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**INTERNATIONAL
COMMISSION OF JURISTS**

**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

FEBRUARY 15-19, 1965

GENEVA - SWITZERLAND

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International Commission
of Jurists (ICJ)
Geneva, Switzerland

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WORKING PAPER

on

**THE DYNAMIC ASPECTS OF THE RULE OF LAW
IN THE MODERN AGE**

Theme: How far existing conditions in the areas under study are conducive to the maintenance and promotion of the Rule of Law in those areas; and in what ways further improvements can be effected in the observance of the Rule of Law in the context of such conditions.

PREFACE

The purpose of a Working Paper is to provide the background information necessary for the Participants and to set out the principal issues which are likely to captivate the attention of the Conference. It is for the Conference to formulate solutions to the problems raised. If, in the course of this Working Paper, we have appeared to suggest solutions to some of the problems discussed, it is for the purpose of ensuring the consideration of these solutions and not to impose them on the Conference. Likewise, the Summaries at the end of Parts III, IV and V were included merely to assist the three principal Committees in their deliberations.

While, in the course of the Working Paper, we have referred liberally to the concepts of the Rule of Law as elaborated at earlier ICJ Congresses and Conferences, we have done so only for the purpose of providing the point of departure for the work of the Conference. The elaborations of the concepts of the Rule of Law formulated at earlier Congresses and Conferences have now been finally accepted by the International Commission of Jurists and it is not the purpose of this Conference to re-state them or to revise them. Rather, it is intended that the Conference should regard them as *res judicatae* and as the starting-off point for an examination of the factors which impede the full application and advancement of these rules in parts of the South-East Asian and Pacific area. It is the quest for answers to the questions posed in the theme which inevitably leads to the realization that political, economic and social factors are inextricably linked to the proper application of the Rule of Law. In other words, such evils as hunger, poverty, dictatorship, feudal land tenures, corruption, inefficient administrators and an inadequate Bar and Bench are all factors which militate against the proper application of the Rule of Law. It is in this sense that we regard the eradication of these evils as forming a vital part of the responsibility of lawyers and as coming within the framework of "The Dynamic Aspects of the Rule of Law in the Modern Age".

The South-East Asian and Pacific area comprises some 1,700 million people; this represents about 57 per cent of the world population. In vast portions of the area the subsistence levels of the population are alarmingly low. In some countries the concepts of democracy under the Rule of Law are virtually unknown. These conditions constitute one of the world's major problems.

Viewed in this light, the theme of this Conference constitutes an exciting challenge to governments, law-makers, judges and lawyers alike. For the mass of the people in a large part of the area under consideration the solution of the problems raised in the Working Paper means the difference between slavery and freedom; the dignity, personality and freedom of the individual cannot survive in circumstances that deny to him political, economic and social justice or that shut him away from the progress and benefits of this age. For us, lawyers who are dedicated to the democratic way of life under the Rule of Law, the solution of these problems is essential for the survival and advancement of our ideals.

It would be vain optimism to think that the Conference will solve the problems raised in this Working Paper. However, a Conference of this nature representative of the leading jurists in this part of the world, can make a valuable contribution towards the finding of solutions and will serve to arouse the consciousness of the rulers and the people to the requirements of the Rule of Law in the modern age. It will also highlight the responsibility of the lawyer for the economic progress of his country, the social advancement of his people and the stability of legal institutions.

The work of the Conference will be carried out in the main by its three principal Committees which will report to the Plenary Sessions of the Conference. The Plenary Sessions will thus have an opportunity of passing judgement on and of adding to the Conclusions of its three main Committees. It is intended that the Advisory Committee on Regional Conventions on Human Rights should be rather in the nature of a group of experts who would advise as to the possibility of securing the adoption of Regional Conventions in the whole or part of the area. The report of this Advisory Committee will also be presented to the Final Plenary Session but by its nature is not likely to involve protracted discussion.

This Working Paper is presented as an instrument to facilitate the exciting and challenging work of the Conference. If it does so in any way, it has served its purpose. It is for the Conference, by the combination of wisdom and idealism, to provide the leadership and inspiration which may mark a turning point in the history of this part of our world.

The Working Paper was prepared by the Legal Staff of the Commission who have all had a hand in its shaping. But, in particular, I feel that I should pay a special tribute to Mr. Lucian G. Weeramantry who took over the task of preparing the first draft when Dr. Donald Thompson fell ill in the earlier part of this year; he worked devotedly and incessantly in its preparation since. I also wish to express my deep appreciation of the valuable criticism and suggestions which we received from jurists who could be regarded as experts in the fields under examination. Their views were invaluable and led, in many instances, to considerable revisions of the Working Paper.

Finally, may I express the hope that each Participant will study the whole Working Paper. As I know from my own past experience, this may be a counsel of perfection. If a detailed study of the whole Working Paper is not possible, may I urge that Participants should in particular study Parts I and II and the Part applicable to the Committee in the deliberations of which they propose to participate. However, in order to make a substantial contribution to the success of the Conference, it is hoped that each Participant will find it possible at least to read the entire Working Paper. Every effort has been made to segregate the discussion of the issues applicable to Committees I, II and III in Parts III, IV, V respectively, but a full appreciation of the Conference theme in its entirety is not possible without a reading of the entire Working Paper.

