

[36] Albert Verdoodt: *Naissance et signification de la Declaration Universelle des Droits de l'Homme,* Louvain-Paris, 1963.
[37] *Everyman's United Nations,* 1964, 7th edition, pp. 305, 312.
[38] Cf. The Draft International Covenant on the Elimination of all Forms of Religious Intolerance, infra, p. 288.

The International Law Commission is charged with promoting the progressive development of internationnal law and its codification. Its 25 members, sitting in their personal capacity as experts in international law, are elected in such a way that the different legal systems of the world receive appropriate representation. In formulating those rules of international conduct which are emerging in different parts of the world this expert body of the United Nations has become a nucleus which enables scholarly co-operation between international lawyers.

UNESCO. – The United Nations Educational, Scientific and Cultural Organization is also involved in the promotion of comparative jurisprudence. UNESCO's purpose, as defined in its Constitution, is to "contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for human rights and fundamental freedoms for all".

One aspect of UNESCO's social science programme is its work for the promotion of human rights and of international understanding. A report on the legal programme of UNESCO in 1947 referred explicity to comparative study of legal institutions and procedures in order to find common elements.[39]

International Association of Legal Science. – In 1950, UNESCO created an international non-governmental organization with headquarters in the Maison de l'UNESCO, Paris, to carry the main burden of this programme. The International Association of Legal Science aims at the promotion of the development of legal science throughout the world by the study of foreign legal systems and the use of the comparative method. In this way the Association contributes to a better knowledge of systems and to mutual understanding among nations. The means of implementation is scientific exchange in all its forms: exchange of jurists and of documentation, organization of meetings, encouragement of national institutions devoted to research in comparative law, the co-ordination and support of their activities. The 37 National Committees (as of 1963) form the Association's Council, which elects the 9-member executive committee, the International Committee of Comparative Law, the top organ of the profession in the world. International institutions willing to contribute to the efforts of the Association may become associate members. The countries of Eastern Europe, with the exception of Albania and the German Democratic Republic, all have their National Committees.

---

[39] Lambert, J.: Rapport sur le programme juridique de l'UNESCO, 2C/40, Annexe, Paris 1947.

In spite of very limited resources, which compel the Association to rely mainly on the work of its National Committees and Associate Members, it can look back to important achievements, *inter alia,* in broadening co-operation between jurists of Eastern Europe and the West. In 1958 it organized the Warsaw Colloquium, commented on above. In Rome another colloquium on the legal aspects of trade relations between countries of different economic structures was held in 1958. A meeting for the comparison of the law of contracts and property in countries with different economic structures took place in Trier in 1961, and in the same year a symposium on the legal aspects of trade with countries with a planned economy was published by the Association.

In 1960 a long range programme was adopted including the publication of national legal bibliographies, dictionaries and introductory works to foreign legal systems. Particular research subjects were also listed, e.g. legal problems of international trade, the protection of human rights, legal problems of developing countries.

Relations between countries of Eastern Europe and of the West received an important place. The report expressed serious criticism of deficiencies in this field in relation to the importance of the problems involved, the lack of co-ordination in comparative study, of teaching of the law of Eastern Europe in Western law schools, the narrow, dogmatic and orthodox, ideological approach to comparative law in Eastern Europe.[40] The activities of the International Academy of Comparative Law, affiliated with the Association, and of the International Faculties for the Teaching of Comparative Law in Strasbourg and Luxembourg, should also be mentioned in this respect.

A consideration of recent efforts in international organizations to widen the ground for encounter for jurists belonging to different legal systems and professing different concepts of legality, should also include a review of the activities of the International Commission of Jurists.[41]

The International Commission of Jurists. – To clarify the contemporary meaning of the Rule of Law, the International Commis-

[40] Cf. footnote 2.
The I.A.L.S. plans to publish in English an *International Encyclopedia of Comparative Law* presenting several legal systems of the world in 16 volumes and 17,000 pages, directed by Professor Konrad Zweigert of Hamburg as responsible editor.
On the role of socialist law in this project see:
John N. Hazard: Socialist Law and the International Encyclopedia *Harvard Law Review,* vol. 79, No. 2. December 1965, pp. 278-302.
The Memorandum concerning the Encyclopedia and the article were published during the impression of the present paper.

[41] *The International Commission of Jurists,* Objectives-organization-activities, Geneva, 1965.

sion of Jurists has made a conscious and deliberate use of the comparative method.

Preparatory works for the New Delhi Congress held in 1959 to deliberate on the definition of the Rule of Law included years of broad comparative research canvassing the legal systems of five continents.[42] As a result of this research the Commission has come to believe that

> Over a wide part of the world there is – although in an embryonic form – a consensus of opinion, particularly among the legal profession, as to the nature and importance of the Rule of Law, a concept which was taken as a convenient term to summarize a combination on the one hand of certain fundamental ideals concerning the purpose of organised society and on the other of practical experience in terms of legal institutions, procedures and traditions, by which these ideals may be given effect.

On the basis of the above consideration, the Congress of New Delhi defined the concept of the Rule of Law as

> the principles, institutions and procedures, not always identical but broadly similar, which the experience and traditions of lawyers in different countries of the world, often themselves having varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.

The Delhi Congress left no doubt that the underlying principles of the Rule of Law and the human rights and fundamental freedoms listed in the Universal Declaration of Human Rights are identical. Indeed, the institutions and procedures constituting the Rule of Law are designed to implement the substantive rights of the Universal Declaration.[43]

The subsequent Congresses and Conferences of the Commission and its other diversified activities have certainly contributed to a considerable degree towards the acceptance of the Rule of Law as an international or supranational concept capable of practicable

---

[42] *The Rule of Law in a Free Society*, Report on the International Congress of Jurists, New Delhi, India, 1959, pp. 187-197.

[43] Committee I. Clause III:
(1) Every legislature in a free society under the Rule of Law should endeavour to give full effect to the principles enunciated in the Universal Declaration of Human Rights.
(2) The governments of the world should provide the means whereby the Rule of Law may be maintained and furthered through international or regional agreements on the pattern of the European Convention on the Protection of Human Rights or otherwise.

application in countries with varying political and economic systems and differing legal traditions.[44]

The very concept of the Rule of Law as defined in New Delhi implied the acceptance of the comparative approach by the International Commission of Jurists. In fact, its use was developed in subsequent years, and served in the Commission's publications to put important legal institutions in a global perspective.[45] At the Congresses and Conferences it continued to provide the means whereby the problems on the agenda were elaborated and dealt with in the discussions.[46]

When shaping the modern concept of the Rule of Law, the Congress of New Delhi was aware that while this definition is recognized in the West and in many other parts of the world[47], in countries ruled by Communist parties the concept of legality differed from it in fundamental aspects.

Continuous work is carried on by the Commission in contact with research institutes of Eastern European Law in the comparison of these two types of legality. These contacts are evolving and useful. Co-operation with the Council of Europe has also opened up new important channels of information and collaboration.[47a]

The Commission has published in its special reports and periodicals a series of comparative comments on legal developments in Eastern Europe.[48]

In the present context attention is drawn to the article by Dr. E. Zellweger in 1964 on "The Concept of Socialist Legality", in which the author undertook a comprehensive comparison of the two concepts of legality.[49] Reviewing their application to legal institutions, the article outlined similarities and differences in the two concepts. Administration and adjudication according to law and legal protection of the individual were found to be identical principles. The basic difference was seen in legislation and in the interpretation of the laws, which in Eastern Europe are guided by the Communist party. The author stated: "It is perfectly logical, however paradoxical it may seem, for Communist legal theory to state that Bolshevist Party-

---

[44] Norman S. Marsh: The Rule of Law: New Delhi-Lagos-Rio de Janeiro, *Journal of the International Commission of Jurists*, Vol. IV, No. 2, 1963, p. 258.

[45] E.g.: Norman S. Marsh: Legal Aid, a Comparative Outline, *Journal*, Vol. II, No. 2.
Preventive Detention (in different countries), *Journal*, Vol. III, nos. 1 and 2.

[46] Cf. footnote 4.

[47] The Rule of Law, as understood in the West. *Annales de la Faculté d'Istambul*. Tome IX, No. 12, 1959.

[47a] Cf. footnote 10.

[48] A bibliography of these publications is given in the Appendix.

[49] E. Zellweger: The Principles of Socialist Legality, *Journal of the International Commission of Jurists*, Vol. V, No. 2, 1964, pp. 163-202.

mindedness is the essence of Socialist Legality." The source of the fundamental divergence between the principle of Socialist Legality and the principle of legality in States under the Rule of Law was found in their respective attitude towards the individual. In the West the organs of the State are required to observe the laws in order to respect the individual's sphere of freedom. Under Socialist Legality not only is every individual required to adhere to the law, he must also collaborate actively in the implementation of socialist law. Through the educative function of law the individual must be taught to interweave "all essential individual activities into social activities". From this fundamental aspect Dr. Zellweger saw the main difference between the two concepts of legality in the fact that the purpose of Socialist Legality is not so much to safeguard the individual's sphere of freedom as to permit the total shaping of the individual.[50]

The comparative approach to legal problems adopted by the International Commission of Jurists is intended to offer possibilities for dispassionate and scholarly discussion of "legal principles, institutions and procedures used in different countries of the world having varying political structures and economic background", to use the New Delhi definition.

To further such discussions the Commission devotes great attention to the work of the different international bodies of the United Nations family, mentioned above. The participation of the Commission in the work of the Commission on Human Rights and its Sub-Commission are providing solid possibilities to work together with jurists adhering to different concepts of legality, including jurists of Eastern Europe. United Nations Seminars on Human Rights, and especially those held in Eastern Europe (Warsaw 1963, Ljubljana, 1965) are eminently qualified for such encounters and work in common. Meetings of UNESCO and its affiliated organizations may open up further channels of communication and collaboration.

The Commission has established direct contacts with institutes of legal research in Eastern Europe. With some of them there exists a smoothly functioning exchange of publications. These exchanges could certainly be broadened in the future. In the field of human rights there are subjects of common interest, such as the study of social and economic rights in which documentation and experience can be shared.

Personal contacts and visits are a simple and useful means of fostering understanding. In addition to visits of members of the International Commission of Jurists' Secretariat to Eastern Europe and visits of jurists from Eastern Europe to the International Secretariat in Geneva, the initiative of the Austrian Commission of Jurists,

---

[50] *Op. cit.* p. 201, 202.

a National Section of the ICI, can serve as an example. At the invitation of the Austrian National Section, eminent Eastern European jurists attended the Sections annual meeting near Salzburg, in May 1965. Their attendance at the meeting, conducted as a seminar on contemporary problems of the Rule of Law, provided an opportunity for an exchange of views and a confrontation of ideas, both useful and interesting, and underlined the desire to maintain and broaden contacts between jurists in the Western and Eastern parts of Europe.[51]

II. SURVEY OF COMPARATIVE JURISPRUDENCE IN EASTERN EUROPE

The Statement made above, that in Eastern Europe legal scholars are at the stage of stock-taking, will be illustrated by a survey of recent publications on comparative law in Eastern Europe. The authors of the articles reviewed are well-known scholars who occupy top posts in the hierarchy of the institutions directing legal science in their countries.

Czechoslovakia

Problems of contemporary comparative jurisprudence are dealt with in articles by Professors Viktor Knapp and Rudolf Bystricky.

In 1959, Knapp concluded that comparative jurisprudence was regarded as a western phenomenon and was neglected in Eastern Europe.[52] In 1964, he criticized the formalistic and dogmatic analysis of western comparative law.[53]

The first article in Eastern Europe asking for a genuine Marxist science of comparative jurisprudence was written by Rudolf Bystricky.[54] Starting with A. Schnitzer's comprehensive "Vergleichende Rechtslehre" of 1960, he outlined the history and contemporary situation of western comparative jurisprudence and criticized it in the light of the resolutions of the 21st Congress of the Communist Party of the Soviet Union and comments made by **P. S.** Romashkin. Taking over the initiative of two French Marxist comparative lawyers, Roland and Monique Weyl[55], he pleaded for the elaboration of a genuine Marxist science of comparative jurisprudence. The comparative method cannot be left entirely for the West, Communist

[51] *Bulletin of the International Commission of Jurists,* No. 23, 1965, August.
[52] Viktor Knapp: *Bibliography of Czechoslovak Legal Literature* 1945-1958; the Institute of Law of the Czechoslovak Academy of Sciences, Prague 1959.
[53] Viktor Knapp: Verträge im Tschechoslovakischen Recht (Contracts in Czechoslovak Law), *Rabels Zeitschrift,* 1963, No. 3, pp. 495-497.
[54] Rudolf Bystricky: Za marxistickou srovnávací pravovedu (For a Marxist Comparative Jurisprudence), *Právnik,* 1962, No. 8, pp. 625-637.
[55] Monique et Roland Weyl: Y-a-t-il une conception marxiste du droit comparé? *La nouvelle critique,* Juin 1961, p. 146.

scholars should also make use of it. A Marxist comparative jurisprudence could carry out an analysis of legal institutions in depth, in their socio-economic context. As policy aims of such a Marxist comparative jurisprudence the following tasks were listed:

1. Comparison of legal institutions of socialist countries with a view to their harmonization and to the development of the socialist commonwealth of countries;
2. A better understanding of foreign legal systems, in order to improve conflicts of law rules and to improve knowledge of the socialist commonwealth of countries;
3. To unmask the reactionary essence of law and legality in the imperialistic West;
4. To show the superiority of the communist social and legal system as a higher type of law;
5. To contribute to a broadening of contacts between Eastern Europe and the West both in jurisprudence and in economic relations.

These policy aims were further elaborated in 1963 by S. L. Zivs in the Soviet Union. Criticisms of these policy aims have already been expressed above.

Hungary

The problems of contemporary comparative jurisprudence have been dealt with fairly broadly in recent publications. Authors of these articles are Professors Szabó and Eörsi.

Articles by Imre Szabó [56] deal mainly with methodological and theoretical aspects; those by Gyula Eörsi rather with policy problems involved.

From the aspect of legal theory the articles stress the fundamental difference between western and communist legal systems. A formal, dogmatic analysis is judged, rightly, incapable of coping with the problems arising in this kind of comparison. Western comparative law is seen to stop generally short of the sociological approach. Even those scholars who take social structures into consideration seem to get stuck at secondary differences determined by the different legal systems and do not arrive at the real differences, the social movements determining law itself.[57]

---

[56] Szabó Imre: La science comparative du droit, *Annales Universitatis Scientiarum Budapestiensis, Section Iuridica,* 1964, p. 134.
Szabó Imre: Ellentmondások a Különböző társadalmi rendszerek joga között (Contraditions entre les systèmes juridiques des différents systèmes sociaux) *Allam és Jogtudomány,* Budapest, 1963, Vol. VI, No. 2, pp. 165-167.

[57] Szabó: Contradictions, p. 59.

Similarity or identity of legal institutions does not in itself reveal the content of the law. The example of Eastern Europe is cited, where the old bourgeois laws of Roman heritage were used for a long time by the new political power for new functions and developed new social relations among people. The similarities are relative and partial, the opposition is fundamental and total. There are also completely new and unique legal institutions, such as the law of agricultural co-operatives, of state enterprises or of local councils, which have no counterpart in western law and defy comparison. All this said, comparison remains possible and desirable if only it is concentrated on the differences: it should show how legal institutions are used in a new, higher type of legal system based on socialist ownership of the means of production. Comparison should reveal the logical contradictions of the two types of law in legal theory, and in legal institutions. The contradictions should always be regarded as emanating from the different social structures and their solution can only be sought on the level of society. These theoretical considerations can be regarded as the elaboration of the views expressed by Professor Szabó at the Warsaw Colloquium.

The policy problems implied in the use of comparative law were primarily dealt with by Gyula Eörsi.[58] The development of international trade on a worldwide scale has promoted the evolution of comparative law; for instance, it has contributed to the unification of the law of negotiable instruments, and new developments in private international law. Comparative law is flourishing in the West where the conditions for its cultivation are extremely favourable. Comparison of the legal institutions and concepts of the European continental and common law systems is very fruitful, the more so since on the same economic infrastructure they present very different practical solutions. Increasing economic interdependence calls for an increasing harmonization of legal systems which can be usefully promoted by comparative law.

The real problems arise in the comparison of the two opposed legal systems, the "bourgeois" and the "socialist", since the two opposed social systems provide different solutions for the similar tasks with which they have to cope. As an example of the Western approach to the problem, André Tunc's article is cited on the role of contracts in different economic systems.[59] Tunc pointed out

[58] Eörsi, Gyula: Jogösszehasonlitás és békés együttélés (Comparative law and peaceful coexistence), *Allam és Jogtudomány*, Budapest; 1964, Vol. VII, No. 3, pp. 380-393.
Eörsi, Gyula: Részvételünk "összehasonlitó jogi" rendezvényeken (Our participation in meetings on "comparative law"), MTA II.O. Közleményei. (Publications of the Academy of Sciences) 1962, No. 1, 2, pp. 113-114.

[59] A. Tunc: Le possibilité de comparer le contrat dans les systèmes juridiques à structures économiques différentes, Rabels Zeitschrift, 1963, No. 3, pp. 489-494.

that the impact of industrialization puts the same problem before the two systems for solution: how to reconcile comprehensive planning with individual initiative and interest. In the West the solution is based on individual initiative and planning is superimposed to harmonize individual actions. In Eastern Europe the basis is central economic planning, granting growing elbowroom for individual initiative. Tunc and many western comparative lawyers find here a certain convergence and project an eventual synthesis of the two types of legal solution. In line with the general position reviewed at the Warsaw Colloquium, Eörsi takes a firm stand against the possibility of synthesis with the main argument that there is still no alternative outside the classical Marxist opposition between private and socialist property, thus a solution by a third method is unthinkable. Here his arguments remain unconvincing for anyone who does not subscribe to Marxist orthodoxy. He is justified in stressing the present limitations of convergence as well as the demand for an open discussion of differences and in advocating, as do western comparative lawyers, the peaceful and civilized competition of different schools of thought in comparative jurisprudence. But it remains to be seen whether it is Tunc's expectation of a synthesis of the two legal systems or Eörsi's expectation of the survival of Marxist orthodoxy that will turn out to be merely wishful thinking.

Poland

Polish legal science has played a prominent role in the establishment of contacts between jurists of Eastern Europe and of the West. The achievement of the Warsaw Colloquium should be recalled once more. Later Professor Stefan Rozmaryn, the Chairman of the Colloquium, was elected Chairman of the International Committee of Comparative Law, the executive organ of the International Association of Legal Science.

When in 1957 the Chicago Colloquium of I.A.L.S. on the concept of the Rule of Law was prepared, Rozmaryn contributed to this work by outlining ideas on the comparative method applied to legal systems having a common economic structure.[60] In this article he rejected the sociological method of "model" or "ideal types" as giving too much scope for subjectivism and advocated a method consisting of the analytical discovery of common principles and legal institutions. He stressed his conviction that the comparative method should not limit itself to a formal exchange of information. It should

[60] Stefan Rozmaryn: A propos des colloques de l'Association internationale des sciences juridiques pour la règle de la légalité, *Revue Internationale de Droit Comparé,* 1958, pp. 70-75.

delve deeply into the comparison of systems of the same type of legality.

At the closing speech of the Warsaw Colloquium Rozmaryn indicated that the International Commission of Comparative Law had charged him with the preparation of a general report on the colloquium as had been done by Professor Hamson on the Chicago Colloquium. It can only be regretted that this general report was not included in the volume published on the proceedings of the Warsaw Colloquium. It would certainly have elaborated on the method of comparison of legal systems with different types of legality, some basic principles of which were referred to in Rozmaryn's closing speech cited above.

In the field of comparative civil law the activities of Professor Czachorski and J. Jakubowski should be mentioned.[61]

Rumania

There is one article in recent legal literature pertaining to legal theory, which is also of great importance in relation to comparative law. The authors are Professor Traian Ionasco, Director of the Institute of Legal Research of the Rumanian Academy of Sciences and his deputy Eugen A. Barasch; its subject is "Constant Factors in Law – Law and Logic".[62]

The article suggests the use of comparative legal science to provide scientific legal concepts to facilitate the work done in jurisprudence and in legislation. A new approach is developed to the use of the comparative method by recognizing the existence of constant factors and concepts in law, common to all legal systems, whether of communist, western or other origin. These common concepts derive from logic, i.e. the nature of human reasoning in the regulation of human relations and in rules governing human behaviour. After fixing their standpoint in Marxist thinking by citing Engels to the effect that economic factors determine historical development in the last resort, and by qualifying law as a superstructure of economic relations formed by a highly complex array of human factors among which economics, while decisive, is but one,

---

[61] N. W. Czachorski: *Bibliographie juridique polonaise* 1944-1956. Institut des sciences juridiques de l'Académie polonaise des sciences, Warszava, 1958.
Witold Czachorski: Le problème du cumul de la responsabilité contractuelle et delictuell, *Rapports généraux au VIe Congrès International de droit comparé,* Hambourg, 1962; Bruxelles, 1964, pp. 351-367.
J. Jakubowski: Some methodological problems of research on comparative law. *Panstwoi Prawo,* July 1963. 183.

[62] T. Ionasco, E. A. Barasch: Les constants du droit – Droit et logique (Constant factors in law – law and logic). *Revue Roumaine des Sciences Sociales, Série de Sciences Juridiques,* Vol. 8, No. 2, 1964. Cf. Bulletin ICJ, No. 23.

the authors recall a pioneering article of Rumanian legal science published in 1956 in the first issue of the same Rumanian legal periodical by the present Prime Minister, Professor Ion Gh. Maurer. In this article Maurer admitted that legal systems have their own pattern of development, which he called evolution. In this evolution, legal concepts derived from human logic play a decisive part which could not and should not be left out of consideration. Proceeding from this tenet, and taking as their example basic concepts of the law of contract and of tort such as liability for wrongs committed (responsabilité delictuelle et contractuelle) or legal capacity, the authors develop the considerations outlined above. In their reasoning they use the comparative method and quote a broad array of writers from Jhering to contemporary Soviet authors, François Gény and the Mazeaud brothers. They differentiate between legal theory and legal techniques. The final aims and the theoretical context of legal institutions are developed by legal theory. The final purpose of a given legal system may be different from that of other legal systems, for it is determined by the theoretical basis of legal science, dependent on whether it is Marxist or not. The fundamental approach is determined by the theoretical, ideological basis. Nevertheless, the authors insist, the legal techniques used to further development toward the final purpose have very much in common in different legal systems, in spite of ideological differences, since they derive from constant factors, i.e. from the laws of human logic applied to the development of human relations in changing historical circumstances.

This article constitutes a new approach to a fundamental problem in Eastern European countries: the modernization of their legal system in order to deal with the circumstances and needs of the second half of our century. In the development of the legal system legal techniques may be adopted from anywhere, provided they serve the aims of the State as interpreted by the Party. The recognition of constant features in legal techniques by Rumanian jurisprudence is a step forward from the stand adopted by Marxist legal scholars at the Warsaw Colloquium, where differences rather than similarities were stressed, and may certainly make it easier for Rumanian lawyers to speak, fundamental ideological differences notwithstanding, a common professional language with lawyers belonging to non-communist systems of law, first of all with lawyers trained in the West European legal heritage.

Soviet Union

The problem of the relative independence of legal science from philosophy, which in the Soviet Union means Marxist ideology, has

become a much debated issue. Leading Soviet scholars of law have devoted elaborate arguments to strengthening this relative independence.

M. S. Strogovich, the grand old man of Soviet legal science, took a firm stand in his recent article affirming that "the use of Marxist dialectical materialism does not exclude, indeed it suggests, the existence and use of special scientific methods in the different branches of knowledge. Legal science should also have special methods adopted to the characteristics of the subjects it is dealing with." Among special methods to be used in jurisprudence the sociological and comparative methods were specifically mentioned.[63]

A. A. Piontkovsky insisted on both the relative independence of the evolution of legal systems and the relative independence of legal science from general philosophy in theory and from the legislator in practice.[64]

Legal science should have its own methods with the help of which legal scholars have to deal with the events of social and legal life, measure the efficiency of existing legal norms and make suggestions for their better application or even their improvement. This implies the claim to criticise the legislator or the legislation, a serious claim in a country where previously only favourable comments were printed.

In the field of comparative law, S. L. Zivs devoted the article cited above to outlining the role of the comparative method in a relatively independent Marxist jurisprudence. The same views were explained by him at a round table conference organised by the French Institute of Comparative Law in Paris in 1963.[65]

Professor Zivs' considerations on the comparative method started with the immediate past in which "dogmatic schematism" prohibited the use of the comparative method and consideration of the achievements of western comparative law. This stage corresponds to what was called above the period of isolation of East European legal science.

Quoting the 1961 Programme of the Communist Party of the Soviet Union (CPSU) and the 1963 Plenum of the Presidium of the Academy of Sciences of the USSR, – at which L. F. Ilichev, then chief of the ideological section of the CPSU secretariat, outlined

---

[63] Strogovich, M. S.: Filosofiya i pravovedenie, Nekotorye metodologicheskie voprosy yuridicheskoi nauki (Philosophy and Jurisprudence, Some Methodological Questions of Legal Science), *Sovetskoe Gosudarstvo i Pravo,* (Soviet State and Law). 1965, No. 6, pp. 74-82.

[64] Piontkovsky, A. A.: Yuridicheskaya nauka ee priroda i metod (Legal Science, its Nature and Method), *Sovetskoe Gosudarstvo i Pravo,* 1965, No. 7, pp. 73-82.

[65] Table ronde sur les études et les recherches de droit comparé en URSS, par Gérard Lyon-Caen, *Revue internationale de droit comparé,* 1964, pp. 69-77.

the tasks in the field of methodology – Professor Zivs made an attempt to define the marxist concept of the comparative method in legal science. His definition reads as follows:

> Comparative jurisprudence is a concrete application of the method of dialectical materialism in the research of problems of state and law. The specific characteristic of this method is that it is dealing with more than one legal system and its purpose is to reveal similarities, differences and oppositions.

Comparative jurisprudence thus defined is not a separate branch of legal science: it is a method to be applied in every branch of law by all legal scholars. The role of comparative law as a kind of a "super-method" is rejected. In terminology the term comparative law is also rejected on the consideration advanced above: the term comparative jurisprudence can be used on the condition that it is understood that it means comparative research in law, even more precisely, the use of the comparative method in research on the institutions of State and Law.

In the methodological part of his article, S. L. Zivs elaborated the distinction between "comparison of legal systems of an identical type" and of "legal systems of different type". The first included comparison of western systems among themselves, or communist systems among themselves. The second means comparison of communist and "bourgeois" legal systems, where ideological difficulties arise. In this case comparison should consist in revealing the differences in legal solutions and oppositions in ideology.

The policy chapter of the article has already been dealt with above, but a reference might here be made to a metaphor used by the author to explain better the use of the comparative method in the comparison of legal systems with different types of legality.[66] Comparative jurisprudence is seen as a very useful practical method by which a screen can be formed on which the principal features of the superiority of one legal system and the inherent defects of the other can be projected.

Yugoslavia

Yugoslavia is the only country in Eastern Europe where an Institute of Comparative Law has been organized. Under the directorship of Professor B. Blagojević the Institute has conducted numerous research projects and published a series of studies on Yugoslav and foreign law. B. T. Blagojević conceived comparative law as early as 1953 as of primary importance in the co-operation of jurists. Among its varied possibilities of application he underlined

---

[66] Zivs, op. cit. pp. 32-33.

the elaboration of general principles of law recognized by civilized nations, as stated in article 38 (c) of the Statute of the International Court of Justice.[67] In the field of the law of international trade and arbitration, Yugoslav legal science has, under the leadership of Professor A. Goldstajn of Zagreb, been the pioneer in Eastern Europe.[68] Recent developments in Yugoslav comparative law will require a more detailed treatment than the present survey may offer.

Conclusions

In Eastern Europe ten years ago comparative legal research was completely subordinated to ideological political expediency. But gradually legal science in general and the comparative method in particular began to acquire a relative degree of independence. Efforts towards an assertion of this relative independence are still in their early stages. They tend to replace the ideological orthodoxy of the past by a scientific approach which would take into consideration universal and constant factors in law. Observed from Western Europe, these developments appear as a "secularization" of legal science formerly completely dominated by ideology. There is a gradual, if slow, re-introduction of specific legal research methods, such as the comparative, the sociological and the statistical. Indeed, ideological considerations should not and cannot hamper scientific and comparative legal research.

One of the basic tasks of law is to resolve conflicts among parties holding opposing views or having opposing interests. For this purpose what is called in French "le procédé contradictoire" which enables the parties to argue their cases fully, is applied. Each party plays his role and in the majority of cases an equitable decision is ultimately reached.

Why should not the same method be applied to the comparison of different concepts of legality and to different approaches to comparative jurisprudence? Each of the parties involved should state its case in conformity with the rules of comparative jurisprudence; the "procédé contradictoire" could be applied by means of discussion. This is how the Rule of Law could be applied to comparative jurisprudence.

---

[67] Borislav T. Blagojevic: Le droit comparé – science ou méthode; *Revue international de droit comparé:* 1953, No. 4.
Borislav T. Blagojevic: *Bibliographie juridique yougoslave,* Institut de Droit Comparé, Belgrade, 1959; *Collection of Yugoslav Laws,* Vols. I-VIII, Institute of Comparative Law, Belgrade.

[68] Aleksander Goldstajn: The Practice of Economic Courts, *New Yugoslav Law,* 1956, No. 3-4, pp. 33-57;
Aleksander Goldstajn: The contract relations of economic organizations, *New Yugoslav Law,* 1958, No. 1, pp. 24-38.

Appendix

ICJ PUBLICATIONS CONCERNING EAST EUROPEAN COUNTRIES

1. BULLETIN ARTICLES

Bulletin No. 1, 1954

U.S.S.R.	The Significance of the Independence of the Judge behind the Iron Curtain
Poland	The Klimowicz Case
U.S.S.R.	Book Review – Soviet Law by René David and John N. Hazard, 1954
U.S.S.R.	Book Review – Soviet Law and Soviet Society by George C. Guins, 1954
U.S.S.R.	What is necessary to prepare a trial? Soviet legal proceedings and advocacy

Bulletin No. 2, March 1955

Czechoslovakia	Socialist Legality in Czechoslovakia
Czechoslovakia	Justice and Education
Hungary	Justice and Education
Poland	Justice and Education
Czechoslovakia	For Better Decisions of Law in Czechoslovakia
Czechoslovakia	Book Review – The Political Control of Czechoslovakia, by I. Gadourek, 1953
Czechoslovakia	Book Review – Prague under the influence of Moscow, by P. Barton

Bulletin No. 3, November 1955

U.S.S.R.	The Dictatorship of the Proletariat and of the Party
Eastern Europe	Book Review – The Communist theory of Law, by Hans Kelsen

Bulletin No. 6, 1956

Poland	The Poznan Trials
Hungary	The Hungarian Situation
U.S.S.R.	The Rule of Law and Socialist Legality
U.S.S.R.	Justice and Judges

Bulletin No. 7, 1957

Czechoslovakia	Recent Legal Trends
East Germany	Legal Status Quo
Yugoslavia	The Djilas Trial

Bulletin No. 8, 1958

Hungary	Purge of the Hungarian Bar
Yugoslavia	A Political Trial in Belgrade

Bulletin No. 9, 1959

East Germany	The Dresden Student Trial
Hungary	Disturbing Situation (Political Trials)
Rumania	Penal Code
U.S.S.R.	Criminal Law Reform

Bulletin No. 10, January 1960

Czechoslovakia	Justice – Class Justice
Poland	The Bar

Bulletin No. 11, December 1960

East Germany	Collectivisation
Hungary	Legal Developments

Bulletin No. 12, 1961

East Germany	The Labour Code
U.S.S.R.	Death Penalty for Economic Crimes

Bulletin No. 13, May 1962

Albania	A Political Show Trial
U.S.S.R.	Socialist Legality

Bulletin No. 14, October 1962

U.S.S.R.	Increase in the Application of the Death Penalty
Yugoslavia	The Djilas Case

Bulletin No. 15, April 1963

Bulgaria	Political Rehabilitation and Parasite Legislation
Hungary	Destalinization in the Judiciary
Poland	Workers' Court

Bulletin No. 16, July 1963

East Germany	Berlin Refugees
East Germany	Reforms in the Administration of Justice

Bulletin No. 17, December 1963

Czechoslovakia	The Rehabilitation of Victims of Political Trials
Rumania	The Hungarian Minority Problem
Yugoslavia	The New Constitution

Bulletin No. 18, March 1964

Hungary	The Bar

Bulletin No. 19, May 1964

Czechoslovakia	Legal Reforms
Poland	New Statutes for the Bar

Bulletin No. 20, September 1964

Eastern Europe	(Poland, Yugoslavia, Czechoslovakia, Bulgaria) The Growing Role of National Assemblies

Bulletin No. 21, December 1964

Eastern Europe	(Bugaria, East Germany, Poland, Rumania) Amnesties
U.S.S.R.	The Right of Personal Ownership of Dwellings

Bulletin No. 22, April 1965

East Germany	The East German Arbitration Commissions as an Instrument of Social Jurisdiction

Bulletin No. 23, August 1965

Rumania	Legal Developments in Rumania
U.S.S.R.	Discussion on a New Draft Soviet Constitution

Bulletin No. 24, December 1965

Eastern Europe	Recognition of Human Rights

* * *

JOURNAL ARTICLES

Volume 1, No. 1

U.S.S.R.	The Soviet Procurary and the Rights of the Individual against the State	Dietrich A. Loebner
Poland	On Some Guarantees of the Rights of the Accused in Polish Criminal Trials	Book Review Tadeusz Taras, 1956

Volume I, No. 2

U.S.S.R. and Eastern Europe	Judicial Procedure in the Soviet Union and in Eastern Europe	Vladimir Gsovski and Kazimierz Grzybowski (editors)

Volume II, No. 2

U.S.S.R.	The "General Supervision" of the Soviet Procuracy	Glenn C. Morgan
U.S.S.R. and Eastern Europe	Government, Law and Courts in the Soviet Union and Eastern Europe	Book Review Vladimir Gsovski and Kazimierz Grzybowski, 1959
U.S.S.R.	"Le Pouvoir Soviétique"; Introduction à l'étude de ses institutions	Book Review Henri Chambre, 1959
East Germany	"Dokumente zur Staatsordnung der Deutschen Demokratischen Republik"	Book Review Günther Albrecht, Editor 1959
U.S.S.R.	L'institution concentrationnaire en Russie	Book Review Paul Barton, 1959

Volume III, No. 1

Eastern Europe	Protection of Personal Liberty in the Criminal Procedures of Eastern Europe	Kazimierz Grzybowski
U.S.S.R.	Preventive and Administrative Detention in the U.S.S.R.	Vladimir Gsovski
U.S.S.R.	Infringements of the Law in the Socialist State and their Repression	Book Review Rolf Schüsseler, 1958
Hungary	Hungarian Penal Legislation	Book Review (Translated into German and prefaced by Dr. Ladislaus Mezöfy, 1960)

Volume IV, No. 1

East Germany	The Power of the Judiciary in East Germany	Walther Rosenthal

Volume IV, No. 2

Eastern Europe	Law in Eastern Europe. A series of publications issued by the Documentation Office for East European Law, Univ. of Leyden	Book Review 1958-1963
U.S.S.R.	The Soviet Legal System	Book Review John N. Hazard and Isaac Shapiro, 1962

Volume V, No. 1

U.S.S.R.	Economic Crimes in the Soviet Union	Staff Study
U.S.S.R.	Soviet Administrative Legality, The Role of the Attorney-General's Office	Book Review Glenn G. Morgan, 1962

Hungary	Der Strafkodex der Ungarischen Volksrepublik	Book Review Dr. Ladislaus Mezöfy, 1964

Volume V, No. 2

U.S.S.R.	The Principle of Socialist Legality	Edouard Zellweger
Hungary	The Socialist Constitutional Evolution	Book Review István Kovács, 1962

Volume VI, No. 1

U.S.S.R.	Outline of Modern Soviet Criminal Law	Tomaso Napolitano

* * *

SPECIAL STUDIES

Eastern Europe	Justice Enslaved (A Collection of Documents on the Abuse of Justice for Political Ends), 1955
Hungary	The Hungarian Situation and the Rule of Law (1957)
Hungary	The Continuing Challenge of the Hungarian Situation to the Rule of Law (June 1957)
Hungary	Justice in Hungary Today (The Hungarian Situation and the Rule of Law) (Febr. 1958)
East Germany	The Berlin Wall: A Defiance of Human Rights (March 1962)

THE RULE OF WHAT LAW? A KOREAN CONUNDRUM

by

PYONG CHOON HAHM *

I

In its efforts to build a world community that is free from continuing threats of thermonuclear holocausts and man's inhumanity towards man, mankind is coming to realize the urgent necessity for some kind of international order that can guarantee peace and secure some of the minimum conditions of dignified living. For us, lawyers, this international order must be one that is constructed on the foundation of, and placed under, the Rule of Law. Before world affairs can be carried on under the Rule of Law, however, the Rule of Law itself must first be established in every nation and in every corner of the earth.

Every lawyer knows very well that the establishment of the Rule of Law in any country is a very difficult task indeed. The lawyers of those countries where the Rule of Law is, and has been, a reality recognize the difficult nature of this task perhaps better than anyone else. But for the lawyers in those countries where not even a semblance of the Rule of Law has been secured, the problem of establishing it in their own countries has a peculiar aspect which is the subject of this article.

The question "What is Law?" may be said to belong to the realm of philosophy of law or to semantics (or "semiotics"). And, therefore, an effort to find an answer to this question may be dismissed as having no practical import. But the question cannot so easily be dismissed. If the word "law" creates in the mind of an average Korean a mental effect that makes him even faintly apprehensive or antagonistic, can we expect him to rejoice on hearing the phrase "the Rule of Law"? Does the word "law" mean the same thing to an average Korean as to an average Englishman, for instance? Are we not defeating the whole purpose of endeavouring to establish the Rule of Law by merely using the phrase?

When an Englishman hears that his petition or suit is being dealt with "judicially" or according to "due process of law", he can rest assured of rational and impartial solution of his problems.

---

* LL.B., Assistant Professor of Law and Executive Secretary of Social Science and Research Institute, Yonsei University, Seoul, South Korea.

He is proud of a valuable heritage of *legality*.[1] Law is something that is for the protection of his and his neighbour's rights and interests. The law may be used against him, but he can always resort to it for his own benefit some day in the future. When law and order is respected and enforced, he can feel safe and secure. The law may not have had the same meaning throughout the history of England, but for the most part of the last two centuries at least, the law has been something which has existed for his benefit.[2]

In an Asian country like Korea the situation has been quite different. In the first place, the law as presently enforced is not the product of the people's way of life. The people do not have "a valuable heritage of legality" to be proud of. The present legal system has been transplanted on Korean soil from Europe. It has yet to take root in this alien land. It is clearly one of the most modern and scientific legal systems of the world. But it is regarded as neither urgent nor important to the daily lives of the ordinary people. The law is intended to be for the benefit of the people, but the people do not know how to take advantage of it. It gives a legal right to a Korean, but he is reluctant to exercise is, because traditionally it was not a "virtuous" thing to resort to the law.