Should any Participant wish to have any written memoranda concerning the problems raised circulated at the Conference, it would greatly facilitate the Secretariat if such memoranda could be transmitted to Geneva before the 15th January 1965.

SEÁN MACBRIDE
Secretary-General

... It is, perhaps, not by accident that affluent countries of the world came to believe in and practise democracy. We... who belong to the other side, i.e. that of the underdeveloped countries, also believe in democracy, not because it is believed in by the Western world, but because we realize that the dignity of man, in fact the survival of the human spirit, is only possible when a government is freely elected by the people of a country.

It is also well to remember, however, that to the teeming millions of Asia and Africa, things like freedom and indeed even human dignity itself are only of academic interest... For them—and they account for the overwhelming majority of the human race—the central problem... is the problem of getting enough to eat... (and) the satisfaction of hunger alone is a worthwhile achievement for the foreseeable future. In their case, if totalitarianism can deliver the goods, i.e. satisfy their hunger, nothing else really matters, not even the loss of political and civil liberties which they have not known in any case... The main thing is to fill the stomach first.

Excerpt from a statement by
HON. ENCHE TAN SIEW SIN,
Minister of Finance, Malaysia
February 1964

PART I—INTRODUCTION

General

1. Underlying the theme of the Conference is the belief of the International Commission of Jurists that the Rule of Law, being a dynamic concept, should have, for the areas under study, the same essential validity it has for other parts of the world, and the further belief that the representative government which the Rule of Law seeks to foster and protect should not be eclipsed by the urgent and fundamental problems of those areas but rather should ultimately find acceptance as the only sure basis for their enduring solution.
2. The Conference is held with the hope that it may contribute means to give further practical effect to these beliefs.
3. The purpose of this Introduction is to review in summary terms the background for the Conference and to define generally its terms of reference, particularly the dynamic concept of the Rule of Law and the meaning of democracy.
4. While in the early part of the century, the principles of the Rule of Law were accepted in some areas of the world, they were not then regarded as being of general application. After two world wars the realization grew that these concepts were indeed of general application. Scientific progress, the spread of mass education, the rapid transmission of ideas through mass media of communication and swifter

transportation hastened the more general application and definition of the principles of democracy and of the Rule of Law. These factors also hastened the termination of the colonial era.

5. It is in this situation that the nations of the world formulated with care and deliberation a declaration setting out the common standards that should apply to human society, irrespective of race, colour or religion. The Universal Declaration of Human Rights of 1948 in effect sets forth, in terms of the rights of the individual, the attributes of a democratic system, and with respect to the function of the Rule of Law states:

It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law.

6. Not unnaturally, those areas of the world which had been under colonial rule concentrated in the post World War II period on the dismantling of the colonial structure. For most colonial dependencies nationalism and national sovereignty had become ideals in themselves; in some cases nationalist ambitions had become the end target of the struggle against colonialism. While this is understandable, this tendency overlooked the essential reasons for this struggle. It was not merely to give a free reign to emotional nationalist sentiments, but to achieve self-determination and independence, and thus to ensure a free society founded on justice and peace.

7. In large areas of the world the dismantling of the colonial system is virtually completed. The main task in newly-independent countries is one of construction. This involves not only the political aspects of democratic government but also economic and social aspects which are prerequisites to the effective exercise of the rights of the individual. This necessitates the strengthening of the Rule of Law in its more dynamic aspects.

The Dynamic Concept of the Rule of Law

8. The International Commission of Jurists has, since its foundation, been dedicated to the support and advancement throughout the world of those principles of justice which constitute the basis of the Rule of Law. The term "Rule of Law", as defined and interpreted by the various Congresses sponsored by the International Commission of Jurists, seeks to emphasize that mere legality is not enough and that the broader conceptions of justice as distinct from positive legal rules are embraced by the term and, indeed, provide its more vital aspect.

9. Law, as all other human institutions, is never static. Within the changing pattern of human relations resulting from progressive social advancement, the Rule of Law undergoes an evolutionary and expanding process to meet new and challenging circumstances. This is what we mean by the term "The Dynamic Aspects of the Rule of

Law". From the outset, the International Commission of Jurists has also recognized that the applicability of the Rule of Law was not limited to a specific legal system, form of government, economic order or cultural tradition. This, too, makes its concept dynamic.

10. From the first international Congress sponsored by the International Commission of Jurists, which was held in Athens in 1955 and attended by jurists from 48 countries, there emerged the new dynamic concept of the Rule of Law. The Act of Athens, which crystallized the deliberations of that Congress, described the Rule of Law as springing "from the rights of the individual developed through history in the age-old struggle of mankind for freedom; which rights include freedom of speech, press, worship, assembly and association and the right to free elections to the end that laws are enacted by the duly elected representatives of the people and afford equal protection to all".

11. The first important step in the development of the dynamic concept of the Rule of Law was taken in January 1959 at the Congress of Delhi, held under the aegis of the International Commission of Jurists and attended by 185 practising judges, lawyers and teachers of law from 53 countries. This Congress, having reaffirmed the principles expressed in Athens, proceeded by the Declaration of Delhi to

recognize that the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspiration and dignity may be realized.