In the olden days, before the introduction of a European legal system, the law was an instrument for governing the people. The law was for the benefit of the ruler, never for the benefit of the ruled. When necessary, the ruler never hesitated to disregard the law, for he was the one who promulgated it and he did so for the sole benefit of himself. Even when he paid lip service to the theory that the law was for the benefit of the people, he did not hesitate to disregard it on the ground that such disregard *was* for the benefit of the people. A mere legal technicality could never encumber the benevolence of a virtuous ruler. A legal obligation on the part of a ruler was a contradiction in terms, as far as a Korean was concerned. A moral obligation or perhaps an obligation to Heaven may be said to exist, but never a *legal* obligation. A charter or a code that could bind both the king and his subjects was conceptually im-

---

[1] A. K. R. Kiralfy, *Potter's Outlines of English Legal History* (London: Sweet & Maxwell, 1958), pp. 4–5.

[2] cf. "If we look to the laws, they afford equal justice to all in their private differences; . . . The freedom which we enjoy in our government extends also to our ordinary life. . . . But all this ease in our private relations does not make us lawless as citizens. Against this fear is our chief safeguard, teaching us to obey the magistrates and the laws, particularly such as regard the protection of the injured, whether they are actually on the statute book, or belong to that code which, although unwritten, yet cannot be broken without acknowledged disgrace." Pericles' Funeral Oration in Thucydides, *The Peloponnesian War,* trans. R. Crawley (New York: Modern Library, 1934), p. 104.

possible.[3] A king was always, and by definition, above the law. In England, the theory of the divine right of kings did hold sway for a time. But such an expression as "the King can do no wrong" was always qualified by the notion that *"Rex non debet esse sub homine, sed sub Deo et lege, quia lex facit regem."* [4] And of course there was the Magna Carta.

The idea that an ordinary subject may look to the law for the protection of his freedom and liberty never even occurred to a Korean. The idea was totally alien to his way of thinking. It was conceptually impossible. The law was an antinomy or an antonym of freedom. Freedom vitiated the law, and *vice versa.* The truth of the matter is that there never existed any notion of freedom that was even remotely comparable to that held by a Greek or a Roman.[5] The notion that a process of law, "due" or otherwise, is essential for the protection of life, liberty and property is simply not "Oriental".

A famous Chinese poet-historian prided himself on not bothering to read the law. If a Roman was proud of his law and had faith in the Roman system of jurisprudence, a Korean was contemptuous of his law or was afraid of it. If a Roman treated jurisconsults with respect and always respected law and order, a Korean admired only those who could "live without the law."

Thus, traditionally, the Korean people had never had a good opinion of the law. On the contrary, the law was an instrument of oppression. Therefore, they did their best to evade it as far as possible.[6] They enjoyed "hoodwinking" the law and the law enforcement officers. When they could not be bold enough "to hoodwink" the law, they were afraid of it. They tried to keep it at a respectful distance. They were always afraid to "get involved" with the law. Had the people considered the law as their own, they would have tried

---

[3] In another article, the present writer intends to pursue this aspect of the problem farther in connection with the absence of "feudalism" in Korea.

[4] cf. "Laws are something different from what regulates and expresses the form of the Constitution; it is their office to direct the conduct of the magistrate in the execution of his office and the punishment of offenders." Aristotle, *Politics,* trans. Jowett (Oxford University Press, 1926), Book IV, Chap. 1, 1289a.

[5] "Herodotus reports some Greeks as saying to a Persian official who was urging them to submit to Xerxes. 'Freedom you have never tried, to know how sweet it is. If you had you would urge us to fight for it not with our spears only, but even with hatchets.' " Edith Hamilton, *The Greek Way to Western Civilization* (New York: The New American Library, A Mentor Book, 1954), p. 124. Other differences between the East and the West are very interestingly brought out in pp. 123–5.

[6] cf. paragraphs 76, 77, 78 and 81 of the Working Paper on The "Dynamic Aspects of the Rule of Law in the Modern Age" – South-East Asian and Pacific Conference of Jurists held in Bangkok, Thailand, February 15–19, 1965, under the aegis of the International Commission of Jurists.

to protect and preserve it. However, the law was always from the "above" *(von oben)*. Their interests were never taken into account when it was promulgated.

An obligation or a duty was always in terms of a family or a community. The law was never considered something that had to be observed because it *was* the law. A Korean is not familiar with the notion that a contract or a promise must be performed or kept because it *is* a contract or a promise. *"Pacta sunt servanda"* has no meaning whatever to a Korean. A Korean may keep his promise because the promisee is someone related to him either by family or through a communal tie. The reason for this is that when a family or a community relationship stands between the parties to a contract, non-performance of such a contract involves "loss of face". When it is in the interests of the promisor to keep the promise, of course, such a promise will be kept.

Asia can boast of one of the earliest codes of penal law in the world. The succeeding dynasties in China kept expanding and enlarging it. It was successively copied by other Asian countries. These penal codes were meticulously thorough and ran into scores of volumes and several thousands of provisions. But when it came to the law of contract, property, voluntary associations, commerce, agency and other private law, there was no uniform codified body of law comparable to the penal codes. The laws that were necessary for ruling and controlling the people were thought essential and were promulgated. They are, indeed, the masterpieces of "Oriental despotism."

The Korean word for law, "bup," was originally derived from the Chinese word "fa". It has three meanings when used as a noun. The first is "a norm, an order or a system." The second is "a punishment or a penalty." The third is "a form or an appearance."[7] When we compare these meanings with those of *ius, droit* or *Recht* we have at least a partial explanation of the Korean people's attitude toward the law. The first meaning of the word may be said to be the same in both Europe and Asia. But the so-called "subjective" meaning of the European words was not only lacking in many parts of Asia, but was also in some ways the exact opposite of a punishment or a penalty.

In this age of modern communications, a word that is used in one language with a certain meaning almost always finds its equiva-

[7] In olden times, a punishment took the form of compelling the guilty to wear a certain form of dress, thus making him conspicuous. The reason for this conspicuous appearance is to make the wearer of such an apparel feel ashamed in front of others. He would become a target of reproach as well as an example to others. Again this meaning of the word has its root in a form of a punishment.

lent in another through the process of translation, interpretation or assimilation. Korean counterparts are often willy-nilly assigned to such words as democracy, freedom, individual, justice, rights, duties and so forth. Otherwise, the process of communication cannot be maintained among nations. But matters do not end there. After the so-called translation, the problems get more and more complicated. Frequently, these complications do not show any outward sign of subterranean tension. Yet, the problem gets worse as well as more subtle.

We have assigned our "bup" as a Korean equivalent of *ius, droit, Recht* and law. Ever since this assignment we have been using it, without paying any attention to its other meanings which are more important simply because they tend to be ignored. And also the fact that these other meanings of the word are closely bound up with social and psychological convictions and the subconscious cultural outlook of the people makes these meanings very important. When we come to other sundry and more technical juridical concepts and propositions, the difficulties become greater.

II

Can a system of European legal concepts and values engraft itself upon a people with such a historical background? It is not the purpose of this article to assert that there is no possibility of a new system of legal concepts and values taking root in an Asian country like Korea. The point is that before we try to adopt a concept such as the Rule of Law and work towards its realization in Korea, we must beware of pitfalls created by the difference in cultural backgrounds and historical traditions. If the phrase "the Rule of Law" does not have a happy connotation in the cultural context of this country, we should not go on repeating it in the hope that through dint of repetition a kind of social order that may be said to be under the Rule of Law will be established. It appears, therefore, that either the phrase or the cultural context must be changed.

Remembering that one can easily qualify a term by adding an adjective or two, we might propose the addition of such words as "just" or "truly democratic" before the word "law". Thus, the phrase would read "the Rule of Just Law," or "the Rule of Truly Democratic Law." It is not intended here to settle the phraseology once and for all. It is sufficient to point out the need for making the idea of "the Rule of Law" more meaningful to the ordinary Korean.

But some doubt remains as to the practicability of bringing about the necessary understanding by merely adding a few adjectives

to the phrase. It seems that, in order to make the concept as meaningful to the Korean as it is to the American, for example, something more than a change in phraseology is needed. The concept of law itself, as understood by a Korean, must undergo a fundamental change. It is, however, no easy matter to change an attitude of a people, particularly when it is the product of several thousand years of history. Such an attitude cannot be altered or re-adjusted by a few decades of so-called *modern* life. Under these circumstances, one is inclined to abandon the whole effort as impossible or futile.

To make matters worse, the modernization process in Korea for the past several decades has not gone at all well. For the Koreans, the twentieth century started with colonization of their country by a foreign power. The introduction of a modern system of law was achieved through the medium of this colonization process. The new system of law was again looked upon as *theirs,* not *ours.* The law was again something that was imposed from the above. The law was again an instrument of oppression – an oppression that was more odious because it was by a foreign master. Furthermore, this oppression had all the trappings of an "Oriental despotism," since our colonial master was an Asian country. It is only natural that the people again learned to fear the law and the bureaucrats who enforced it. The law was again working against their interests. Freedom, independence and the other good things of life had to be captured by waging an incessant war against the law.

This state of affairs was doubly unfortunate because it not only taught the people to fear and abhor the law, but it also made the breaking of the law "patriotic". It became almost a patriotic duty of a Korean to disregard and violate the law. When a person committed treason, he was the greatest patriot of all. If a Korean assassinated a Japanese police official or bombed a police station or robbed a military supply train, he was admired, though secretly, by the people. After almost half a century during which this state of affairs prevailed, the country was suddenly liberated at the end of the Pacific War. By this time, the fear of and the disrespect for the law had become a very definite attitude.

In our efforts to establish a stable and democratic government, we first had to fight this destructive attitude of the people toward the law. In the face of such an attitude, any effort to establish law and order was simply futile. But the habitual disregard and fear of the law could not be broken overnight. The people could not suddenly be made to realize fully that the law they were disregarding was their own law, and that the law now was something for their own benefit.The Korean Bar, which grew up under the Japanese, was apt to be regarded with suspicion, because its members were

mostly Japanese-trained and co-operated closely with the Japanese colonial administration. [8]

On the other hand, the Rule of Law would appear to depend on a stable democratic government. In other words, it would appear that a political democracy was a condition precedent for a democratic legal order. A people who have had no actual experience of enjoying freedom cannot be expected to know its value. A nation that has had no stable legal order cannot be expected to fight for such a legal order. They must first have an opportunity of witnessing the Rule of Law in actual operation, protecting their freedom and dignity. They will then, and only then, realize the need for the Rule of Law. If a people have only had experience of dictatorship and authoritarianism, they will not be able to appreciate the need for the Rule of Law.

But this takes us right back to where we started. We started out working towards securing the Rule of Law, and ended up with saying that in order to appreciate the need for the Rule of Law, we have to have the Rule of Law first. The Rule of Law is deemed essential for a workable democracy. Yet, we are saying that we must have democracy before we can have the Rule of Law. This is the vicious circle in which a developing nation such as Korea finds itself caught.[9] This chain of the circle must be broken somehow. We may not expect a fast and easy formula. One thing is certain, however. If a small advance is made in one area, a similar or a greater advance may be expected in the other.

This takes us to the problem of the greater role lawyers must play in the political life of the nation. When a lawyer moves into the political arena, he tends to be considered a degenerate by his fellow practitioners. This unfavourable view of lawyers who become active in politics is, however, formed not without reason. The experience in this country to this date has shown us that when a lawyer becomes a responsible member of the government, he does not show much more respect for the Rule of Law, as we understand it, than an average politician. Of course, we cannot expect any one

---

[8] Some former colonies which attained independence after a prolonged period of colonization must have been faced with a similar type of difficulty. Since many newly independent countries were once colonies, a series of exchanges of lessons gained by these countries will certainly do much to facilitate the establishment of the Rule of Law in all of these countries.

[9] This reminds us of a vicious circle in which an underdeveloped nation is caught in the area of economic development. Professor Samuelson defined this circle as follows: "Poverty creates want, want destroys thrift, absence of capital formation prevents improvement, limitation of mass demand makes new mass-production projects unappealing, absence of mass-production makes poverty." Paul A. Samuelson, *Economics: An Introductory Analysis* (New York: McGraw-Hill, 1955), p. 722.

lawyer-politician to achieve the Rule of Law single-handed. He may well be simply outnumbered by other politicians who have no understanding of the importance of the Rule of Law. If this were the case, a greater number of lawyers active in politics would be the answer. At the same time, we may not rule out a greater participation in the political affairs of the nation by the lawyers solely on the ground that past experience has fallen short of expectations. If more lawyers with a strong faith in the Rule of Law were to participate actively in the political life of the nation, the Rule of Law would certainly have a better chance of securing a strong foothold in the country.

A greater and more active participation in the political life of the country by lawyers, however, cannot be realized without an effort at co-operation by others in the profession. It is easier to talk about individual liberty and the dignity of man than to do something positive that may involve personal sacrifices and hardships of one kind or another. The judges, prosecutors and practising lawyers must do their share of the difficult work. A courageous and honest judiciary will do much to make the Rule of Law a reality. The prosecutors can do a great deal to lessen the suspicion of the law that lurks in the minds of the people. They are in fact in the best position to turn such ideas as individual liberty and human dignity into something more than lofty but empty *clichés*. On the other hand, the prosecutors, as government employees, tend to be mere executors of administrative policies. When they become true guardians of personal freedom, the Rule of Law can become a thing of value that is desired, not feared.

In the case of practising lawyers, however, the problem involves an aspect that cannot be disposed of by a mere didactic "ought". As in any other country, the Korean practitioners must wait for the people to come to them for their services. It is true that the practitioners can make some contributions to the Rule of Law in areas not directly connected with the practice of the law. They can be active in civic matters or in social welfare work. But they can make the most effective contribution through their professional practice. If people come to them with their difficulties and injuries, the practitioners can help them to find answers to their problems and remedies for their injuries. But this depends on the willingness of the people to come to practising lawyers for help. Unfortunately, the Korean people in general are unwilling to do so. This unwillingness of the people to take advantage of the services of lawyers is in part due to the lack of effort on the part of the legal profession to establish a better and more effective relationship with the public. But this reluctance of the people can best be explained in terms of the traditional hostility of the Korean people toward the law and any one connected with the law. The people

must be made to come to the lawyers for advice and help. The people must be made to appreciate the value of their professional services. The general attitude of the people towards the law colours their attitude towards the legal practitioner. Therefore, before practitioners can do effective work towards building the Rule of Law, the Rule of Law must be secured so that the people may be able to view the law as something for their benefit. Now we are again back in the vicious circle. How can we break the circle and make the people trust the law and the lawyers?

Before we can tackle the problem, we must have a clear understanding of the nature of the problem we are faced with. Before we can attempt to penetrate the hostility of the people towards law, we must have an accurate grasp of the extent, the intensity and the nature of such hostility. "Selling" the law and the services of the lawyers to the people may seem a simple matter of public relations and propaganda. But this "selling" cannot be accomplished without some kind of "market survey." If we do not have a sufficient understanding as to *how* reluctant the people are to call on a lawyer for help, and the *reasons* for such reluctance, we cannot possibly hope to be successful in our efforts to make the people trust and rely on the law. A well-organized survey of the opinions and attitudes of the people towards the law will be very useful in this respect. This type of *sociological* approach will be particularly valuable in countries that have had no tradition of the Rule of Law. The difficulties inherent in this type of survey are recognized. But if it were a truism that an attitude or an opinion is not capable of exact measurement, yet some degree of insight can be gained from this type of survey which will be of great value in helping to overcome the coolness of the people towards the law.

III

In trying to establish the Rule of Law, an Asian country like Korea faces the difficulty of bringing the law closer to the hearts of the people. Unqualified and unconditional abhorrence and fear of anything that is even remotely connected with governmental power and authority must be replaced by trust and willingness of the people to accept the Rule of Law as the guardian of their liberty and individual dignity. In order to make the concept of the Rule of Law more meaningful to the Korean people, an addition of a few adjectives such as "just", or "truly democratic" to the phrase might be helpful. But, if we are to make the Rule of Law something more meaningful than a mere propaganda phrase, we must be prepared to bring about the necessary change in the attitude of the people toward the law.

Everyone connected with the legal profession is primarily responsible for making the Rule of Law a happy and concrete reality. Lawyers, however, must first understand the antagonism of the people towards the law. An intensive study of the legal history of the nation will be useful in shedding light on their traditional values and concepts vis-à-vis the law. At the same time, the nature and extent of the people's present antagonism or coolness towards the law must be ascertained beforehand so that the best methods of overcoming this antagonism or coolness can be devised. It is suggested that a survey of the attitudes and opinions of the people will prove most useful in this connection.

UNITED NATIONS DRAFT INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RELIGIOUS INTOLERANCE

STAFF STUDY

A Draft International Convention on the Elimination of All Forms of Religious Intolerance, prepared by the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities in January 1965, was discussed by the Commission on Human Rights in March–April of the same year. This Draft Convention is a very important addition to the series of international instruments drafted by the United Nations to implement human rights and fundamental freedom on a world level. Other draft international instruments are, it will be useful to recall, the Draft Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights; the Draft Conventions on the Elimination of All Forms of Racial Discrimination and on Freedom of Information.

The present draft under discussion is intended to implement Article 18 of the Universal Declaration of Human Rights, granting everyone the right to freedom of thought, conscience and religion. The Universal Declaration included in the concept of religious freedom "freedom for everyone 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 teaching, practice, worship and observance".

Similar provisions were included in the American Declaration on the Rights and Duties of Man, adopted at Bogota in 1948 by the Ninth International Conference of American States. The provision of Article 18 of the Universal Declaration was taken over verbatim and given effect to by Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on November 4, 1950. It was embodied in Article 18 of the Draft Covenant on Civil and Political Rights of the United Nations.

The United Nations has been dealing with the problem of the implementation of the freedom of religion for a number of years. A short historical retrospect may put the present draft in a proper perspective.

Survey and Preparatory Works

1. The Sub-Commission on Prevention of Discrimination and Protection of Minorities started studies on problems of discrimination in 1956. Among other rapporteurs it appointed Mr. Arcot Krishnaswami of India as Special Rapporteur to carry out a "Study of Discrimination in the Matter of Religious Rights and Practices". The study, based on extensive documentation including 86 country monographs, was submitted for final study to and adopted by the Sub-Commission in 1960.

It pointed out that there was increasing recognition of the right to freedom of thought, conscience and religion in the world. On the one hand there had occurred a change of attitude more favourable to the rights of agnostics and atheists in certain areas. On the other hand, the attitude of certain religions towards other religions had also improved. The favourable trend, the Special Rapporteur emphasized, gave hope and strength to those who believed that the time was ripe for an elaboration of the general principles of non-discrimination, enshrined in the Universal Declaration of Human Rights. The international community had a serious responsibility to take proper safeguards against any sudden reversal of those trends.

By way of conclusions drawn from his study Mr. Krishnaswami attempted to formulate positive and constructive principles to be applied in the eradication of discrimination in respect of freedom of thought, conscience and religion. The Sub-Commission adopted them in substance, with certain modifications designed to introduce greater clarity. These draft principles were considered and developed by the Sub-Commission and by the Commission on Human Rights at their subsequent sessions (see under 4 below).

The Commission on Human Rights was unanimous in its appreciation of Mr. Krishnaswami's Report. In its view the Special Rapporteur had produced a masterly study of great integrity and intrinsic importance, comprehensive, objective and impartial. The study was not only profoundly scientific and scholarly, but also had the virtues of conciseness and clarity. It was decided to print and circulate it widely so that it might be used throughout the world.[1]

2. The Non-governmental Organizations Interested in the Eradication of Prejudice and Discrimination held a Conference at the European Office of the United Nations, Geneva, from June 22 to

---

[1] United Nations Publication Sales No. 60 XIV. 2. Commission on Human Rights, Report of the 16th Session, 1960, 29 February – 18 March 1960, Geneva. E/3335; E/CN.4/804, paras. 150-159; 161.

26, 1959. Among the resolutions adopted by this Conference the following recommendations in particular should be mentioned: intensification of UNESCO's programme for the eradication of prejudice and discrimination; improvement in the facilities for research into the causes of prejudice and discrimination, and the techniques for their eradication; further action to be taken by the United Nations to combat prejudice and discrimination.
Members of the Commission on Human Rights, in reviewing the work of the Conference, pointed out that careful attention should be given to the views expressed by the non-governmental organizations, as they were often free to investigate certain subjects more deeply, and to express their views more frankly, than official organs. Moreover, their views were useful indicators of the trend of world public opinion [2].

3. The Sixteenth Session of the Commission on Human Rights, meeting in Geneva in March 1960, discussed and adopted a resolution on "Manifestations of Anti-Semitism and other Forms of Racial and National Hatred and Religious and Racial Prejudice of a Similar Nature". As reported in the *Bulletin of the International Commission of Jurists* [3], all representatives unanimously branded these manifestations as a threat to freedom of religious belief and expression. The delegates of the Communist countries denounced the anti-semitic manifestations in West Germany as evidence of a revival of Nazism and of a policy of aggression. Other delegations regretted that anti-semitic manifestations had occurred in numerous countries on both sides of the ideological divide. After a lengthy debate, a resolution was eventually unanimously adopted which was firm in condemning manifestations of anti-semitism but free from any specific reference to a given country. The problem was reconsidered at subsequent sessions of the Commission, the Council and the Assembly.

4. The General Assembly of the United Nations, deeply disturbed by the manifestations of discrimination based on racial and religious prejudice, passed a resolution on December 7, 1962 in which it asked the Commission on Human Rights to prepare (a) a draft declaration on the elimination of all forms of religious intolerance

---

[2] Commission on Human Rights, Report of the 17th Session, 1961, E/3456, E/CN.4/817, paras 140-142; Commission on Human Rights, Report of the 16th Session, 1960, E/3335, E/CN.4/804; paras 175-200.

[3] N° 11, December 1960, pp. 51, 55-56. It should be noted that the International Commission of Jurists, having consultative status category B with the Economic and Social Council, was represented at the sessions of the Commission on Human Rights by observers.

and (b) a draft international convention on the same subject.

In 1963 at its 19th session, held in Geneva, the Commission on Human Rights considered resolution 8 (XV) of its Sub-Commission on Prevention of Discrimination and Protection of Minorities. This resolution expressed the view that the draft principles submitted earlier by the Sub-Commission and currently under examination by the Commission on Human Rights contained the basic elements of a draft declaration, and that therefore the Commission should give priority to completing its examination of these draft principles (referred to above under 1.). The Commission, notwithstanding the views expressed by the Sub-Commission, asked it to prepare and submit a new draft declaration and limited itself to a general debate of the problems involved.

In the general debate it was emphasized that the draft declaration would have to take into account that discrimination and intolerance existed in certain countries, particularly in regard to consideration of religion or belief in teaching, practice, worship and observance. For instance, in certain places discrimination was practised against particular groups who were denied the necessary means for observing or performing their religious rites, or who were not permitted freely to associate with others belonging to the same faith, either in their own country or abroad. In some cases press campaigns were permitted against certain religious groups. In fact, the Commission would have to consider all the rights included in the Universal Declaration and their relationship to the proposed draft declaration on the elimination of all forms of religious intolerance [4].

The requested draft declaration was submitted by the Sub-Commission to the Commission on Human Rights at its 20th session [5]. However, owing to lack of time, the Commission was unable to consider and to adopt a draft declaration and transmitted all the relevant documents to the Economic and Social Council. The Council, after a debate at its 37th session, passed the unresolved problem of a draft declaration to the General Assembly and suggested that "it takes a decision at its 19th session on the further course to be followed on the matter [6]".

The stormy nineteenth session of the General Assembly was also unable to consider the question, due to the differences of opinion which had arisen regarding the financing of peace-keeping operations.

The draft declaration on the elimination of all forms of religious

[4] Commission on Human Rights, Report of the Nineteenth Session, 11 March – 5 April 1963, E/3743; E/CN.4/857, paras. 146 to 156.

[5] Commission on Human Rights, Report of the Twentieth Session, E/3873, paras. 291 to 294.

[6] Report of the ECOSOC to the General Assembly for the year 1963-1964, GAOR, 19th session, Suppl. No. 3.A/5803; paras. 435-440.

intolerance has thus been caught up in the procedural labyrinth of the United Nations. With the exception of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, a body of experts, no other organ of the United Nations has devoted to it the necessary time and energy required to arrive at satisfactory results. Fortunately, the draft international convention on the same subject has received much more satisfactory treatment.

Drafting of the Convention

The draft international convention on the elimination of all forms of religious intolerance was elaborated by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its 17th session, held in Geneva on January 11 to 29, 1965 [7]. The Sub-Commission devoted twenty of its twenty-six plenary meetings to this item and elaborated a draft consisting of a preamble and thirteen articles, as well as a preliminary draft as an expression of the general views of the Sub-Commission on additional measures of implementation.

The Sub-Commission had before it a note by the Secretary-General summarizing substantive comments submitted by Member States concerning the proposed draft convention, the text of Article 18 of the draft covenant on civil and political rights as adopted by the Third Committee of the General Assembly, the paragraphs adopted by the Commission on Human Rights for inclusion in the preamble of the proposed draft principles on freedom and non-discrimination in the matter of religious rights and practices, and a report of the working group set up by the Commission on Human Rights at its twentieth session to prepare a draft declaration on the elimination of all forms of religious intolerance. A number of international non-governmental organizations submitted written or oral statements. An oral statement was made also by the observer from Israel.

Three drafts were submitted to the Sub-Commission, by Mr. Calvocoressi (United Kingdom), by Mr. Abram (United States of America) and by Mr. Krishnaswami (India). Six draft articles were submitted by Mr. Nassinovsky (USSR) and two by Mr. Ingles (Philippines).

In preparing the draft convention, the Sub-Committee set up an informal working group with a view to combining the three drafts into a single joint text, which then served as a basis for further discussion, in the course of which the final text was elaborated and adopted.

---

[7] Report of the Seventeenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights E/CN.4/882.

The general debate in the Sub-Commission stressed the fact that it was more difficult to legislate on religious intolerance than on racial discrimination, since an international convention on religious freedom impinged upon the most intimate emotions of human beings. Historically, the suppression and persecution of religion and belief by the State had been a long, unhappy tragedy in which States, individuals, groups and even religious institutions had been offenders as well as victims. Today the world was passing through a period of ideological turbulence, characterized by disputes and growing understanding between the great religions of the world and by renewed and increased confrontation between theism and atheism, in which some States had chosen to play an active part. At the same time it was noted that a welcome change had occurred in recent years in the atmosphere surrounding the questions of freedom of thought, conscience and religion, due in part to the feeling of revulsion which had spread over the world after outbursts of feeling against the Jewish religion, and in part to debates in various United Nations bodies which had served to clarify the basic issues and to demonstrate the need for international action. It was recognized that no law or international convention could achieve the ideal situation in which everyone accorded to all others the necessary degree of respect, for only the individual conscience could provide such a guarantee. Nevertheless, the law could reflect that conscience and could prevent State action which curtailed all or some religious beliefs, or penalized persons on the ground of their religion or belief. It could provide a climate in which private action against freedom of thought, conscience and religion could be minimized, and it could set community standards and provide a moral force capable of changing past attitudes and creating new ones.

The Draft Convention, considered in its present form, consists of three parts: 1. The Preamble and first four articles adopted by the Commission on Human Rights; 2. ten subsequent articles adopted by the Sub-Commission which the Commission had no time to deal with at its twenty-first session; 3. the seventeen articles of the Preliminary Draft on Additional Measures of Implementation submitted by the Sub-Commission.

Final voting in the Sub-Commission or in the Commission on Human Rights was either unanimous or taken with a few abstentions only.

During its twenty-first session the Commission on Human Rights devoted the major part of its work, 21 out of 36 plenary meetings, to the draft convention. It adopted the text submitted by the Sub-Commission on the basis of discussion. The drafting of the text in plenary meetings consumed much time. Many amendments were submitted and debated at length. The debates and the voting on

the proposed amendments showed, however, that the wording of the Sub-Commission or a different wording expressing the original purpose were retained in most cases.

The right to freedom of thought, conscience, religion and belief is recognized today, as Mr. Krishnaswami concluded in his study cited above, in nearly all areas of the world. But even if proclaimed it has not as yet been fully implemented in all countries or at the international level. The purpose of the proposed convention is to render its recognition universal and its implementation optimal.

The measures of implementation proposed by the draft convention can be grouped, as far as substantive rights are concerned, under three headings:

1. freedom to maintain or to change religion or belief;
2. freedom to manifest religion or belief;
3. the limitations imposed on these rights.

The procedural aspect provides two further headings:

1. remedies in municipal law (domestic remedies);
2. remedies in international law (means of international protection).

The Preamble sets out the place of freedom of thought, conscience, religion and belief among the fundamental rights and freedoms listed in the Universal Declaration of Human Rights and the conventions already adopted by the International Labour Organization in 1958 and the United Nations Educational, Scientific and Cultural Organization in 1960 in the field of non-discrimination, by stressing that religion or belief, for anyone who professes either, is a fundamental element in his conception of life, the freedom of which should be fully respected and guaranteed.

In the Charter of the United Nations all Member States have pledged themselves to take joint and separate action in co-operation with the Organization to promote and encourage universal respect for and observance of human rights. The proposed international convention on religious freedom can be considered as one more step in the implementation of this pledge, invoked by the Preamble. The convention's purpose is, according to the Preamble "to adopt all necessary measures for eliminating speedily religious intolerance in all its forms and to prevent and combat discrimination on the ground of religion or belief".

Both the Preamble and Article V of the draft convention recognize the overwhelming importance of education in creating the conditions necessary for the untrammelled enjoyment of freedom of religion and belief, without which legal provisions may also

remain ineffective. Having thus highlighted the indispensable role of education, the draft convention, as an instrument of international law, deals with legal provisions of municipal and international law deemed to be necessary for the implementation of religious freedom.

Freedom to maintain or to change religion or belief is assured by Article III (a) guaranteeing "freedom to adhere or not to adhere to any religion or belief and to change his religion or belief in accordance with the dictates of his conscience". This freedom is absolute and is not subject to any limitations whatsoever, not even to those which apply to freedom to manifest one's religion.

Freedom to manifest one's religion or belief is guaranteed by Article III (b) in general terms, and by (c) to (h) in specified aspects, covering the major manifestations of religion or belief practised either alone or in community with others, such as worship, teaching, maintenance of charitable works and institutions, rituals and dietary practices, pilgrimages, protection of places of worship and disposal of the dead, the expression in public life or elsewhere of the implications of religion or belief and the freedom from compulsion to take an oath of a religious nature. Freedom of association in religious matters includes, by Article III (g), the freedom to organize and maintain local, regional, national and international associations in connexion with one's religion or belief, to participate in their activities and to communicate with one's co-religionists and believers.

The rights relating to the manifestations of religion are subject to the minimum limitations, imposed by the States "to protect public safety, order, health or morals, or the individual rights and freedoms of others, or the general welfare in a democratic society", (Article XII), a provision identical with Article 29 of the Universal Declaration of Human Rights and Article 18 (3) of the Draft Covenant on Civil and Political Rights.

The provisions on the rights to manifest one's religion or belief, read together with the provision on limitations, mean that this freedom must be ensured as widely as possible. Any limitation imposed upon that freedom should be exceptional and confined within the narrowest possible bounds, should be prescribed 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 [8].

Institutionalized legal safeguards of the freedom of religion and belief are of two kinds: remedies assured in municipal law and in international law.

In the field of municipal law States that are Parties to the

[8] Arcot Krishnaswami, op. cit., p. 66.

proposed convention undertake "to promote and implement policies which are designed to protect freedom of thought, conscience, religion or belief" (Article II), "to take effective measures to prevent and eliminate discrimination based on religion or belief, including the enactment or abrogation of legislation where necessary . . ." (Article VI), to ensure equality before the law in the exercise of the right to freedom of thought, conscience and religion and to equal protection of the law against any discrimination on the ground of religion or belief (Article VII). On the legislative or other measures adopted by States Parties in the implementation of the obligations outlined above, the States have to report periodically to the Economic and Social Council as provided for by Article XIII.

Domestic remedies for the possible infringements of religious freedom are included in Article X of the draft convention including recourse to competent judicial or administrative authorities. It was frequently stressed before the United Nations that unless human rights may be defended in the courts, as for example prescribed by the Indian Constitution, or by the special writs issued out of the common law courts, their implementation is jeopardized.

If all available domestic remedies have been exhausted in the given cases and freedom of religion still remains impaired, the Preliminary Draft on Measures of implementation proposes to assure remedies in international law through a United Nations Good Offices and Conciliation Committee (Articles XIV to XXIX) or as an alternative by the submission of the case to the International Court of Justice (Article XXX). The rights of petition granted by Article XXVI to individuals claiming to be the victims of a violation of the Convention by any State Party, or to any non-governmental organization in consultative status with the Economic and Social Council, would raise the international protection of the human right of freedom of religion to the level assured by the European Convention on Human Rights.

Pending the adoption of effective implementation machinery, a U.N. High Commissioner for Human Rights could supervise to an extent the application of the Convention. The proposal for the establishment of a U.N. High Commissioner for Human Rights with status and powers analogous to that of the High Commissioner for Refugees is now on the Agenda of the General Assembly.

Considering the Draft Convention as a whole, entire satisfaction can be expressed with the work done by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its preparation, as was done at the session of the Commission on Human Rights. One can only hope that the Commission will at its coming twenty-second session adopt the remaining parts of the draft. Furthermore it would be highly desirable that the International Convention on the Elimination of All Forms of Religious Intolerance,

as it is called at present, be adopted by the General Assembly and signed by a great number of States before the beginning of or during the International Year for Human Rights in 1968 [9].

[9] E/CN.4/886, paras. 93-99, and Recommendation VI (para 99).

RELEVANT UNITED NATIONS DOCUMENTS [1]

A. Resolutions adopted by the Commission on Human Rights and the Economic and Social Council.
Commission on Human Rights, Resolution 1 (XXI), 7 April 1965.

Draft International Convention on the Elimination of All Forms of Religious Intolerance,[2]

The Commission on Human Rights

Noting General Assembly resolution 1781 (XVII) requesting, *inter alia,* the preparation of a draft convention on the elimination of all forms of religious intolerance,

Noting with satisfaction the preliminary draft for such a convention prepared by the Sub-Commission on Prevention of Discrimination and Protection of Minorities,

Having adopted at its twenty-first session a preamble and four Articles, but having been unable, due to lack of time, to complete its work on the draft convention,

1. *Decides* to give absolute priority at its twenty-second session to completing the preparation of a draft convention on the elimination of all forms of religious intolerance;

2. *Recommends* to the Economic and Social Council that it adopt the following draft resolution:
The draft resolution was adopted by ECOSOC on July 28, 1965 at the 1392nd plenary meeting, thirty-ninth session.[3]

The Economic and Social Council, Resolution 1074 (XXXIX) B:

Having taken note of resolution 1 (XXI) of the Commission on Human Rights concerning the draft convention on the elimination of all forms of religious intolerance

Draws the attention of the General Assembly to this resolution.

B. Text of Provisions of the Draft Convention adopted by the Commission:

Preamble

The State Parties to the present Convention,

Considering that one of the basic principles of the Charter of the United Nations is that of the dignity and equality inherent in all human beings, and

---

[1] Economic and Social Council, Official Records: Thirty-Ninth Session, Supplement No. 8, Commission on Human Rights, Report on the Twenty-First Session, 22 March – 15 April 1965, E/CN.4/891.

[2] EC/N.4/891, para. 326.

[3] E/RES/1074 (XXXIX) 28 July, 1965.

that all States Members have pledged themselves to take joint and separate action in co-operation with the Organization to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion,

Considering that the Universal Declaration of Human Rights proclaims the principle of non-discrimination and the right to freedom of thought, conscience, religion and belief,

Considering that the disregard and infringement of human rights and fundamental freedoms, and in particular of the right to freedom of thought, conscience, religion and belief, have brought great suffering to mankind,

Considering that religion or belief, for anyone who professes either is a fundamental element in his conception of life, and that freedom to practice religion as well as to manifest a belief should be fully respected and guaranteed,

Considering it is essential that Governments, organizations and private persons should strive to promote through education, as well as by other means, understanding, tolerance and respect in matters relating to freedom of religion and belief,

Noting with satisfaction the coming into force of conventions concerning discrimination, *inter alia,* on the ground of religion, such as the ILO Convention on Discrimination in Respect of Employment and Occupation, adopted in 1958, the UNESCO Convention against Discrimination in Education, adopted in 1960, and the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, adopted in 1948,

Concerned by manifestations of intolerance in such matters still in evidence in some areas of the world,

Resolved to adopt all necessary measures for eliminating speedily such intolerance in all its forms and manifestations and to prevent and combat discrimination on the ground of religion or belief,

Have agreed as follows:

Article I

For the purpose of this Convention:

(a) the expression "religion or belief" shall include theistic, non-theistic and atheistic beliefs;

(b) the expression "discrimination on the ground of religion or belief" shall mean any distinction, exclusion, restriction or preference based on religion or belief which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life;

(c) the expression "religious intolerance" shall mean intolerance in matters of religion or belief;

(d) neither the establishment of a religion nor the recognition of a religion or belief by a State nor the separation of Church from State shall by

itself be considered religious intolerance or discrimination on the ground of religion or belief; provided that this paragraph shall not be construed as permitting violation of specific provisions of this Convention.

Article II

States Parties recognize that the religion or belief of an individual is a matter for his own conscience and must be respected accordingly. They condemn all forms of religious intolerance and all discrimination on the ground of religion or belief and undertake to promote and implement policies which are designed to protect freedom of thought, conscience, religion or belief, to secure religious tolerance and to eliminate all discrimination on the ground of religion or belief.

Article III

1. States Parties undertake to ensure to everyone within their jurisdiction the right to freedom of thought, conscience, religion or belief. This right shall include:

(a) freedom to adhere or not to adhere to any religion or belief and to change his religion or belief in accordance with the dictates of his conscience without being subjected either to any of the limitations referred to in Article XII or to any coercion likely to impair his freedom of choice or decision in the matter, provided that this sub-paragraph shall not be interpreted as extending to manifestations of religion or belief; and

(b) freedom to manifest his religion or belief either alone or in community with others, and in public or in private, without being subjected to any discrimination on the ground of religion or belief;

(c) freedom to express opinions on questions concerning a religion or belief;

2. States Parties shall in particular ensure to everyone within their jurisdiction:

(a) freedom to worship, to hold assemblies related to religion or belief and to establish and maintain places of worship or assembly for these purposes;

(b) freedom to teach, to disseminate and to learn his religion or belief and its sacred languages or traditions, to write, print and publish religious books and texts, and to train personnel intending to devote themselves to its practices or observances;

(c) freedom to practice his religion or belief by establishing and maintaining charitable and educational institutions and by expressing in public life the implications of religion or belief;

(d) freedom to observe the rituals, dietary and other practices of his religion or belief and to produce or if necessary import the objects, foods and other articles and facilities customarily used in its observances and practices;

(e) freedom to make pilgrimages and other journeys in connexion with his religion or belief whether inside or outside his country;

(f) equal legal protection for the places of worship or assembly, the rites, ceremonies and activities, and the places of disposal of the dead associated with his religion or belief;

(g) freedom to organize and maintain local, regional, national and international associations in connexion with his religion or belief, to participate in their activities, and to communicate with his co-religionists and believers;

(h) freedom from compulsion to take an oath of a religious nature.