12. It is not proposed at this stage to make specific reference to the many vital principles enunciated in the Declaration of Delhi and the Conclusions of the four Committees at that Congress which considered different aspects of the Rule of Law, but reference to these principles will be made in the course of this Working Paper as and when occasion arises.

13. The African Conference on the Rule of Law, held in Lagos, Nigeria, in 1961, reaffirmed the basic principles underlying the Rule of Law as enunciated in New Delhi. One important fact that emerged from the Lagos Conference was the recognition that the basic principles underlying the Rule of Law were universal in their application and what was true for other parts of the world was equally true for Africa. The Law of Lagos laid down that the Rule of Law can be fully realized only under a system of government established by the will of the people.

14. The next important step in the process of definition and application of the Rule of Law was taken at the International Congress of Jurists, held in Rio de Janeiro (Petrópolis) in December 1962. This Congress considered such problems as how to balance the freedom of the Executive to act effectively with the protection of the rights of

the individual, what safeguards should be introduced against the abuse of power by the Executive, and on what points emphasis should be placed in the teaching of law so as to ensure the existence of a legal profession capable of performing its social function satisfactorily.

15. The work of the Commission throughout its history has stressed in addition the vital importance of an independent Judiciary to the proper functioning of the Rule of Law. It has given equal emphasis to the essential role which lawyers must be required to play in any system under the Rule of Law. The following statement was included in the Conclusions of the International Congress of Jurists held in Rio de Janeiro in December 1962:

In a changing and interdependent world, lawyers should give guidance and leadership in the creation of new legal concepts, institutions and techniques to enable man to meet the challenge and the dangers of the times and to realize the aspirations of all people.

Part V of this Paper is devoted to the Role of the Lawyer in a Developing Country.

16. In respect of written constitutions, traditional Eastern philosophy is bound to influence profoundly the approach of many Eastern countries. The Western lawyer is accustomed to testing criteria of the Rule of Law against a mass of elaborate constitutional and statutory safeguards, either setting out in positive terms the rights of the citizen, or providing rules and procedures whereby he may check the wrongful encroachment on his rights by the State. In Western eyes an elaborate institutional structure and a complex system of rules immediately spring to mind. The concept of a wise and benevolent ruler has traditionally dominated much Eastern thinking, with the result that many leading thinkers in Asia see no necessity for this elaborate regulation, and may indeed find it irksome.

17. This is especially important when attempting to evaluate potential dangers that may arise in the absence of detailed safeguards. The phenomenon of a paper constitution which belies reality is well known. The concept of trusting a majority for the time being not to use powers which theoretically exist in order effectively and finally to crush the minority for the time being is also a phenomenon known in many parts of the world.

18. Various devices are employed in South-East Asian countries to prevent the abuse of political power. In some cases there are constitutional restrictions. In others a pragmatic solution is found by ensuring that the election process to which the government must submit within a few years is not tampered with so as to make it impossible or more difficult to unseat the government in power. As in the case of countries in the Western world, the essential question is to evaluate how power is really exercised, whether or not formal legal safeguards exist.

19. In conclusion, it is important to emphasize that except in political and legal systems based on the supremacy and overwhelming importance of the State, the underlying principles of the Rule of Law have found expression and realization in vastly divergent societies and cultures. The working definition of the Rule of Law as a dynamic concept, adopted by the Commission at the New Delhi Congress in 1959, reads:

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 having themselves 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.

20. It is the hope of the Commission that the work of the Conference will show that, while the problems of the South-East Asia and Pacific areas in many cases differ from those of other parts of the world, their solutions can effectively be sought through the establishment and observance of the Rule of Law.

21. While the Commission has concentrated its efforts on the development of domestic law, it is believed that the gradual acceptance of the Rule of Law in individual nations will, by establishing "general principles of law recognized by civilized nations", contribute to the growth and recognition of such principles as a part of International Law. It is in this context that this Conference includes, in Part VI, suggestions with respect to regional conventions and courts of human rights.

Concepts of Democracy

22. Since common terms such as "democracy" are often given distorted meaning, it is important to define the meaning given them in this Working Paper.

23. The first of these expressions is "democracy". Few political leaders would bluntly state that they do not accept democracy. Virtually every country, whatever its political system, claims to be democratic, but from time to time the noun "democracy" is qualified by such expressions as "basic", "guided", "paternal" or "people's". The original meaning of the term democracy was "a form of government where the right to make political decisions is exercised directly by the whole body of citizens acting under procedures of majority rule". This is known as "direct democracy". The second and most usual meaning is "a form of government where the citizens exercise the same right but through representatives chosen by them and responsible to them through the process of free elections". This is known as "representative democracy".

24. Thirdly, a development from "representative democracy" with power wielded by simple majority, is that of a democracy with en-

trenched fundamental rights. In this sense the powers in the hands of the majority are exercised within a legal framework of constitutional restraints designed to guarantee that certain basic principles and basic rights are not at the mercy of a transient or erratic but simple majority.

25. Fourthly, the word "democratic" is often used to describe a system which seeks or claims to seek to minimise social and economic disparity, especially differences arising out of the unequal distribution of property. This is described as "social" or "economic" democracy. This is the sense in which the term is often used by democratic socialists who accept the framework of representative democracy.

26. On the other hand, the term is also used in Marxist philosophy, which accepts as a basic and unquestionable premise that such a system is democratic, regardless of whether a free choice by the majority is possible. This proceeds on the basis that the individual as such has no rights, but that his interests must always be subordinated to the policy of what amounts to a small hierarchy. This hierarchy is selected, not by the free choice of the people, but by the ruling party which itself is not selected by the people. In such circumstances the people have no free choice of party or of policy. Unless in a particular system social and economic measures are linked to those democratic institutions and procedures ensuring individual human rights, such a system cannot be considered democratic.

27. The basic principles of democracy within the meaning of the term as used in this Working Paper emerged from the French and the American Revolutions, and in our time, as indicated earlier, are expressed in the Universal Declaration of Human Rights. While the basic requirements of representative government are discussed at some length in Part III of this Working Paper, it may be useful to enumerate some of them at this point:

- (a) Free elections
- (b) General freedom of expression
- (c) Independent political parties
- (d) A written constitution

28. Free elections are a necessary and inevitable concomitant of democracy. A free election means that at reasonably frequent intervals the people, without regard to any factor other than adult standing and their own disqualifying conduct, should have the opportunity of expressing their wishes as to the lines of policy to be followed by their society and as to the persons who should implement that policy.

29. Closely linked with the mechanics of a free election is the question of freedom of expression, which in some cases is aggravated by a serious problem of illiteracy. Democracy can hardly function properly in an illiterate society, though this does not mean that it cannot function at all.

30. One of the fundamental problems facing any society, whatever its level of education or stage of economic and social development, is that, even if the basic attributes of democracy referred to above are present, the different solutions offered are not capable of technical evaluation by the electorate at large. The needs of economic planning, of industrialization, of measures to protect the national currency or even of defence, are not matters on which the average elector in any country is able to form an expert opinion or to decide on their technical merits.

31. Political parties presenting alternative programmes and enjoying freedom to put forward to the electorate the ideas which they hold and their criticism or defence, as the case may be, of those in power are a basic attribute of democracy as known in the West.

32. There is, however, a considerable danger in the idea that political parties everywhere should follow the pattern of those existing in Western Europe and the United States. For a number of reasons this is not necessarily so. In the case of many countries in South-East Asia, there are diverse racial elements or different castes, giving rise in some of them to a tendency to reinforce existing divisions by division into political parties along similar lines. Many countries in South-East Asia have been under colonial rule and there was a tendency to sink internal differences that might have existed in the common struggle for independence. In such cases, a political party would emerge which represented, or purported to represent, the entire people in their claim for independence. In such circumstances a real opposition party was not easily found and there was the further complication that the party which led the nation to independence inevitably acquired an aura of prestige as the party that truly represents the nation. Not surprisingly, in such cases these parties have not been slow to take advantage of this fact in the dialogue between government and opposition. Another noticeable factor is that political parties do not sometimes correspond to a real difference in policy but merely provide platforms in the struggle for power.

33. In view of the fact that there is no country in South-East Asia where direct democracy is practised to an appreciable extent, the factors which make political parties different in conception and purpose from those in the West are of great importance. It is difficult to conceive of representative democracy without political parties and the less such parties reflect real differences in programmes the less healthy is the outlook for democracy, and indeed, for the Rule of Law. Another factor which weakens the democratic process is the absence of democratic procedure within the structure of individual parties, thus making them often the instruments of ambitious leaders rather than the voice of a broad section of the population holding similar political views.

34. It is believed that this may, in part, explain the tendency in South-East Asia for authoritarian " non-political " (often military) regimes to take over power, often in a sincere attempt to save the country, on the ground that the ineffectual feuds of self-seeking politicians were leading the country towards disaster.

The Scheme of the Working Paper

35. Part II of the Working Paper reviews the particular problems of South-East Asia. This Part, taken together with the Country Surveys which form an Appendix to the Working Paper, seeks to outline the background of the problem which the Conference will consider. It is suggested that the participants at the Conference familiarize themselves with these problems before devoting their attention to the specific issues that will be considered both by the Committees and by the Plenary Sessions of the Conference.

36. Part III on " The Basic Requirements of Representative Government under the Rule of Law " is intended to form the basis of the work to be undertaken by Committee I. It is also of general interest to all participants because of the interconnection between the work of the different Committees.

37. Part IV on " Economic and Social Development within the Rule of Law " is intended to form the basis of the work to be undertaken by Committee II. This Part has special importance for the developing countries of South-East Asia.

38. Part V of the Working Paper on " The Role of the Lawyer in a Developing Country " is referable to the work of Committee III. This Committee will have to relate the earlier Parts of the Working Paper to the practical day-to-day functions as well as to the larger civic responsibilities of the lawyer.

39. Part VI, which deals with " Regional Conventions and Courts of Human Rights for Asia and the Pacific " expresses in general terms the desirability of regional conventions for the protection of human rights. It was not considered necessary in the light of the general acceptance of the need for such conventions to have the Conference deal with this matter in detail, but merely to suggest ways and means for a regional convention or regional conventions in Asia and the Pacific. Thus it is proposed that the opening Plenary Session of the Conference appoint an Advisory Committee to examine this question and to report to the closing Plenary Session of the Conference.