Article . . . (to be inserted after Article IV)

States Parties shall ensure to everyone freedom to enjoy and to exercise political, civic, economic, social and cultural rights without discrimination on the ground of religion or belief.

C. Text of Draft Convention and other Provisions relating to it submitted by the Sub-Commission.

Article IV

1. The States Parties undertake to respect the prior right of parents and, when applicable, legal guardians, to choose the religion or belief of their children.

2. In the case of a child who has been deprived of his parents, their expressed or presumed wishes shall be duly taken into account.

3. In the case of a child who has reached a sufficient degree of understanding, his wishes shall be taken into account.

4. In both these cases the best interests of the child, as determined by the competent authorities, shall be the guiding principles.

Article V

States Parties undertake to adopt immediate and effective measures by methods appropriate to national conditions and practice, particularly in the fields of teaching, education and information, with a view to promoting understanding, tolerance and friendship among nations and religious groups, as well as to propagating the purposes and the principles of the Charter of the United Nations and the Universal Declaration of Human Rights, and to combat prejudices which lead to religious intolerance between persons, groups and institutions and to discrimination on the ground of religion or belief.

Article VI

1. States Parties shall take effective measures to prevent and eliminate discrimination based on religion or belief, including the enactment or abrogation of legislation where necessary to prohibit such discrimination by any person, group or organisation.

2. States Parties undertake particular that they shall not pursue any policy or enact or retain rules and regulations restricting or impeding freedom

of religion and belief or the free and open exercise thereof; nor discriminate against any person, group or organization on account of membership in, practice of, or adherence to any religion or belief.

Article VII

States Parties undertake to ensure to everyone equality before the law without any discrimination in the exercise of the right to freedom of thought, conscience and religion, and to equal protection of the law against any discrimination on the ground of religion or belief.

Article VIII

States Parties shall ensure equal protection of the law against promotion or incitement to religious intolerance or discrimination on the ground of religion or belief. Any incitement to hatred or acts of violence against any religion or belief or its adherents shall be considered an offence punishable by law, and all propaganda designed to foster it shall be condemned.

Article IX

1. States Parties undertake to make no distinction between, and to give no preference to any religion or belief or its followers or institutions in the event of granting of subsidies, exemption from taxation, or assisting towards the preservation of religious structures recognized as monuments of historic or artistic value.

2. Any distinction or preference provided for by the law for reasons of public interest in this regard, shall not be considered discriminatory within the meaning of this Convention.

Article X

States Parties undertake to make available appropriate remedial relief by their competent judicial or administrative authorities for any violation of the rights protected by this Convention.

Article XI

Nothing in this Convention shall be interpreted as giving to any person, group or institution the right to engage in activities aimed at prejudicing national security, national sovereignty or friendly relations between nations.

Article XII

Nothing in this Convention shall be construed to preclude a State Party from prescribing by law such limitations as are necessary to protect public safety, order, health or morals, or the individual rights and freedoms of others, or the general welfare in a democratic society.

Article XIII

1. States Parties undertake to submit a report on the legislative or other measures which they have adopted and which give effect to the provisions of this Convention:

(a) within one year after the entry into force of the Convention for the State concerned, and

(b) thereafter every two years and whenever the Economic and Social Council so requests upon recommendation of the Commission on Human Rights and after consultation with the States Parties.

2. All reports shall be submitted to the Secretary-General of the United Nations for consideration by the Economic and Social Council, which may transmit them to the Commission on Human Rights or to a specialized agency for information, study and, if necessary, general recommendations.

3. The States Parties directly concerned may submit to the Economic and Social Council observations on any general recommendations that may be made in accordance with paragraph 2 of this article.

D. Text of the "Preliminary draft as an expression of the general views of the Sub-Commission on additional measures of implementation which will help to make the draft international convention on the elimination of all forms of religious intolerance more effective." [4]

Article XIV

There shall be established under the auspices of the United Nations a Good Offices and Conciliation Committee (hereinafter referred to as "the Committee") to be responsible for seeking the amicable settlement of disputes between States Parties concerning the interpretation, application or fulfilment of the present Convention.

Article XV

1. The Committee shall consist of eleven members who shall be persons of high moral standing and acknowledged impartiality.

2. The members of the Committee, who shall serve in their personal capacity, shall be elected by the Economic and Social Council on the recommendation of the Secretary-General of the United Nations, due consideration being given to equitable geographical distribution of membership and to the representation of the different forms of civilization as well as of the principal legal systems.

3. The Committee may not include more than one national of the same State.

Article XVI

The members of the Committee shall be elected for a term of five years. They shall be eligible for re-election if nominated. The terms of six of the

[4] Against which, however, some experts on the Sub-Commission had raised objections.

members elected at the first election shall expire at the end of two years; immediately after the first election the names of these six members shall be chosen by lot by the President of the Economic and Social Council.

Article XVII

When electing members of the Committee, the Economic and Social Council shall also designate, on the recommendation of the Secretary-General of the United Nations, an alternate for each member so elected. An alternate need not be of the same nationality as the member concerned, but both of them should be from the same geographical area or region.

Article XVIII

1. In the event of the death or resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

2. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, or is unable to continue the discharge of his duties, the Chairman of the Committee shall notify the Secretary-General of the United Nations who shall thereupon declare the seat of such member to be vacant.

3. In each of the cases provided for by paragraphs 1 and 2 of this article, the Secretary-General of the United Nations shall forthwith induct into office the alternate concerned as member of the Committee for the unexpired term and shall inform each State Party to this Convention accordingly.

Article XIX

Members of the Committee shall receive travel and *per diem* allowances in respect of the periods during which they are engaged on the work of the Committee from the resources of the United Nations on terms laid down by the General Assembly.

Article XX

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations. Subsequent meetings may be held either at the Headquarters or at the European Office of the United Nations, as determined by the Committee.

2. The secretariat of the Committee shall be provided by the Secretary-General of the United Nations.

Article XXI

1. The Committee shall elect its Chairman and Vice-Chairman for a period of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure. Before adopting such rules, the Committee shall send them in draft form to the States then Parties to the Convention who may communicate any observation and suggestion they may wish to make within three months.

3. The Committee shall re-examine its rules of procedure if at any time requested by any State Party to the Convention.

Article XXII

1. If a State Party to this Convention considers that another State Party is not giving effect to a provision of the Convention, it may, by written communication, bring the matter to the attention of that State. Within three months after the receipt of the communication, the receiving State shall afford the complaining State an explanation or statement in writing concerning the matter, which should include, to the extent possible and pertinent, references to procedures and remedies taken, or pending, or available in the matter.

2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee by notice given to the Secretary-General of the United Nations and to the other State.

Article XXIII

The Committee shall deal with a matter referred to it under article XXII only after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law.

Article XXIV

In any matter referred to it, the Committee may call upon the States concerned to supply any relevant information.

Article XXV

1. Subject to the provisions of Article XXIII the Committee, after obtaining all the information it thinks necessary, shall ascertain the facts, and make available its good offices to the States concerned with a view to an amicable solution of the matter on the basis of respect for the Convention.

2. The Committee shall in every case, and in no event later than eighteen months after the date of receipt by the Secretary-General of the United Nations of the notice under article XXII, paragraph 2, draw up a report in accordance with the provisions of paragraph 3 below which will be sent to the States concerned and then communicated to the Secretary-General of the United Nations for publication. When an advisory opinion is requested of the International Court of Justice, in accordance with article XXVII, the timelimit shall be extended appropriately.

3. If a solution within the terms of paragraph 1 of this article is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached. If such a solution is not reached, the Com-

mittee shall draw up a report on the facts and indicate the recommendations which it made with a view to conciliation. If the report does not represent, in whole or in part, the unanimous opinion of the members of the Committee, any member of the Committee shall be entitled to attach to it a separate opinion. Any written or oral submission made by the parties to the case shall also be attached to the report.

Article XXVI

1. The Committee may receive petitions addressed to the Secretary-General from any person or group of individuals claiming to be the victim of a violation of this Convention by any State Party, or from any non-governmental organisation in consultative status with the Economic and Social Council, alleging that a State Party is not giving effect to this Convention, *provided* that the State Party complained of has declared that it recognizes the competence of the Committee to receive such petitions.

2. The declaration of a State Party mentioned in the preceding paragraph may be made in general terms, or for a particular case or for a specific period, and shall be deposited with the Secretary-General who shall transmit copies thereof to the other States Parties.

3. In considering petitions submitted under this article, the Committee shall be guided as far as possible by the principles and procedures outlined in articles XVII, XVIII, and XIX of this Convention.

Article XXVII

The Committee may recommend to the Economic and Social Council that the Council request the International Court of Justice to give an advisory opinion on any legal question connected with a matter of which the Committee is seized.

Article XXVIII

The Committee shall submit to the Economic and Social Council, through the Secretary-General of the United Nations, an annual report on its activities.

Article XXIX

The States Parties to this Convention agree that any State Party complained of or lodging a complaint may, if no solution has been reached within the terms of article XXV, paragraph 1, bring the case before the International Court of Justice after the report provided for in article XXV, paragraph 3, has been drawn up.

Article XXX

The provisions of this Convention shall not prevent the States Parties to the Convention from submitting to the International Court of Justice any dispute arising out of the interpretation or application of the Convention in a matter within the competence of the Committee; or from resorting to other procedures for settling the dispute in accordance with general or special international agreements in force between them.

DIGEST OF JUDICIAL DECISIONS

by

SUPERIOR COURTS OF DIFFERENT COUNTRIES

on

ASPECTS OF THE RULE OF LAW

Compiled and Annotated

by

LUCIAN G. WEERAMANTRY *

Editorial Note: This Section, which appears for the first time in this Number, will be a regular feature in future Numbers of the Journal of the International Commission of Jurists. Our readers are invited to send in interesting decisions from their countries pertaining to Rule of Law questions. Their co-operation will assist us to make this Section more representative in later Numbers.

* B.A. (London); Advocate, Ceylon Bar; of Gray's Inn, Barrister-at-Law; Senior Legal Officer and Advisor on Asian Affairs, International Commission of Jurists.

INDEX

* * *

Supreme Court of the United States

RIGHTS OF NATURALIZED CITIZENS

SCHNEIDER v. RUSK, SECRETARY OF STATE

(377 U.S. 163)

Para. 352 (a) (1) of Immigration and Nationality Act (1952) providing that naturalized citizens lose citizenship by continuous residence for three years in country of origin discriminatory – violates due process under Fifth Amendment of Constitution – impermissible to treat nationalized citizens as inferior to native born citizens.

Appellant was born in Germany, went to the U.S. as a child with her parents, and acquired derivative American citizenship when her parents became naturalized. She later married a German national and, except for two visits to the U.S., had lived in Germany for the past eight years.

Para. 353 (a) (1) of the Immigration and Nationality Act of 1952 provides that a naturalized citizen loses citizenship by continuous residence for three years in his country of origin. Relying on this provision, the State Department refused appellant a passport, stating that she had lost her American citizenship. Held: Para. 352 (a) (1) is discriminatory and therefore violative of due process under the Fifth Amendment of the Constitution, since no restriction against the length of foreign residence applies to native-born citizens.

In the words of the Court, "This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make. Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process' .... A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business or other legitimate reasons."

Supreme Court of Ireland

CONSTITUTIONAL GUARANTEE OF FUNDAMENTAL RIGHTS

THE STATE (QUINN) v. RYAN AND OTHERS
(118 of 1963)

Fundamental right guaranteed by the Constitution cannot be circumvented – law which makes it possible to frustrate such right invalid – the Courts are the custodians of fundamental rights.

Before the Full Court

Judgment by: O'Daly (Chief Justice), Lavery, Kingsmill Moore and Walsh JJ., Haugh J. dissenting.

Delivered on December 4, 1964.

The issue in this case was the constitutionality of S. 29 of the Petty Sessions (Ireland) Act, 1851, which authorized the execution in Ireland of a British warrant of arrest by the arrest and immediate removal to England of the person named in the warrant. After Quinn, an Irish citizen, had been arrested on an invalid warrant and released by order of the High Court, he was immediately re-arrested on a fresh warrant and removed at once by motor car across the border into Northern Ireland. His legal advisers, who had arranged that he should wait for them in the precincts of the Court while they attended to other business, being unable to find him or to obtain satisfactory information from the police as to his whereabouts, applied to the High Court for a writ of *habeas corpus*. The High Court having upheld the validity of the respondents' returns to the writ, the appellant appealed to the Supreme Court.

The Supreme Court found that "a plan was laid by the police, Irish and British, to remove the prosecutor after his arrest on the new warrant from the area of the jurisdiction of our Courts with such dispatch that he would have no opportunity whatever of questioning the validity of the warrant. It is also clear that the applicant's solicitor was refused information (and in one case supplied with misinformation) as to his client's whereabouts while his client was still within the jurisdiction, and that this refusal was persisted in while the prosecutor was still in Northern Ireland . . . In plain language the purpose of the police plan was to eliminate the Courts and to defeat the Rule of Law as a factor in government."

The Court held that S. 28 did purport to authorize removal from the jurisdiction *instanter* without any opportunity, reasonable or otherwise, to invoke the Courts, but that such a provision, being contained in an Act of the British Parliament (passed when Ireland was still a part of Great Britain) prior to the Constitution of 1937, was inconsistent with the provisions of Article 40 of the Constitution and therefore invalid. In the words of O'Daly C. J., "The claim made on behalf of the police to be entitled to arrest a

citizen and forthwith to bundle him out of the jurisdiction before he has an opportunity of considering his rights is the negation of law and a denial of justice...

"It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that those rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights."

Agreeing with the Chief Justice, Walsh J. said, "It is quite clear that a right to apply to the High Court or any Judge thereof is conferred on every person who wishes to challenge the legality of his detention. It must follow that any law which makes it possible to frustrate that right must necessarily be invalid having regard to that provision of the Constitution... Any law authorizing the removal of a detained person out of the jurisdiction must, to avoid the taint of unconstitutionality, permit the detained person to remain or to be kept within the jurisdiction for such a length of time as would afford him a reasonable opportunity to consider and, if he so desired, to exercise his constitutional right to apply to the High Court for the purpose of questioning the validity of his detention."

The Court ordered that notice be served on four police officers who appeared to be responsible for the arrest and removal of Quinn from the jurisdiction requiring them to show cause why they should not be held guilty of contempt of court in depriving the appellant of his fundamental constitutional right to challenge the validity of his arrest in the Courts.

At a subsequent hearing the Court found that it was the intention of the respondents to remove the prosecutor from the jurisdiction at once in order to avoid any further delays; and that "The effect of the actions of the respondents here has been that the jurisdiction and authority conferred on the Courts by the Constitution has been interfered with in that the right of recourse to these Courts guaranteed to Philip Anthony Quinn was impaired and in the result defeated." It therefore held the respondents to be in contempt of court, but on their expression of regret imposed no penalty.

High Court of Patna, India

EQUALITY OF OPPORTUNITY

ABDUL LATIFF v. STATE OF BIHAR AND OTHERS

(A.I.R. 1964, Patna, 393)

Equality of opportunity guaranteed in Article 16 of the Indian Constitution applied to all persons in the service of the State – the guarantee does not exhaust itself after the first appointment and includes promotion to selective posts – undue preference cannot be given to one class in the same service as against the others.

Article 16 (1) and (2) of the Constitution of India reads:

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

The Court decided that the equality of opportunity which Article 16 (1) guarantees stems from the recognition in the Constitution that all persons in the service of the State similarly situated are entitled to an equal opportunity not only in the matter of appointment but in promotion and other conditions of service. The guarantee enshrined in Article 16 does not exhaust itself after the first appointment in a particular branch of service and would include promotions to selective posts. In other words, if the advancement of officers of the same service is impeded or retarded by a rule which is found to be unjust or unreasonable insofar as it accords undue preference to one class in the same service as against another, the rule would certainly be open for examination and scrutiny of the High Court under Article 16.

It was held that, whatever may be the source of the rules, these could be struck down if found to be discriminatory under Article 16.

Supreme Court of the United States

FREEDOM OF ASSEMBLY

COX v. LOUISIANA

(379 U.S. 536)

Maintenance of the opportunity for free political discussion a basic tenet of constitutional democracy – to allow persons to be punished for a "breach of the peace" merely for expressing unpopular views by giving that term a wide and vague definition amounts to an unconstitutional violation of the rights of free speech and assembly – clearly unconstitutional to enable a public official by use of a statute providing broad discretionary licensing powers to engage in invidious discrimination among persons or groups.

Appellant was the leader of a civil rights demonstration in Baton Rouge, Louisiana. It consisted of an orderly march to the courthouse – where other demonstrators were detained – where the group assembled on the sidewalk across the street from the courthouse and sang songs, after which appellant addressed them, concluding with an exhortation to "sit-in" at up-town lunch counters. The sheriff thereupon ordered dispersal of the

group, which was effected by tear gas. Appellant was convicted of disturbing the peace and obstructing public passages. Two issues were raised.

1. The Louisiana Supreme Court interpreted the term "breach of the peace" in the statute under which the appellant was convicted to mean "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet". Held: This definition was so vague as to be an unconstitutional violation of appellant's rights to free speech and assembly. It would allow persons to be punished merely for peacefully expressing unpopular views... "The conviction under this statute must be reversed as the statute is unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected, namely, free speech and assembly. Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy."

2. The Louisiana statute relating to obstruction on its face forbids all street assemblies and parades, but in practice certain meetings and parades were permitted, even though they had the effect of obstructing traffic, provided prior approval was obtained. The Court found that "From all the evidence before us it appears that the authorities in Baton Rouge permit or prohibit parades or street meetings in their completely uncontrolled discretion." Held: "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute."

On the types of restrictions that are proper the Court said:

> The rights of free speech and assembly, while fundamental in our democratic society, do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to ensure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection... It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is 'exercised with uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination... and with a systematic, consistent and just order of treatment, with reference to the convenience of the public use of the highways'.

Both convictions were reversed as being in violation of the appellant's freedom of speech and assembly.

Supreme Court of the United States

FREEDOM OF EXPRESSION

COX v. LOUISIANA
(See above)

Supreme Court of the United States

FREEDOM OF EXPRESSION

FREEDMAN v. MARYLAND
(380 U.S. 51)

Requirement of prior submission of films to a censorship board not necessarily unconstitutional – however there is a heavy presumption against constitutional validity of prior restraints of expression – absence of adequate safeguards against undue inhibition of freedom of expression can render statutory requirement of prior submission to censorship an invalid previous restraint.

A Maryland statute required that films be submitted to the State Board of Censors for prior approval. An appeal to the courts lay against the refusal to approve the film, but the procedure was time-consuming and the statute prohibited the showing of a disapproved film pending appeal.

Held: While a requirement of prior submission of films to a censorship board is not necessarily unconstitutional, there is a heavy presumption against the constitutional validity of prior restraints of expression, and the absence in the Maryland procedure of adequate safeguards against undue inhibition of the freedom of expression protected by the Constitution rendered the statutory requirement of prior submission to censorship an invalid previous restraint.

"Applying the settled rule of our cases," said the Court, "we hold that a non-criminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor . . . Second, while the State may require advance submission of all films in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary

sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint... To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the *status quo* for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor... Therefore, the procedure must also assure a prompt final judicial decision to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

"Without these safeguards, it may prove too burdensome to seek review of the censor's determination..."

German Federal Constitutional Court

FREEDOM OF EXPRESSION

JUDGMENT OF THE FIRST SENATE OF JANUARY 25, 1961

(Reference No. 1 BvR 9/57)

To express one's opinion is one of the noblest human rights in society – in addition it is a basic right which is of itself constituent of the democratic order – it guarantees the free debate of ideas which is vital for the proper working of society.