PART II—SOUTH-EAST ASIAN PROBLEMS

The Different Types of Community in South-East Asia

40. The countries in this region do not form a homogeneous whole. They may be classified in different ways. There are communist societies such as those in China, North Korea and North Vietnam. There are countries where the people all speak the same language, and which have basically the same kind of culture, e.g. Australia, notwithstanding its Aborigine minority, New Zealand, notwithstanding its Maori minority, and Japan, notwithstanding its Ainu minority. In others, there is a diversity of language and even markedly different physical characteristics among the population, as in the case of India. There are also countries which fall broadly into two ethnic divisions with corresponding language differences. Ceylon is an example. There are yet other countries like Malaya, where the supposedly national group is in fact almost a minority compared with the total of other groups.

41. The unity of some countries is political rather than geographical. Indonesia consists of many scattered islands. The Federation of Malaysia is itself a political rather than a geographical unit, as is Pakistan. In other countries, like New Zealand, Japan and the Philippines, there are two or more land masses but a marked geographical homogeneity in the different units.

42. Factors such as these are reflected in the system of government and in the institutions, and sometimes in serious tensions that exist in the different countries. Discrimination rarely exists in a homogeneous population but does present serious problems in mixed societies, usually in practice rather than as a result of legislation. In countries where different affiliations have produced a loyalty to a group rather than to the country as a whole, these divisions are sometimes racial, sometimes linguistic, and sometimes religious.

43. Countries may also be divided into those which have been former colonial territories or otherwise subject to the authority of some foreign power, and those which have enjoyed independence throughout modern history. Those that have been former colonies reflect to a large extent the pattern of institutions and techniques of the colonial power. Japan is unique in that, although never a colony, its modern institutions undoubtedly follow the institutions and techniques of a foreign power which imposed new institutions after military conquest.

The largely American-inspired Japanese institutions of the present day appear to reflect the new temper of the Japanese nation after imperial rule and authority had come to an end with defeat in the Second World War.

44. Some countries are unnaturally divided by political differences, and frontiers were drawn at points which tear apart the ethnic and economic unity of a community. Korea and Vietnam are obvious examples, with serious resulting tensions and grave economic difficulty due partly to the ravages of war and partly to the division of a formerly viable economic whole.

45. Although it is common to regard South-East Asia as an area where social and economic developments are the pressing needs of the day calling for urgent solution, it should also be remembered that there are countries where the economic level is high and poverty does not exist on a serious scale. Australia, Ceylon, Japan, the Philippines, New Zealand and Thailand are countries which have in varying degrees reached the stage where poverty and hunger are not endemic. Other countries are faced with the calamitous necessity of feeding a population which cannot reach proper subsistence level with the resources of the country as at present organized and distributed. It is in such countries that the economic and social connotations of the Rule of Law come down to sheer fundamentals of human existence. China and India are both countries where poverty and hunger are widespread. As the two most populous countries in the region, they present striking contrasts in their conceptions of how society should be organized, and in their conception of human beings.

Some Characteristic Features of Asian Societies

46. One of the principal factors that runs through all Asian societies is that their societies are old and are largely governed by tradition. They are what are known as "traditional societies". Their social structure, economy and culture are traditional and their ancient political traditions do not include representative or constitutional government in the modern sense. These societies were almost always reigned over by kings or princes who were invariably absolute rulers. In the case of those South-East Asian countries which have a colonial history, this observation would be applicable to their pre-colonial period and sometimes even to parts of the colonial period when a colonial power and a local monarch co-existed in the same country with different spheres of influence. It is true that even under absolute rule *certain rudimentary forms of local self-government* were discernible, but rigid social institutions such as caste existed and therefore there was no democracy in the modern sense. Custom continues to play an important part in the day-to-day life of the individual and governs his relations with his fellowmen. Custom in most of these

countries has formed the basis of local law as in many European countries such as England. There are certain general attitudes in the countries of this region which owe their origin largely to their colonial past. While the impact of the colonial rulers is discernible in the institutions, laws, and way of life of the people, there has grown a general distrust of the West and a disinclination to assimilate even progressive ideas, ideologies and techniques of the West. Politicians often find themselves seriously handicapped unless they are prepared to disown the West and champion local techniques, customs and ways of life, irrespective of whether they are the most suitable to the needs of societies which, though traditional, are nevertheless undergoing change in the face of the intense social and economic ferment in which the whole world is caught up.

47. The strong feeling of nationalism which is the natural consequence of the achievement of freedom from foreign control is also evident in countries which have not had a history of colonial rule such as Thailand. A result of the new nationalist movement is a desire for equality with more developed nations, not only in the political but also in the economic field, and an extreme sensitivity about status in the hierarchy of world states. Such countries desire to become modern while retaining their individuality and cultural background, and to have modern armies and modern amenities of life, but without economic dependence on the West. The desire to absorb ideas and methods from outside varies.

48. Another common factor which can be seen in these countries is the presence of a new intelligentsia springing from the ranks of the middle class and having a vital influence on their political life. The structure of society in most South-East Asian countries was feudal and marked by the absence of a middle class, whether or not they had ever known colonial rule. It was the growth of a middle class in Europe, consisting of intellectuals, lawyers, doctors, traders etc., which spear-headed most movements for political and social reform in the 17th, 18th and 19th centuries. The counterpart of this class in South-East Asian countries sprang into existence at a much later point of time due partly to the traditional structure of their societies and partly to the stifling of the natural course of progress by reason of external intervention. But today it is true to say that in all these countries a new middle class, a new intelligentsia, has emerged. Some intellectuals in these countries have received their education abroad, and have absorbed ideas in the course of their studies which they have imported into their own countries. Others have been educated in universities and training institutions in their own countries where they have had access to local and foreign political ideas. The new intellectuals were concerned with the solution of the prevailing problems of poverty, inequality and injustice. Their political ideologies, of course, sprang from different sources depending upon where they received their

education, the influence upon them during their student life and the movements with which they were associated or from which they drew their inspiration. It is from this new class that most of the political leaders of South-East Asian countries have emerged. While trade unions and working-class movements are political forces which cannot be ignored in these countries, even the top leaders of workers' and trade union movements are often drawn from the new middle class.

49. During the periods of colonial rule the language of the administration was invariably that of the colonial rulers, with the result that knowledge of this language was an essential pre-requisite for preferment in the government services in particular and in society in general. The result was a neglect of the mother tongue. The South-East Asian region is the home of many ancient and developed languages such as Hindi, Urdu, Bengali, Tamil, Sinhalese, Burmese, and Malay, but these languages were neglected and their further development interrupted by the advent of the colonial rulers. The achievement of independence brought about a phenomenon common to all South-East Asian countries which had a colonial past, namely a strong enthusiasm for the revival of the national language. This feeling found expression in the promotion of the study of the national language and in attempts to effect a rapid and complete switch-over to it as the medium of education and administration. While the reasons for this trend can be well understood, the switch-over process has often been accompanied by a hostile attitude towards the language of the former colonial ruler, even if it be a language that has acquired international status and recognition. The lack of encouragement given to the study of foreign languages may adversely affect communication in the scientific, political, social and economic fields and shut out certain avenues of knowledge. The position in countries like Japan and Thailand, which have always been independent, is rather different, because, while the national language is emphasized in these countries, every encouragement is given to the study of English and other international languages.

50. From the new emphasis that is being given to the national language there has arisen in these countries, largely from amongst the ranks of the rural population, a new kind of political and social leader, educated entirely in the national language and steeped in the national culture and heritage. Their leaders are an important force giving a new direction and a new orientation to rural society in these countries. They are mostly village schoolmasters, indigenous physicians, village headmen, members of village committees, political monks and young people who have received a good education in the national language.

51. Another feature common to all the countries of these regions is the strong influence of religion on the day-to-day life and the social outlook of the people. This observation is true of almost all Eastern

societies, be they Buddhist, Hindu, Muslim, Christian or any other, with the exception perhaps of Communist China where neither Confucianism nor Buddhism appears to have had the same deep influence on the lives of the people as a religion. This may be because Confucianism was looked upon as merely an ethical code and Buddhism in China assumed a very different form and aspect from the pure Theravada Buddhism of Ceylon and Burma.

52. The actions and reactions of the average Asian must be understood in the light of this strong religious feeling, an important feature of Asian life. This also readily explains why the religious cry, whether it be in support of a particular religion or directed against another, is often a most powerful one on Asian political platforms.

53. One feature that strikes a student of political events in the South-East Asian region is that the region is today alarmingly productive of national and international tensions, as indicated by events in India, Pakistan, Ceylon, Burma, Indonesia, Malaysia, Laos, Cambodia, Vietnam or Korea. The tensions in South-East Asia stem not only from political causes but from fundamental social and economic causes as well.

54. The Council of World Tensions, in association with the University of Malaya, organized an important Conference in February 1964 on "Development and Cooperation in the South-Asia Pacific Region" for the purpose of studying the tensions and other factors which impede the economic and social development of the region and of seeking methods by which greater cooperation between the countries of this troubled region can be effected.

55. The following extract from the address delivered at that Conference by the Hon. Enche Tan Siew Sin, Minister of Finance, Malaysia, spotlights the principal problem of countries in this region (a shorter excerpt from the same address appears at the beginning of this Working Paper):

The central problem of our age is whether democracy or totalitarianism shall be the future world system. It is, perhaps, not by accident that affluent countries of the world, which are largely the countries of the Western world, came to believe in and practise democracy. We in Malaysia who belong to the other side, i.e. that of the underdeveloped countries, also believe in democracy, not because it is believed in by the Western world, but because we realize that the dignity of man, in fact the survival of the human spirit, is only possible when a government is freely elected by the people of a country. We are against totalitarianism in any form, by whatever name called, because we realize that whatever the original intentions of dictators may be, however benevolent they may be, "power corrupts and absolute power corrupts absolutely".

It is also well to remember, however, that to the teeming millions of Asia and Africa, things like freedom and indeed even human dignity itself are only of academic interest, simply because they have never known them before. For them—and they account for the overwhelming majority of the human race—the central problem which they face every day and which pervades their very

existence is the problem of getting enough to eat and of trying to subsist on what an affluent society would regard as well below subsistence level. In the case of these teeming millions, the satisfaction of hunger alone is a worthwhile achievement for the foreseeable future. In their case, if totalitarianism can deliver the goods, i.e. satisfy their hunger, nothing else really matters, not even the loss of political and civil liberties which they have not known in any case. It therefore stands to reason that the solution to what is literally regarded as a political problem could really be an economic one. You cannot practise democracy on an empty or half-empty stomach. The main thing is to fill the stomach first.