Reported in Bundesverfassungsgerichtsentscheidungen vol. 12, p. 113.

The complainant, the President of a Court of Appeal, was attacked in an article in the weekly magazine "Der Spiegel", it being alleged in particular that he was sympathetically inclined to communism, and asking whether it was proper that he should be appointed to high judicial office. He replied in an article in another newspaper in which he made disparaging remarks about the Spiegel article and the type of article of which it was an example.

The publishers of "Der Spiegel" brought criminal proceedings against the complainant for publishing insulting words, an offence against the Penal Code, and after a number of appeals he was convicted and fined. The complainant then brought an action by way of constitutional complaint, alleging that by his conviction his constitutional right freely to express his opinion had been infringed.

Art. 5 (1) of the German Basic Law reads: "Everyone has the right to express and disseminate his opinion in words, writing and pictures, and to obtain information without hindrance from generally available sources. The freedom of the press and the freedom of reporting by means of radio and film are guaranteed."

> Art. 5 (2) provides that "These rights find their limits in the provisions of the general laws, the legal provisions for the protection of youth and in the right to personal honour."

The court which convicted the complainant considered his article solely under the aspect of a defence of his personal honour, which by the Penal Code is a defence to a prosecution for insulting words. It held that the article went further than was necessary to protect the complainant's personal honour and amounted to an improper attack upon the publishers of "Der Spiegel".

The Federal Constitutional Court held that this approach to the case was wrong, and a breach of the complainant's rights under article 5, because it failed to take account of the constitutional importance of the formation of public opinion and the resulting influence of the fundamental right to freedom of expression on the interpretation and application of the criminal provisions relating to protection of reputation. In considering whether the complainant's article amounted to a criminal offence, account had to be taken not only of his right to defend himself against the attack made on him, but also of the contribution made by his article, in its context as a reply to an attack made on him, to the formation and education of public opinion.

> The Basic Law has given a special value to the fundamental right to freedom of expression of opinion .... Freedom of opinion as a direct expression of personality is one of the noblest human rights in society; that alone gives it particular importance. In addition this basic right is of itself constitutive of the democratic order, in that it guarantees the battle of minds and the free debate of ideas and interests that is a vital necessity for the proper working of such an order of society. Only free public discussion of subjects of general importance assures the free formation of public opinion that in a free democratic country is necessarily achieved "pluralistically" in the dispute between different concepts, which may be maintained from varying motives but at least are put forward freely, above all by means of argument and counter-argument. Every citizen is guaranteed the right to take part in this public discussion by article 5 (1) of the Basic Law. The press is, together with the wireless and television, the most important instrument in the formation of public opinion; for this reason the freedom of the press enjoys express constitutional protection by article 5 (1), second sentence. The extent of the fundamental right of freedom of opinion must have a significant influence on the balance of interests between honour and freedom of opinion required by para. 193 of the Penal Code in cases in which elements of the formation of public opinion play a part.

The Court went on to hold that, as long as the complainant's article in fact contributed to the formation of public opinion, his motive in publishing it was not the decisive factor; and it could not be denied the protection enjoyed as a contribution to the formation of public opinion because of the contention that it was published solely or primarily to protect his personal honour.

> The complainant's article appears objectively as a contribution to a question that deeply interests the public and deals with confidence in the country's leadership and the administration of justice, and it cannot

lose that character by the fact that the complainant was at the same time defending his honour and his position. Among the proper interests that he was protecting with his article must be counted his right to contribute to the formation of public opinion.

The conviction was quashed and the case remitted to a court of first instance for further consideration in the light of the principles enunciated by the Constitutional Court.

Supreme Court of Ceylon

FREEDOM OF TRAVEL

ASEERWATHAM v. PERMANENT SECRETARY, MINISTRY OF DEFENCE AND EXTERNAL AFFAIRS AND OTHERS

No unreasonable restrictions should be placed on a person's freedom of movement - person holding a valid Ceylon passport and a return ticket to travel abroad has the right to leave the Island and return without hindrance.

Application for a Writ of Mandamus on the Permanent Secretary, Ministry of Defence and External Affairs, the Controller of Exchange and Air Ceylon Ltd.
J. D. Aseerwatham - Petitioner.

Before T. S. Fernando and Manicavasakar, JJ.

Mr. Aseerwatham, in his capacity as general secretary of the United Nations Association of Ceylon, had been invited to participate in a UN seminar to be held in Kuala Lumpur but was refused clearance by the Permanent Secretary of the Ministry of Defence and External Affairs and exchange clearance by the Controller of Exchange.

He was the holder of a valid Ceylon passport and had been informed by the World Federation of the United Nations Association that he would be provided by that organization with a return ticket from Colombo to Kuala Lumpur.

In October 1964, the petitioner made an application to the first respondent for a certificate of clearance for travel on a form supplied by the Ministry for Defence and External Affairs. He was then notified by the first respondent that the clearance required could not be granted, but no reasons were given for the refusal.

The petitioner then filed an Application in the Supreme Court for a Writ of Mandamus. He claimed that, as a free citizen of Ceylon, he was entitled to go and return without any let or hindrance. The first respondent maliciously and for reasons best known to himself, and which he chose not to disclose, refused to grant the necessary clearance and the petitioner claimed that he was entitled to a mandate in the nature of a Writ of Mandamus

directing the first and/or second respondent to forthwith issue the necessary permit to enable him to obtain his pre-paid air ticket.

At the hearing, Mr. Justice T. S. Fernando observed that the position of the Ministry of Defence and External Affairs was untenable and could not be understood and expressed in very strong terms his disapproval of the attitude of the first respondent in this matter. He added that there should be no unreasonable restrictions placed on a person's freedom of movement, and urged Crown Counsel to see that the necessary clearance was granted to the petitioner without any further delay or hindrance.

Crown Counsel informed Court at a later stage of the hearing that the first respondent was now prepared to grant the necessary clearance.

Supreme Court of Ceylon

FREEDOM OF TRAVEL

GOONERATNE v. PERMANENT SECRETARY, MINISTRY OF DEFENCE AND EXTERNAL AFFAIRS AND ANOTHER

This was an Application similar to Aseerwatham v. Permanent Secretary, Ministry of Defence and External Affairs and Others

Application for a Writ of Mandamus on the Permanent Secretary, Ministry of Defence and External Affairs and the Controller of Exchange.
A. C. Gooneratne – Petitioner.

Before Sri Skanda Rajah, Sirimanne and Manicavasakar JJ.

The petitioner who was an advocate had been invited to attend a legal conference in the Middle East, for which his passage was pre-paid. As the Permanent Secretary to the Ministry of Defence and External Affairs had failed to give him the necessary permits to enable him to proceed to Istanbul, the petitioner filed an application for a Writ of Mandamus.

In the course of the hearing the Crown stated that there was no legal bar to anybody leaving the Island without restriction if he had a valid passport for the countries he was intending to visit and also the air tickets.

Manicavasakar J. observed that it was the duty of the Department of External Affairs to assist persons like the petitioner and not to obstruct them.

Sri Skanda Rajah J., the President of the Court, observed that if there was such confusion in the minds of the officials in regard to these matters, how much more confusion would there be in the public mind. Adequate publication should therefore be given to the fact that no clearance from the first respondent was necessary to enable a person to leave the Island. He added that this was a fit case in which costs should be ordered against the Crown and granted the petitioner costs which were fixed at Rs. 210.

Supreme Court of India

FUNDAMENTAL RIGHTS DURING EMERGENCY

THE D.I.R. CASE

President has power, under Defence of India Regulations, to suspend during an emergency the remedies for enforcing fundamental rights, but cannot suspend the rights themselves – the rights are kept alive – an aggrieved individual might at the end of the emergency sue the Government for damages for any violation of his fundamental rights.

The Supreme Court of India held in the above case that the President of India, during the period of Emergency, had power under the Defence of India Regulations only to suspend the remedies for enforcing fundamental rights, but could not suspend the rights themselves. The Court held that the rights were kept alive even during the Emergency and that therefore an aggrieved individual might, at the end of the Emergency, sue the Government for damages for any violation of his fundamental rights.

Supreme Court of Israel

RIGHTS OF AN EMPLOYEE

MUNICIPALITY OF PETACH TIQVA v. AVRAHAM FRIEDMAN
(C.A. 525/64)

The sum total of the conditions of employment create the status of an employee – withdrawal, without justification, of important condition substantially damages such status – arbitrary deprivation of employee of prospects of promotion amounts to discrimination.

Reported in 19 Piskei Din I 566.

The respondent was employed by the appellant for eight years as a technical draftsman. On various occasions he applied for a promotion, but all his requests were rejected without any explanation and he felt he was discriminated against, for all the other employees were promoted during that period. The respondent then resigned and claimed compensation for loss of employment. Ordinarily compensation is payable to an employee who is dismissed, but there are cases when resignation is considered as dismissal especially when the conditions of employment worsen.

The question to be resolved by the Court was whether the resignation could be considered as a dismissal in view of the deterioration of the status of the respondent.

Held: that the respondent was entitled to receive compensation.

Per Berinson J.: The sum total of the conditions of employment create the status of an employee and the withdrawal, without reason and without justification, of an important condition may justify the conclusion that the status of the employee has been substantially damaged. A reasonable prospect for promotion, where the employee is qualified, is surely an important condition of employment. To deprive the employee arbitrarily of such prospect is a matter which affects him seriously. It amounts to a discrimination with regard to his status as compared with the other employees who are promoted from time to time in accordance with their progress and achievements in work. The position of an employee with normal reasonable prospects of promotion is not the same as that of an employee whose grade is frozen and who has no chances of promotion, in those cases where the job is such that ordinarily the employee is promoted as his work progresses and his professional standard rises.

Supreme Court of the United States

RIGHT TO RECEIVE INFORMATION

LAMONT BASIC PAMPHLETS v. POSTMASTER GENERAL

(381 U.S. p. 301)

Postal addressee entitled to receive his mail without obstruction - the provision of an Act requiring the postmaster general to detain and deliver only upon the addressee's written request foreign mailings of "communist political propaganda" unconstitutional because it imposes an obligation on the addressee to request in writing that it be delivered - provision is an unconstitutional abridgement of addressee's First Amendment rights.

By the Postal Service and Federal Employees' Salary Act of 1962, the Postmaster General is required to detain and deliver only upon the addressee's request unsealed foreign mailings of "communist political propaganda". The procedure adopted was for the Post Office to send a card to the addressee informing him of the mailing, and stating that unless the card was returned within 20 days it would be assumed that he did not want the publication or any similar one in the future.

Held: The provision of the Act in question is unconstitutional, because the addressee in order to receive his mail must request in writing that it be delivered.

In the judgment the Court observed as follows:

"This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him.

This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like school teachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda". The regime of this Act is at war with the "uninhibited, robust and wide-open" debate and discussion that are contemplated by the First Amendment.

Supreme Court of Israel

RIGHT OF PROPERTY

JOSEPH BARUCH v. DIRECTOR OF CUSTOMS

(H.C. 249/64)

Expropriation of property, even for consideration, an interference with basic rights – impossible without express, clear and unambiguous authority – where possible to interpret such authority in favour of the citizen and limit its application, courts will do so and give a restrictive interpretation.

Reported in 19 Piskei Din I 486.

The petitioner imported porcelain articles, and the respondent maintained that their value as declared by the petitioner was "too low" and he therefore gave notice for the seizure of those articles against payment of the declared value plus five percent, in accordance with the provisions of section 149(a) of the Customs Ordinance which reads as follows:

> Where customs duties are charged at ad valorem rates, the Director, if he has reason to believe that the value declared by the importer or his agent is too low, may either take the duties in kind or, on giving notice to the importer or his agent and on paying the amount of the value declared by the importer or his agent, with an addition of five percent, may take the goods:

The value was declared by the petitioner in accordance with valid and undisputed invoices, but it was considerably lower than the market prices. The petitioner explained that the goods were "seconds" and that he sold such goods after artistically decorating them.

The petitioner petitioned for an Order to cancel the said notice for the seizure of the goods.

The Order was made absolute.

Held:
1. When the declaration as to value was in accordance with valid invoices it could not be said that the value of the goods as declared was "too low", for such value *must* be declared by the importer in the appropriate declaration.
2. Per Cohn J.: "... The expropriation of property from an individual, even for consideration, constitutes an intervention in basic rights which is absolutely impossible without legal authority that must be express, clear and unambiguous. Where there is a reasonable possibility to interpret such authority in favour of the citizen and to limit its application, the Courts will avail themselves of such possibility and give a restrictive interpretation."

Supreme Court of the Philippines

RIGHT OF PROPERTY

PROVINCE OF BULACAN v. SAN DIEGO ET AL.
(G. R. No. L-15946)

Constitution protects landowner against indiscriminate and unwarranted expropriation – to justify expropriation it must be for a public purpose and for public benefit.

Decided on February 28, 1964.

Under Section 4, Art. XII of the Constitution, the Government may expropriate only landed estates with extensive areas, especially those embracing the whole or a large part of a town or city. Also held that once an estate is broken up and divided into parcels of reasonable areas, either through voluntary sales by the owner or owners of the said landed estate or through expropriation, the resulting parcels are no longer subject to further expropriation, under Section 4, Art. XIII of the Constitution; that mere notice of the intention of the Government to expropriate a parcel of land does not bind either land or the owner so as to prevent subsequent disposition of the property such as mortgaging or even selling it in whole or by sub-division; that tenancy trouble alone, whether due to the fault of the tenants or of the landowners, does not justify expropriation; that the Constitution protects a landowner against indiscriminate and unwarranted expropriation; that to justify expropriation it must be for a public purpose and for the public benefit, and that just to enable the tenants to own a portion of it, even if they and their ancestors had cleared the land and cultivated it for their landlord for many years, is no valid reason or justification under the Constitution to deprive the owner or landlord of his property by means of expropriation.

Constitutional Court of Yugoslavia

RIGHT OF PROPERTY

VALJEVO COMMUNAL ASSEMBLY CASE

(First Session, 1964–65)

Regulation compelling owners of business premises in privately-owned houses to lease them within 30 days and enabling housing authorities, if this was not done, to lease them against owners' will to "protect common interest" – regulation nullified by Constitutional Court – privately-owned business premises cannot be disposed of without owners' consent.

Decided on February 10, 1965.
Reported in Sluzbeni List SFRJ, March 31, 1965.

Chapter XIII of the new Yugoslav Constitution of 1963 set up a Constitutional Court, an innovation unique in Communist countries. At the first session of the new Court, which opened on October 5, 1964, a case was decided relating to the rights of property of private owners. The Valjevo Communal Assembly and the City Council of Belgrade had issued a regulation which compelled the owners of business premises in privately-owned houses to lease them within 30 days. Where this was not done, for any reason whatsoever, the Communal regulation authorized the housing authorities to lease such premises against the will of their owners in order to "protect common interest". The Constitutional Court decided in favour of the private petitioner and the regulation was nullified. In the future nobody can dispose of business premises owned by private persons without their consent.

Supreme Court of Ceylon

INDEPENDENCE OF THE JUDICIARY

ATTORNEY-GENERAL v. LIYANAGE & OTHERS

(Coup Trial-at-Bar No. 1)

Nomination of judges by the Executive, even if provided for by special statute, offends against the cardinal principle of the independence of the Judiciary – judges so nominated have no jurisdiction to hear case for the very reason that they are so nominated.

Before T. S. Fernando J. (President), de Silva and Sri Skandarajah JJ.

On February 18, 1962, Parliament passed with retroactive effect an Act entitled 'The Criminal Law (Special Provisions) Act'. The object of this Act was to introduce special provisions for the arrest, detention and trial of

certain members of the armed forces and the police and a few civilians who were alleged to have been concerned on January 27, 1962, in a conspiracy to overthrow the Government.

The Act conferred on the Minister of Justice, a political executive, the power to nominate three judges from among the judges of the Supreme Court to try the accused persons and declared that the constitution and jurisdiction of the Court so nominated by the Minister could not be called in question in any Court, whether by way of writ or otherwise.

Twenty-four persons were charged under the Act. The trial commenced on July 18, 1962, and the preliminary legal submissions took several weeks.

The defence raised a preliminary objection to the jurisdiction of the Court for the reasons, *inter alia:*

1) that the provisions of the Act in question conferring on the Minister of Justice the power of nomination or selection of judges were *ultra vires* the Constitution inasmuch as they interfered with the exercise of the judicial function and were in derogation of the powers of the Supreme Court under the Ceylon (Constitution) Order-in-Council;

2) that the power of nomination had hitherto been invariably exercised by the Judiciary as part of the judicial function, and such power could not be reposed in anyone outside the Judiciary.

It was urged by the Attorney-General that the power to nominate was a purely administrative power and could be reposed in a person who formed no part of the Judicature. The defence claimed, however, that the power to nominate judges, although it might have the appearance of an administrative power, was itself so inextricably bound up with the exercise of strictly judicial power or the essence of judicial power that it was itself part of the judicial power.

In its judgment delivered on October 3, 1962, the Court upheld the preliminary objection of the defence to its jurisdiction. The Court made the following observations in regard to the Minister's power of nomination:

> If that power is vested in an outside authority, it will legally be open to such authority to exercise that power to prevent a particular judge or judges from exercising any part of the strictly judicial power vested in them by the Constitution as judges of the Supreme Court. The absurdity of such a possible result will be more marked if, instead of the position of a Puisne Justice of the Court, the position of the Chief Justice himself be considered. Under a provision of law of this nature it seems to us legally possible to exclude the Chief Justice himself from presiding in the Court of which he is the constitutionally appointed head. The exercise of the power to nominate can then in practice result in a total negation of the judicial power of a judge or judges vested in them by the Constitution.
>
> Then, again, if the power to nominate or select judges can be constitutionally reposed in the Minister on the ground that it is no more than an exclusively administrative act, we can see nothing in law to prevent such a power being conferred on any other official, whether a party interested in the litigation or not. The fact that the power of nomination so conferred is capable of abuse so as to deprive a judge of the entrenched power vested in him by virtue of his appointment under section 52 of the Order-in-Council, or at least to derogate from that

power, is a consideration which is not an unimportant one in deciding whether the conferring of this power by section 9 on a person who is not a judge of the Supreme Court is *ultra vires* the Constitution.

The Court further held that even if the view were taken that the power of nomination was *intra vires* the Constitution, such a view would offend against that cardinal principle in the administration of justice which has been repeatedly stated by judges, namely, that justice must not only be done but must appear to have been done. In applying the above principle to the circumstances of this case, the Court made the following illuminating observations:

> A Court cannot inquire into the motives of legislators. The circumstances set out above are, however, such as to put this Court on enquiry as to whether the ordinary or reasonable man would feel that this Court itself may be biased. What is the impression that is likely to be created in the mind of the ordinary or reasonable man by this sudden and, it must be presumed, purposeful change of the law, after the event, affecting the selection of judges? Will he not be justified in asking himself, "Why should the Minister, who must be deemed to be interested in the result of the case, be given the power to select the judges, whereas the other party to the cause has no say whatever in a selection? Have not the ordinary canons of justice and fair-play been violated?" Will he harbour the impression, honestly though mistakenly formed, that there has been an improper interference with the course of justice? In that situation will he not suspect even the impartiality of the Bench thus nominated?
>
> ... Guiding ourselves by these tests and those applied in other cases we have examined, we find it difficult to resist the conclusion that the power of nomination conferred on the Minister offends against the cardinal principle as restated by Lord Hewart. For that reason, even had we come to a different conclusion regarding the validity of Section 9 of the Criminal Law (Special Provisions) Act, we would have been compelled to give way to this principle which has now become ingrained in the administration of common justice in this country.