56. It must be noted that the observations so far made in this part of the Working Paper are not applicable to Australia and New Zealand, which are also countries included in this Regional Conference. They, like Japan, are developed countries enjoying a very much higher standard of living than the others. There are, however, some features common to all the countries involved in this Regional Conference, including Australia and New Zealand. They all have a sizeable minority problem or problems, though these vary in degree or in kind. Reference to their problems has been made in the Country Studies.

57. There is also an important economic factor common to all these countries including Australia and New Zealand, and that is that their economies are primarily agricultural. Japan, whose economy is primarily industrial, is an exception, but here too agriculture is an important sector of the economy.

Factors Undermining the Rule of Law in South-East Asia

58. Reference has been made to the growth of national feeling which culminated in the obtaining of independence by many countries which had long been subjected to foreign rule. The political parties or political groups in these countries which fought for freedom and independence commanded wide and enthusiastic support so long as the struggle for political freedom continued. When freedom was achieved the people of the newly liberated countries expected not only increased political rights but also new social and economic conditions similar to those prevailing in developed countries as the fruits of freedom. Political leaders had made impassioned speeches at mass meetings as part of the campaign for independence, at which promises were freely and often recklessly made. So long as independence had yet to be achieved, future promises were most alluring, but neither politician nor citizen paid much attention to the difficult economic questions involved in the fulfilment of these promises. As a result, after independence, sooner in the case of some countries and later in the case of others, people had to face the stark truth that these promises were incapable of fulfilment by political leaders on whom they had pinned their faith.

59. On the granting of independence political constitutions on democratic lines were introduced. These constitutions were generally the

result of long discussions and negotiations between the colonial ruler and the leaders of the dependent country. The democratic form of government was therefore not one that was foisted upon the colonial peoples against the will of their representatives but was the form of government acceptable to the representatives as the one most suited to the requirements and aspirations of their peoples. In the case of those countries which had been under British rule, for example, local political leaders were familiar with British political institutions and recognized how successfully these institutions worked in England itself and in limited measure in their own countries during the period of transition. It was therefore the form of government most acceptable to them.

60. Why then has the democratic system broken down in so many South-East Asian countries and been replaced by dictatorships or military rule? In Pakistan today there is an authoritarian form of government where, although there has been no complete abandonment of fundamental rights and freedoms, there has been a partial breakdown of the democratic system in such vital spheres as free elections and freedom of the Press. In Burma, to give another instance, all democratic processes were brought to a complete halt following upon the military coup d'état of March 1962. Although the Burmese Constitution of 1947 has not been expressly revoked or suspended, the Revolutionary Council which governs Burma today rules by decrees which are patently unconstitutional and are often flagrant violations of the fundamental rights guaranteed to the people under the Constitution, e.g. the detention of many political leaders and distinguished citizens without trial and without even charges being preferred against them.

61. One of the general causes of the total or partial abandonment of democracy in many Asian countries in favour of alternative forms of government is, as indicated earlier, the shattering of the great expectations which political leaders had built up in the minds of people without any relation to reality. While the path of democracy, though sure, is often slower in the achievement of economic and social goals than one would like it to be, it does not follow that there are speedier methods of reaching these goals, because development, along whatever political road a country travels, must necessarily take time.

62. All countries that had been under colonial rule found on the attainment of independence that they had to travel quite far along the road of economic progress in order to reach anything like the standards that had been attained by the developed nations. Some of the obstacles common to the countries of South-East Asia are lack of technical skill, absence of proper planning, inefficiency, corruption in the administrative services, shortage of capital, inadequacy of foreign aid, political interference in the sphere of administrative and technical decisions and the disinclination to abandon traditional methods of production for

quicker and more modern methods. The population explosion in South-East Asia has also had the effect of lessening overall annual gains in the economic field. Political tensions and preoccupation with the many national and cultural problems peculiar to each of these countries have also served to slacken the rate of progress.

63. While it is contended that the problems that face South-East Asian countries can best be solved through democratic methods, the peoples of many of these countries, disillusioned by promises that failed to materialize shortly after the attainment of independence and no longer prepared to be patient, were ready to accept other forms of government in the belief that democracy could not be successfully worked in their countries and in the hope that the alternative, be it dictatorship, military rule or some other form of government could deliver the goods more quickly.

64. This disillusionment has been more pronounced among the under-privileged, the unemployed and the working classes, whose wages were always low and who have found that, whatever increases in pay they have succeeded in obtaining through their trade unions or through other methods, these have been inadequate to meet the rising cost of living. The existence of discontent and disillusionment on a wide scale provides those who desire to overthrow a representative form of government with an excuse.

65. But one of the principal reasons why democratic institutions once established have not worked smoothly and taken firm root in many South-East Asian countries is the absence of an effective and responsible opposition. At the time of the attainment of independence, a party or political group which had steered the country successfully to the goal of independence enjoyed such enthusiastic support that the opportunities for the development of a strong opposition party were small. The result was that an effective opposition failed to emerge, and such opposition parties as did spring up were either splinter groups of the party in power, or parties representing racial or religious sections of the country, or totalitarian parties. This is a factor which weakens the democratic process even in such countries as India, which are wedded to democracy. The absence of a proper opposition also results in the growth of factionalism within the party in power, thereby weakening its capacity to make and carry out important decisions. This is true not only of the Congress Party in India but also of the Liberal-Democratic Party, the party in power in Japan.