Editor's Note

This judgment is of vital importance to the principle of the independence of the Judiciary. The Bench, constituted as it was of judges nominated by the Executive, held that it had no jurisdiction to hear the case for the very reason that it was so nominated.

German Federal Constitutional Court

JUDGE'S RIGHT TO EXERCISE JUDICIAL FUNCTIONS

JUDGMENT OF THE SECOND SENATE OF FEBRUARY 25, 1964

(Reference 2 BvR 411/61)

President of a Court cannot exclude a particular judge as far as possible from judicial activity – such measure in practice achieves the same result as dismissal or

temporary removal from office and amounts to a breach of Article 97 (2) 1 of the Basic Law.

Reported in Bundesverfassungsgerichtsentscheidungen vol. 17, p. 252.

The complainant was a judge in a Landessozialgericht (District Social Court). Since 1960 he had been practically excluded from the functions of his office by an organizational plan for the work of the Court that allotted him minimal judicial functions. The President of the Court had conceded in correspondence preceding the proceedings that the intention of the Praesidium (a judicial body responsible for drawing up the division of labour among the judges of the Court) was to exclude the complainant as far as possible from any judicial activity.

The complainant brought proceedings in the Constitutional Court by way of constitutional complaint alleging that his fundamental rights guaranteed by articles 1 (right to personal dignity) 2 (right to free development of the personality) and 3 (equality before the law) of the Basic Law had been infringed, and that his effectual exclusion from office amounted to a breach of article 97 (2) 1 of the Basic Law, which reads as follows:

> Professional and duly appointed judges can only be dismissed, permanently or temporarily removed from office, transferred to another position or retired without their consent before the termination of their appointment by judicial decision and only for the reasons and according to the procedures laid down by the law.

The Constitutional Court held that the procedure adopted by the Court infringed the complainant's rights under articles 1, 2 and 3 of the Basic Law, and also the provision of article 101 (1) 2 that "No-one may be deprived of his duly appointed judge".

The Court further held that the complainant's enjoyment of personal independence by article 97 of the Basic Law meant that "He can only be removed from his judicial office against his will on the strength of a judicial decision that has been reached in proceedings taken as provided by law and that is based upon grounds that are laid down in the law. Article 97 speaks of dismissal, permanent or temporary removal from office, transfer to another position or retirement, and thus uses the concepts of the public service. This cannot, however, considering the purpose of the provision, mean that it only provides protection against formal measures that are expressed to be a dismissal, removal from office or a transfer by one's superior according to the rules of the public service. On the contrary, every measure that in substance amounts to a dismissal, a permanent or temporary removal from office or retirement, and by which in practice the same result is achieved as by one of the named formal measures, falls within the scope of article 97; otherwise the scope of the personal independence of the judge could be deprived of substance and the protection that article 97 is designed to guarantee removed. In other words .... article 97 forbids any other method by which a judge is excluded from his judicial functions. From these considerations it also follows that the important factor in assessing whether a judge who is protected by article 97 has been forced out of his office cannot be whether he still formally figures in the organizational plan for the business of the Court and whether he exceptionally and occasionally can and does take part in individual decisions.

It is not within the powers of the Praesidium of a court to qualify a duly appointed judge of a court as intolerable or completely unsuitable and for these reasons to exclude him from judicial decisions."

Supreme Court of India

COURT'S POWERS TO ENTERTAIN PETITION CHALLENGING LEGALITY OF SENTENCE FOR CONTEMPT IMPOSED BY LEGISLATURE

LEGISLATIVE ASSEMBLY OF UTTAR PRADESH v. ALLAHABAD HIGH COURT

(Special Presidential Reference)

Conflict between privileges of the Legislature and the Courts – Court competent to entertain a petition challenging legality of sentence of imprisonment for contempt imposed by Legislative Assembly – Assembly cannot call upon judges dealing with such petition for explanation – Legislature incompetent to take action against such judges.

Before Gajendragadkar (Chief Justice), Sarkar, Subba Rao, Wanchoo Hidayatullah, Shah and Rajagopala Ayyangar JJ.

The majority judgment of the Court was delivered by the Chief Justice, Mr. P. B. Gajendragadkar, on September 30, 1964. Mr. Justice A. K. Sarkar, who disagreed, delivered a separate judgment.

The facts which gave rise to the conflict and the consequent reference by the President to the Supreme Court were that, on March 14, the Speaker of the Legislative Assembly of Uttar Pradesh reprimanded Mr. Keshav Singh, a resident of Gorakhpur, for having committed contempt of the House and for having committed a breach of the privileges of Mr. Narsingh Narain Pandey, a member of the House.

Later, on the same day, the Speaker directed that Mr. Keshav Singh be committed to prison for committing another contempt of the House by his conduct in the House when summoned to receive the reprimand and for writing a disrespectful letter to the Speaker of the House earlier. On March 19, Mr. B. Solomon, an advocate, presented a petition to the High Court on behalf of Mr. Keshav Singh under Section 491 of the Criminal Procedure Code and Article 226 of the Constitution.

The petition was heard by Mr. Justice N. U. Beg and Mr. Justice G. D. Sahgal, who admitted the petition, ordered the issue of a notice to the respondents, the Speaker of the House, the Chief Minister of Uttar Pradesh and the Superintendent of the District Jail, Lucknow, and ordered that Mr. Keshav Singh be released on bail.

The House, on March 21, passed a resolution saying that the two judges and the advocate had committed contempt of the House. Therefore, it was ordered that they be brought in custody before the House and that Mr. Keshav Singh should be taken into custody and kept confined in the jail.

The two judges heard about this resolution on the radio and read about it in the newspapers, and they filed separate petitions before the Allahabad High Court under Article 226 of the Constitution. A Full Bench of the Allahabad High Court, consisting of 28 judges, admitted the petitions and ordered the issue of notice against the respondents restraining the Speaker from issuing the warrant. Mr. B. Solomon presented a similar petition, which was also admitted.

On March 25, the House passed a clarificatory resolution, as a result of which the warrants issued for the arrest of the two judges and Mr. Solomon were withdrawn, but they were placed under an obligation to appear before the House and offer their explanation why the House should not proceed against them.

When the incidents which happened in such quick succession from March 19 to 25 had reached this stage, the President decided on March 26 to exercise his power to make a reference to the Supreme Court under Article 143 (1) of the Constitution.

Issues raised in Reference

The special reference by the President under Article 143 of the Constitution to the Supreme Court raised the following issues:

1) Whether on the facts and circumstances of the case it was competent for the Lucknow Bench of the High Court of Allahabad consisting of Mr. Justice Beg and Mr. Justice Sehgal to entertain and deal with the petition of Mr. Keshav Singh challenging the legality of the sentence of imprisonment imposed upon him by the Legislative Assembly of U.P. for its contempt and for infringement of its privileges and to pass orders releasing Mr. Keshav Singh on bail pending the disposal of his petition.

2) Whether Mr. Keshav Singh, by causing the petition to be presented on his behalf to the High Court of Allahabad, Mr. Solomon, by presenting the petition, and the two judges, by entertaining and dealing with the petition and ordering the release of Mr. Keshav Singh on bail pending the disposal of the petition, committed contempt of the Legislative Assembly of U.P.

3) Whether the Legislative Assembly of U.P. was competent to direct the production of the two judges and Mr. Solomon before it in custody or to call for their explanation for its contempt.

4) Was it competent for the Full Bench of the High Court of U.P. to entertain and deal with the petitions of the two judges and Mr. B. Solomon and to pass interim orders restraining the implementation of the sentence imposed by the Legislative Assembly?

5) Does a judge of a High Court, dealing with a petition of this nature, commit contempt of the Legislature and is the Legislature competent to take proceedings against such judge in the exercise of its powers, privileges and immunities?

The majority judgment of the Supreme Court answered the five questions referred by the President as follows:

1) The Lucknow Bench of the High Court of Uttar Pradesh was competent to entertain and deal with the petition of Mr. Keshav Singh challenging the legality of the sentence of imprisonment imposed upon him by the U.P. Legislative Assembly for its contempt and to pass orders releasing Mr. Keshav Singh on bail.
2) Neither Mr. Keshav Singh nor Mr. B. Solomon, his advocate, nor the two judges had committed contempt of the Legislative Assembly of Uttar Pradesh.
3) It was not competent for the Legislative Assembly of Uttar Pradesh to direct the production of the two judges and Mr. B. Solomon before it in custody or to call for their explanation for its contempt.
4) It was competent for the Full Bench of the High Court of Uttar Pradesh to entertain and deal with the petitions of the two judges and Mr. B. Solomon and to pass the interim orders restraining the Speaker of the Assembly and others from implementing the direction of the House.
5) A judge of a High Court who entertains and deals with a petition challenging any order or decision of a Legislature imposing any penalty on the petitioner or issuing any process against the petitioner for its contempt or for an infringement of its privileges and immunities, or who passes any such order, does not commit contempt of the Legislature. The Legislature is not competent to take proceedings against such a judge in the exercise and enforcement of the powers, privileges and immunities.

Their Lordships prefaced the answer to the fifth question with the observation that the answer was confined to cases in relation to contempt alleged to have been committed by a citizen who is not a member of the House outside the four walls of the legislative chamber.

Court of Appeal of New Zealand

COURT'S POWER TO REVIEW CLAIM OF CROWN PRIVILEGE

CORBETT v. SOCIAL SECURITY COMMISSIONER AND ANOTHER
(1962 Court of Appeal)

Courts of New Zealand can overrule ministerial objection to production of privileged documents if they think it right to do so.
In exceptional circumstances Courts justified in following later House of Lords' decision rather than earlier conflicting decision of Privy Council – particularly so if House of Lords had discussed the Privy Council decision and pointed out its errors.

See also 1962 New Zealand Law Reports, pages 878-920.

Before Gresson P., North and Cleary JJ.

The plaintiff sought writs of *certiorari* and *mandamus* against the three members of the Social Security Commission, a statutory body constituted under the Social Security Act 1938 to administer that Act under the general di-

rection and control of the Minister of Social Security who was joined as a defendant. Though the order for discovery was sought against both the Commission and the Minister, the application against the Minister was dismissed by consent and an order against the first defendant was not opposed and was made accordingly. An affidavit of documents was duly filed, but the second defendant, as Minister of Social Security, claiming to have personally examined the documents and to have formed the opinion that some of them were within a class of documents which for the proper functioning of the Public Service it was necessary to keep confidential in order to ensure freedom and candour of communication within the Public Service, and that the public interest would be prejudiced by disclosure and production, directed that neither the Commission nor any member of the Public Service should produce the same unless the Supreme Court should hold that the objection to production had not been taken in accordance with law. Counsel, when offering no objection to the issuing of the order of discovery against the Commission, had done so without prejudice to the claim that some of the documents were protected from production. There necessarily arose for decision the question whether the Court had power to examine the documents itself or should accept the statement of the Minister as conclusive.

The Court of Appeal held (North and Cleary JJ., Gresson P. dissenting), that the courts of New Zealand still possess the power to overrule a ministerial objection to the production of documents in respect of which privilege is claimed if they think it right to do so, but this is a power to be held in reserve and not to be lightly exercised.

Per North J.: "The Court has in these cases always had in reserve the power to inquire into the nature of the document for which protection is sought, and to require some indication of the nature of the injury to the State which would follow its production. The existence of such a power is in no way out of harmony with the reason for the privilege, provided that its exercise be carefully guarded so as not to occasion to the State the mischief which the privilege, where it exists, is designed to guard against."

There was another important question of Constitutional Law which was considered in this case, namely, which decision should be followed by the courts of New Zealand when confronted with conflicting decisions on the same point of law by the Privy Council and the House of Lords. It was held:

1. Per North J.: "In very exceptional circumstances the New Zealand Court of Appeal would be justified in following a later decision of the House of Lords in preference to an earlier conflicting decision of the Privy Council, and particularly if the House of Lords had discussed the Privy Council decision and had pointed out in what respects it was of opinion that the Board had erred. But even so, that course would only be justified if the case involved only principles of English law which are admittedly part of the law of New Zealand and there are no relevant differentiating local circumstances."

2. Per Cleary J.: "When deciding which of two inconsistent decisions, the earlier of the Privy Council and the later of the House of Lords, is to be followed by the New Zealand Court of Appeal, the question always is whether the Privy Council is likely to adhere to its own earlier decision. Where the House of Lords has made it plain how and in what respects error arose in the earlier case so that it would seem wholly unlikely that there could be any reversion to the earlier decision, the New Zealand Court should follow the decision of the House of Lords."

Editor's Note

The Court of Appeal in New Zealand is the highest court in the country, but an appeal lies from it to the Privy Council in England. The Court of Appeal was set up a few years ago by statute as a distinct court. The Court consists of three judges, all of whom are also judges of the Supreme Court of New Zealand, with the Chief Justice as an ex officio member. The judges of this Court, while being equal in status to judges of the Supreme Court, have the sole jurisdiction to hear appeals. Members of the Court of Appeal can sit as Puisne Judges of the Supreme Court and a Puisne Judge of the Supreme Court can be brought on the Court of Appeal when a permanent member of the Court of Appeal is on leave or unable to function for a particular period.

There was no appeal to the Privy Council from the judgment in Corbett's case.

Court of Appeal of New Zealand

WHEN HOUSE OF LORDS' DECISION CONFLICTING WITH PRIVY COUNCIL CAN BE FOLLOWED

CORBETT v. SOCIAL SECURITY COMMISIONER AND ANOTHER

(See above)

Court of Appeal of the Sudan

WHEN COURTS WILL FOLLOW ENGLISH STATUTE NOT EXPRESSLY INTRODUCED TO SUDAN

HEIRS OF IMAN IBRAHIM v. EL AMIN ABDEL RAHMAN

(AC-REV-53-1963)

Sudanese Courts can apply the substance of an English Statute even though not declared to be part of the law of Sudan when it accords with the principles of the Civil Justice Ordinance of the Sudan – in such a case what is applied in the Sudan is not the English Statute, but the principles of justice which prompted the English Legislature – but the Sudan Courts cannot borrow artificial qualifications placed on a general principle by a foreign statute.

See also Sudan Law Journal and Reports, 1962, pages 228–237.

Before M. A. Abu Rannat (Chief Justice) and Awadalla J.

Extract from the Judgment delivered on May 16, 1963, by Awadalla J. (Abu Rannat C. J. agreeing):

> The Honourable Judge of the High Court refused to afford protection to the family of a deceased statutory tenant in the Sudan because in his opinion he would be blindly following the provisions of an English statute. But would he? Much as I do respect the attitude of the Honourable Judge of the High Court, I must say with much diffidence that the real question before him was whether in this case there is an obvious hardship which it would be contrary to *justice, equity* and *good conscience* to leave unremedied. Once the court is satisfied that there is such hardship, then it should not in my view be dissuaded from its duty in applying the principles of the Civil Justice Ordinance, s. 9, by the simple fact that a similar situation was in England remedied by a statutory provision. What we apply in the Sudan is not the English statutory provision itself but the general principles of justice which prompted the legislature in England to cater for the situation. This has always been the attitude of the Sudan courts in matters of this sort, and I see no reason why a different view should be taken in the case now before us. What the Sudan courts are prevented from doing is the borrowing of artificial qualifications grafted on a general principle by a foreign statute.

Editor's Note: The English statutory provision which the Court refers to is the English Increase of Rent and Mortgage Interest (Restriction) Act, 1920, Section 12 (1) (g) of which deals with dwelling-houses and reads as follows:

> ... the expression 'tenant' includes the widow of a tenant who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court.

Supreme Court of Ceylon

RETROACTIVE AND DISCRIMINATORY LEGISLATION

ATTORNEY-GENERAL v. LIYANAGE AND OTHERS

(Coup Trial-at-Bar No. 3)

> *Courts averse to ex post facto laws which render unlawful and punishable acts which at the time of their commission had not actually been declared to be offences – also averse to ad hoc Legislation applicable to a particular case – such Legislation is discriminatory.*

Before Sansoni, Chief Justice (President), H. N. G. Fernando and de Silva JJ.

After the earlier judgment of the Supreme Court delivered in this case in October 1962 upholding the preliminary objections to the jurisdiction of the Court, the Legislature amended the law to empower the Chief Justice, and not the Minister of Justice, to nominate the judges to hear this case.

The Chief Justice accordingly nominated three other judges to hear this case. But these judges too refused to proceed with the hearing when it was brought to their notice that one of them had dealt with a file that had a bearing on the case at a time when he was acting as Attorney-General.

Another Court was then constituted, composed of the Judges mentioned above. This Court proceeded to hear the case against the accused and, after a very lengthy trial, delivered its judgment on April 6, 1965. 11 of the 27 accused originally charged were found guilty and sentenced to terms of imprisonment with confiscature of property. The other accused were acquitted, some in the judgment and some in the course of the trial itself.

Dealing in the judgment with certain preliminary objections by the defendants to the progress of the trial, the Court observed: "We share the intense and almost universal aversion to *ex post facto* laws in the strict sense, that is laws which render unlawful and punishable acts which, at the time of their commission, had not actually been declared to be offences. And we cannot deny that in this instance we have to apply such a law... Nevertheless it is not for us to judge the necessity for such a law...

"The third charge, that of conspiracy to overthrow the government, was framed in terms of the retroactive amendment of Section 115 of the Penal Code made by the Criminal Law (Special Provisions) Act No. 1 of 1962. This circumstance has not in fact been seriously disadvantageous to the defendants, because we hold in any event that those defendants whom we convict are guilty on the other charges which do not depend on the amendment. Probably also the proved conspiracy would have been punishable under other sections of the Code. But we must draw attention to the fact that the Act of 1962 radically altered *ex post facto* the punishment to which the defendants are rendered liable. The Act removed the discretion of the Court to impose a term of less than ten years' imprisonment, although we would have wished to differentiate in the matter of sentence between those who organized the conspiracy and those who were induced to join it. It also imposed a compulsory forfeiture of property.

"These amendments were not merely retroactive: they were also *ad hoc,* applicable only to the conspiracy which was the subject of the charges we have tried. We are unable to understand this discrimination. To the courts, which must be free of political bias, treasonable offences are equally heinous whatever be the complexion of the government in power or whoever be the offenders."

Editor's Note:

The earlier judgment in this case appears on pages 325-327 above under the heading 'Independence of the Judiciary'.

Supreme Court of India

SCOPE OF PREROGATIVE WRITS IN INDIA

CIVIL APPEAL 62 OF 1964

Powers of High Courts to issue writs under Article 226 of the Indian Constitution very wide – cannot be

equated to powers of English Courts to issue similar writs – Language of this Article wide enough to reach injustice wherever it is found.
Duty to act judicially – may be inferred even if not expressly stated in the relevant statute.

Article 226 of the Constitution of India reads as follows:

226 (1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari,* or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred on a High Court by clause (1) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

"Article 226 (dealing with powers of High Courts to issue writs, etc.) of the Constitution is couched in comprehensive phraseology" said the Court "and it *ex facie* confers a wide power on High Courts to reach injustice wherever it is found: The Constitution designedly used wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England: but the scope of those writs also is widened by the use of the expression 'nature' (in Article 226), for the said expression does not equate the writs that can be issued in India with those in England, but only draws analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of the country.

"Any attempt to equate the scope of the power of a High Court under Article 226 with that of the English courts to issue prerogative writs is to introduce unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary Government, to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the Article itself. To say this is not to say that the High Courts can function arbitrarily under this Article. Some limitations are implicit in the Article and others may be evolved to direct the Article through defined channels.

"The question whether an act is a judicial act or administrative one arises ordinarily in the context of the proceedings of an administrative tribunal or authority. Therefore, the fact that an order was issued or an act emanated from an administrative tribunal would not make it any the less a quasi-judicial act if certain tests are satisfied. (The tests are: the body of persons must have legal authority, the authority should be given to determine questions affecting them and they should have the duty to act judicially).

"The provisions of a statute may enjoin an administrative authority to act administratively or judicially. If the statute expressly imposes a duty on the administrative body to act judicially, it is a clear case of judicial act. But the duty to act judicially may not be expressly conferred, but may

be inferred from the provisions of the statute. It may be gathered from the cumulative effect of the nature of the rights affected, the manner of the disposal provided, the objective criterion to be adopted, the phraseology used, the nature of the power conferred or the duty imposed on the authority and other indicia afforded by the statute. In short, a duty to act judicially may arise in widely different circumstances and it is not possible or advisable to lay down a hard and fast rule or an inexorable rule of guidance."

Supreme Court of the United States

PRIVILEGE AGAINST SELF-INCRIMINATION

MALLOY v. HOGAN
(378 U.S., 1)

Privilege against self-incrimination available to a witness in a statutory inquiry as well as to a defendant in a criminal prosecution.

Supreme Court of the United States

PRIVILEGE AGAINST SELF-INCRIMINATION

GRIFFIN v. CALIFORNIA
(380 U.S. 609)

Comment in summing up that defendant's failure to explain facts within his knowledge entitled inferences unfavourable to him to be drawn – such comment on the defendant's failure to testify or explain facts violates privilege against self-incrimination guaranteed by Fifth Amendment.

In a criminal trial both the prosecutor and the judge in summing up commented on the defendant's failure to give evidence or to deny or explain facts which must have been within his knowledge, and indicated that inferences unfavourable to the defendant could properly be drawn from it.
Held: Such comment on the defendant's failure to testify violates the privilege against self-incrimination guaranteed by the Fifth Amendment to the Constitution. "For comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making the assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, given help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."

Supreme Court of the United States

ADMISSIBILITY OF CONFESSION

JACKSON v. DENNO

(378 U.S. 368)

Judge to make proper determination on the voluntariness of confession prior to its admission to the jury – admitting the confession and leaving it to the jury to determine its voluntariness and truthfulness is procedure violative of the due process clause of the Fourteenth Amendment – jury must be told that confession should be disregarded if involuntary even if believed to be true.

Under the New York procedure, the trial judge must make a preliminary determination of the voluntariness of a confession and exclude it if the confession could in no circumstances be deemed to be voluntary. If the evidence presents a fair question as to its voluntariness, as where certain facts bearing on the issue are in dispute or where reasonable men could differ over the inferences to be drawn from the undisputed facts, the judge must admit the confession and leave to the jury, under proper instructions, the determination of its voluntary character and also of its truthfulness.

In the case under appeal, the admission of the confession was not objected to, but the question of its voluntariness was raised. The judge directed the jury that if it found the confession involuntary it was to disregard it entirely, but if it found the confession voluntary it was to determine its truth or reliability and afford it weight accordingly.

Under the New York procedure, the jury returns only a general verdict upon the ultimate question of guilt or innocence, and it is impossible to discover whether the jury found the confession voluntary and relied upon it or involuntary and supposedly ignored it.

Held: This procedure does not provide an adequate and reliable determination of the voluntariness of the confession and does not adequately protect the petitioner's right not to be convicted through the use of a coerced confession, and is therefore violative of the Due Process Clause of the Fourteenth Amendment. Due process requires that a proper determination of the voluntariness of a confession be made prior to the admission of the confession to the jury which is adjudicating on guilt or innocence. The Court observed:

> The New York jury is at once given both the evidence going to voluntariness and all of the corroborating evidence showing that the confession is true and that the defendant committed the crime. The jury may therefore believe the confession and believe that the defendant has committed the very act with which he is charged, a circumstance which may seriously distort judgment of the credibility of the accused

and assessment of the testimony concerning the critical facts surrounding his confession.

In those cases where without the confession the evidence is insufficient, the defendant should not be convicted if the jury believes the confession but finds it to be involuntary. The jury, however, may find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession... That a trustworthy confession must also be voluntary if it is to be used at all generates natural and potent pressure to find it voluntary. Otherwise the guilty defendant goes free. Objective consideration of the conflicting evidence concerning the circumstances of the confession becomes difficult and the implicit findings suspect.

The danger that matters pertaining to the defendant's guilt will infect the jury's findings of fact bearing upon voluntariness, as well as its conclusion upon that issue itself, is sufficiently serious to preclude their unqualified acceptance upon review by this Court, regardless of whether there is or is not sufficient other evidence to sustain a finding of guilt.

Supreme Court of the United States

RIGHT TO COUNSEL – INCRIMINATING STATEMENTS MADE IN HIS ABSENCE

MASSIAH v. UNITED STATES

(377 U.S. 201)

Incriminating statements elicited from the accused in absence of his counsel and therefore when deprived of his right to counsel cannot constitutionally be used as evidence against him at his trial.

The petitioner was indicted for violating the federal narcotics laws and released on bail. He had retained a lawyer to defend him. Government agents, in continuing their investigations, installed a radio transmitter in the motor-car of an alleged confederate of the petitioner with the former's consent and were thereby able to overhear damaging statements made by the petitioner. The Sixth Amendment of the U.S. Constitution provides that "In all criminal prosecutions the accused shall enjoy the right... to have the assistance of counsel for his defence."

Held: Incriminating statements thus deliberately elecited by federal agents from the petitioner, in the absence of his attorney, deprived the petitioner of his right to counsel and therefore could not constitutionally be used as evidence against him at his trial.

Supreme Court of Cyprus

RIGHT TO FAIR AND PUBLIC HEARING

ANDREAS HJISAVVA AND ANOTHER (APPELLANTS) v. ANNA GEORGHIOU HJISAVVA (RESPONDENT)
(Civil Appeal No. 4520)

Constitution of Cyprus, Article 30 – provision that every person is entitled to a fair and public hearing – right should not be overlooked by those connected with the functioning of the Courts, particularly by judicial officers.

Before Vassiliades (President), Munir, Josephides JJ.

Decided on June 4, 1965.

The judgment of the Court was delivered by Vassiliades J. Having disposed of the facts, he observed: "Although this is sufficient to dispose of this appeal, we feel that we must also deal in a way with ground (c) in the notice of appeal: that the hearing of the case took place in chambers. This Court has repeatedly expressed its view on the point. A hearing can only take place in chambers where the law or the rules provide that this may be done; or, where the Judge decides that, for reasons stated in his notes, this exceptional course is necessary. In all other cases the hearing must take place in open court. It has already been said that a dispute may be the business of the parties; but the application of the law and the administration of justice is a matter which concerns the general public, and *must be done in open court.* Article 30 of the Constitution, which is found in the Part providing for the fundamental rights and liberties of the subject, expressly provides that in the determination of his rights and obligations every person is entitled to a fair *and public* hearing. And this constitutional right should not be overlooked by anybody connected with the functioning of the Courts; particularly by judicial officers carrying the responsibility of sustaining and applying the law of the land."

Supreme Court of the Philippines

RIGHT TO BE HEARD

COMEDA v. CAJILOG
(G.R. – No. L-18258)

Importance of the Right to be heard – discretion of Court to declare the Petitioner in default to be exercised with fairness – abuse of discretion in declaring a Party in default can be corrected by Certiorari.

Decided on April 27, 1963.

Action was filed against petitioner for the recovery of a sum of money before the proper Justice of the Peace Court. Summons was issued requiring petitioner to appear on the date fixed. On the said date, petitioner appeared and requested the Court for time to file his answer and, there being no objection, the hearing was reset. On the date reset, petitioner again failed to appear, and the Court, on motion, declared him in default, received plaintiff's evidence, and rendered judgment in latter's favour. Before rendering of the judgment, however, petitioner appeared and presented his written answer, asking at the same time for a new trial. This motion and a subsequent motion for reconsideration having been denied, he filed the instant petition for *certiorari* to annul the order of default and the judgment rendered thereupon. Respondent, plaintiff in the original action, moved to have the petition dismissed, contending that petitioner's remedy should have been appeal and not *certiorari*. The trial court dismissed the petition; hence this appeal.

Held: The appeal is well taken. The Justice of the Peace Court abused its discretion not only in declaring petitioner in default, because he actually appeared on the date originally set for hearing, but also because on the second hearing he appeared, although late, and immediately requested an opportunity to present his evidence. Fairness demands that petitioner be given such hearing considering that when the request was made the Court had not yet rendered its decision on the merits.

Supreme Court of the United States

RIGHT TO CROSS-EXAMINE

POINTER v. TEXAS

(380 U.S. 400)

Right to cross-examine essential to fair trial – introduction of a transcript of a witness's evidence given at a previous hearing where accused's counsel did not cross-examine constitutes clear denial of this right.

The petitioner was arrested and brought before a state judge for preliminary hearing on a robbery charge. The alleged victim of the robbery gave evidence, but petitioner, who had no counsel, did not cross-examine. At his subsequent trial, the transcript of the witness's evidence was read in spite of the petitioner's objection that he was denied the right of confrontation.

Held: The right granted to an accused by the Sixth Admendment to confront a witness against him, which includes the right of cross-examination, is a fundamental right essential to a fair trial, and the introduction of the transcript was a clear denial of the right of confrontation since the statement had not been taken at a time and under circumstances affording the petitioner through counsel an adequate opportunity to cross-examine the witness.

Supreme Court of the United States

RIGHT TO CROSS-EXAMINE

DOUGLAS v. ALABAMA
(380 U.S. 415)

Prosecutor under the guise of cross-examining the accomplice as a hostile witness, notwithstanding accomplice's refusal to answer questions on ground that he would incriminate himself, read in the presence of the jury the accomplice's alleged confession implicating the accused – accused unable to cross-examine the accomplice on the confession – denial of the right of cross-examination – violation of the confrontation clause of Sixth Amendment.

The petitioner and an alleged accomplice were tried separately for assault with intent to murder. The alleged accomplice was called as a state witness in petitioner's trial but repeatedly refused to answer questions on the ground that he would incriminate himself if he did so. Under the guise of cross-examining the accomplice as a hostile witness, the prosecutor, over petitioner's objections and despite the accomplice's continuing refusal to answer, read in the presence of the jury the latter's purported confession which implicated the petitioner. Evidence was then given identifying the document as the confession signed by the accomplice though it was not offered in evidence. Petitioner was convicted.

Held: Petitioner's inability to cross-examine the alleged accomplice about the purported confession, the prosecutor's reading of which may well have been treated by the jury as substantial and cogent evidence of guilt, denied the petitioner the right of cross-examination secured by the confrontation clause of the Sixth Amendment.

BOOKS OF INTEREST

Human Rights

Protection of Human Rights under the Law, by Gaius Ezejiofor (Butterworths, 1964).

La Convention Européenne des Droits de l'Homme, par Karel Vasak. (P. Richou et R. Durand–Auzias, Paris, 1964).

The European Convention on Human Rights: Based on papers given at a Lecture and Conference held under the auspices of the British Institute of International and Comparative Law in London in November 1964. (ICLQ Supplementary Publication No. 11, Stevens & Sons, London, 1965).

Naissance et signification de la Déclaration universelle des Droits de l'Homme, par Albert Verdoodt, Préface de R. Cassin (Editions Nauwelaerts, Louvain-Paris).

The Right of Privacy, by Samuel H. Hofstadter and George Horowitz (Central Book Company, New York, 1964).

Handbuch der Grundfreiheiten und der Menschenrechte – Ein Kommentar zu den österreichischen Grundrechtsbestimmungen, von Felix Ermacora (Wien 1963).

Human Rights and the International Community – the roots and growth of the Universal Declaration of Human Rights. 1948–1963, by Egon Schwelb (Quadrangle Books, Chicago, 1964).

Géographie de la Liberté, (Les Droits de l'Homme dans le Monde 1953/1964, par Louis de Villefosse. (Ed. Robert Laffont, Paris, 1965).

Protecao Internacional dos Direitos Humanos, C. A. Dunshee de Abranches (Livreria Freitas Bastos S.A., Rio de Janeiro 1964).

Report on the Situation regarding Human Rights in Haiti, Inter-American Commission on Human Rights (Pan-American Union, Washington D.C., 1963).

Report on the Situation regarding political prisoners and their families in Cuba, Inter-American Commission on Human Rights (Pan-American Union, Washington D.C., 1964).

Report on the Situation regarding Human Rights in the Dominican Republic, Inter-American Commission on Human Rights (Pan-American Union, Washington D.C., 1965).

Courts and Procedure

Etudes sur le Recours de Pleine Juridiction, par Dr. Pierre Sandevoir. (Librairie Générale de Droit de Jurisprudence, Paris, 1964).

The Supreme Court in the Political Process, by Samuel Krislov (Collier–MacMillan Ltd., London, 1965, paper-back).

The Supreme Court Review 1964, (University of Chicago Press, Chicago, 1965).

The Rationing of Justice: Constitutional Rights and the Criminal Process, by Arnold S. Trebach (Rutgers University Press, New Brunswick, New Jersey, 1964).

Criminal Procedure in Uganda and Kenya: Law in Africa No. 13 (Sweet & Maxwell, African UP, London, 1965).

Verfassungs- und Menschenrechtsbeschwerde gegen richterliche Entscheidungen, von Dr. Ekkehard Schumann (Duncker & Humbolt, Berlin, 1963).

A magyar büntetö eljárási jog (Traité de procédure pénale hongroise), par Mihály Móra et Mihály Kocses, (Budapest, Tankönyvkiado, 1961).

Justice in Moscow, George Feifer (Simon & Schuster, New York, 1964).

Natural Justice, by H. H. Marshall, Q.C. (Sweet & Maxwell, London, 1959).

Constitutional Law

The New Commonwealth and Its Constitutions, by S. A. de Smith (London, Stevens & Sons, 1964).

The Constitution of Malaysia, by Harry E. Groves, Malaysia Publications Ltd., Singapore, 1964).

Constitutional Law of the Nigerian Republic by B. O. Nwabueze, Butterworths, African Law Series, No. 12, London, 1964).

Constitutional Developments in Nigeria: an Analytical Study of Nigeria's Constitution-Making Departments and the Historical and Political Factors that affected Constitutional Change, by Kalu Ezera, rev. ed. (Cambridge University Press, 1965).

Demokratische Staatsformen in Westafrika, von Eugen Fehr (Europa Verlag, Zürich, 1965).

Institutions Politiques et Droit Constitutionnel, par Maurice Duverger, Presses Universitaires de France, Paris, 1965).

Les Aspects Constitutionnels des Libertés Publiques aux Etats-Unis. Conférences données à la Faculté de Droit et des Sciences Economiques de l'Université de Paris. Février 1964, par Ernest Angell (Librairie Dalloz, Paris, 1964).

Tunisia since Independence – the Dynamics of One-Party Government, by Clement Henry Moore, with a Foreword by Roger le Tourneau (University of California Press, 1965).

Verfassungsgerichtsbarkeit in der Gegenwart (Constitutional Review in the World Today) Max-Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht, (Carl Heymanns Verlag KG., 1962).

Miscellaneous

The Ombudsman: Citizen's defender, edited by Donald Rowalt (Allen & Unwin, London).

L'Union Soviétique face à l'intégration Européenne, par Bernard Dutoit, Préface de Henri Chambre (Lausanne, 1964).

Le marché commun communiste, Principe et pratique du COMECON, par István Agoston (Librairie Droz, Genève, 1964).

Private International Law in the European People's Democracies, by István Szászy, (Publishing House of the Hungarian Academy of Sciences, Budapest, 1964).

Legal Curbs on Racial Incitement – A survey of international measures and domestic legislation (World Jewish Congress London, May 1965).

Der Schwedische Justitieombudsman, von Walter Haller (Polygraphischer Verlag AG, Zürich, 1964).

Not in the Public Interest (The Problem of Security in Democracy), by David Williams (Hutchinson of London, 1965).

Report of the Ombudsman for the Year ended 31 March 1965. Presented to the House of Representatives Pursuant to Section 25 of the Parliamentary Commissioner (Ombudsman) Act 1962. (by Authority: R. E. Owen, Government Printer, Wellington, New Zealand, 1965).

RECENT PUBLICATIONS OF THE INTERNATIONAL COMMISSION OF JURISTS

Journal of the International Commission of Jurists

Volume VI, No. 1 (Summer 1965): Legal Aspects of Civil Rights in the United States and the Civil Rights Act of 1964 (Part III); Outline of Modern Soviet Criminal Law; Recent Retrospective Legislation in Ceylon; Post-Constitutional Development of "People's Justice" in China; The Central American Draft Convention on Human Rights and the Central American Court: The Central American Draft Convention compared.

Bulletin of the International Commission of Jurists

Number 23 (August 1965): Aspects of the Rule of Law: Afghanistan, Chile, Rumania, Soviet Union, Spain, Tanzania; Edward S. Kozera; ICJ News.

Number 24 (December 1965): A World Campaign for Human Rights; Aspects of the Rule of Law: Eastern Europe, European Court of Human Rights, Ghana, Mexico, Southern Africa; ICJ News.

SPECIAL STUDIES

The Berlin Wall: A Defiance of Human Rights (March 1962): The Report consists of four parts: Voting with the Feet; Measures to Prevent Fleeing the Republic; the Constitutional Development of Greater Berlin and the Sealing off of East Berlin. For its material the Report draws heavily on sources from the German Democratic Republic and East Berlin: their Acts, Ordinances, Executive Instruments, published Court decisions and excerpts from the press.

South African Incident: The Ganyile Case (June 1962): This Report records another unhappy episode in the history of the arbitrary methods employed by the Government of South Africa. In publishing this report the Commission seeks to remind its readers of the need for unceasing vigilance in the preservation and assertion of Human Rights.

Cuba and the Rule of Law (November 1962): Full documentation on Constitutional legislation and Criminal Law, as well as background information on important events in Cuban history, the land, the economy, and the people; Part Four includes testimonies by witnesses.

Spain and the Rule of Law (December 1962): Includes chapters on the ideological and historical foundations of the regime, the single-party system, the national syndicalist community, legislative power, powers of the Executive, the Judiciary and the Bar, defence of the regime, penal prosecution of political offences, together with eight appendices.

Report on the Events in Panama, January 9-12, 1964 (May 1964): A report by the Investigating Committee appointed by the International Commission of Jurists.

Regional Conference on Legal Education of the University of Singapore Faculty of Law: A report on the proceedings of the first regional conference, held in Singapore, August-September 1962. (Published for the University of Singapore Faculty of Law).

Executive Action and the Rule of Law (June 1965): Report on the proceedings of the International Congress of Jurists, held in Rio de Janeiro, Brazil, in December 1962.

The Dynamic Aspects of the Rule of Law in the Modern Age (July 1965): Report on the proceedings of the South-East Asian and Pacific Conference of Jurists held in Bangkok, Thailand, in February 1965.

Racial Problems in the Public Service (October 1965): Report of the British Guiana Commission of Inquiry constituted by the International Commission of Jurists.

Signed contributions express the views of their authors, their publication by the Commission implies that they are thought to be of general interest by the Commission which, however, does not necessarily endorse them in their entirety. Unsigned contributions have, unless otherwise stated, been prepared by the staff of the Commission.

Contributions dealing with aspects of the Rule of Law in different countries will be considered for publication. They should be typed, submitted in duplicate and addressed to the Secretary-General at Geneva.

Published twice yearly in English, French, German
and Spanish and distributed by
INTERNATIONAL COMMISSION OF JURISTS
2, QUAI DU CHEVAL-BLANC
GENEVA, SWITZERLAND.

The *Journal* is distributed without charge to Supporting Members of the Commission.

PRICE:

6.75 Sw. Fr. **$ 1.50 U.S.** **£ 0.10.9 U.K.**

TRIO PRINTERS LTD. – THE HAGUE – THE NETHERLANDS