66. While the Rule of Law and democratic forms of government continue to prevail in countries like India and Japan, the absence of cohesive opposition has contributed to the breakdown of the Rule of Law in certain other countries.

67. In Indonesia, for example, the absence of a strong opposition and the consequent strength of the group in power resulted in President

Soekarno, the leader of the group, finding it quite easy to abrogate the 1950 Constitution, and to arrogate more power to himself and to throw all democratic institutions overboard. Although President Soekarno describes the form of government obtaining in Indonesia today as " Guided Democracy ", the fact remains that Indonesia is no longer a democracy inasmuch as representative government no longer exists.

68. In Burma, the Political Party known as the AFPFL (Anti-Facist People's Freedom League) dominated Burmese politics ever since independence, and the absence of a strong opposition contributed to the planning and successful execution of a military coup d'état in March 1962, and the consequent breakdown of the Rule of Law in that country. The Revolutionary Council which rules Burma today professes to follow the " Burmese Way to Socialism ", but this path to socialism certainly fails to recognize the right of the people to express themselves through their elected representatives.

69. South Vietnam is another illustration of a country where the absence of strong democratic institutions and the authoritarian nature of the regime of President Ngo Dinh Diem, rendered possible by the absence of a cohesive opposition party, precipitated a military coup d'état which overthrew the Diem regime in November 1963, but which does not appear to have been particularly successful in producing internal stability.

70. Modern well-trained armies governed by an officer class with special military training are legacies which many of these countries inherited from their colonial rulers. Some of the officers in these armies have received a part of their training abroad. In a modern army there is much specialization which calls for high technical skill. The importance of a modern army being thoroughly efficient constantly requires a soldier to look abroad and compare his own organization and techniques with those of other nations. This creates in the army a great sensitivity to the needs of modernization, sound organization and technical advancement in the country at large. Army officers are often in sympathy with intellectuals, students and other elements in society that are concerned with the political problems of the country. Within the army itself these officers are used to discipline and expect unquestioned obedience to orders. When army leaders feel that the politicians in power are corrupt or inefficient, their military experience tends to make them find solutions to the problem more drastic than those offered by democratic processes. The intervention of the army to establish a military regime is more likely to occur in countries where (a) the army is strong and is led by powerful and influential commanders and (b) where the civilian elements opposed to the government lack dynamism and efficient organization, more especially an organized political opposition, and consequently look to the army for leadership and deliverance from the rule of an unpopular group.

71. One of the chief characteristics noticeable in the armies of South-East Asian countries is that, in contrast to more developed countries where army officers have older traditions, the officers are politically-minded and not necessarily conservative. They are at the same time, however, often hostile to politicians and political parties.

72. Professor Morris Janowitz, in his recent book on "The Military in the Political Development of New Nations", concerns himself with two interesting questions;

First, what characteristics of the military establishment of a new nation facilitates its involvement in domestic politics? Second, what are the capacities of the military to supply effective political leadership for a new nation striving for economic development and social modernisation?

73. His conclusions are as follows:

Those organisational and professional qualities which make it possible for the military of a new nation to accumulate political power, and even to take over political power, are the same as those which limit its ability to rule effectively. Thus, once political power has been achieved, the military must develop mass political organisations of a civilian type, or it must work out viable relations with civilian political groups. In short, while it is relatively easy for the military to seize power in a new nation, it is much more difficult for it to govern.

74. When tracing the factors common to Asian societies, reference was made to the new class of political and social leaders that emerged. Members of this class, who were products of national education and national culture, had their own ideas as to what form of government was most suitable for their countries. The idea that democracy was purely a Western form of government, unsuited to the traditions, background and culture of Asian countries, began to receive more and more support from some sections of this class. The traditional nature of Asian societies and the general distrust of the West, coupled with the resuscitation of nationalist ideas are all factors that facilitated the propagation of anti-democratic ideas, to an extent sufficient in some Asian countries to establish conditions conducive to the breakdown of the Rule of Law.

75. It should not be understood that the entirety of this class is essentially anti-democratic. Many believe in democratic values, but what they generally seek to achieve is the re-establishment of the national culture and heritage and the eradication of foreign influences, be they political, social or cultural, on the ground that these influences had adversely affected and even perverted local society. In their enthusiasm for national restoration, however, they indirectly create attitudes helpful to those less well motivated.

76. There is another traditional attitude towards law itself, which is observable in certain Asian countries, for example Korea, of lack of confidence and even distrust of law; law being regarded as an instrument used by the rulers to further their own interests and to oppress the ruled. In Korea, this attitude is perhaps more pronounced than any-

where else in Asia. During the course of his long subjugation to foreign rule, the average Korean found that laws were made by the rulers not with the ultimate purpose of protecting the individual or furthering his interests, but to provide the machinery by which the country could continue to be kept under subjugation. The result of this attitude towards the law is that the average person, far from considering himself under a duty to obey the law, endeavours as far as possible to evade it.

77. This attitude towards the law is observable, though perhaps in a far less pronounced form, in several other Asian countries which have been under foreign rule. While the rulers did in many instances make laws in the interests of the people, it would be true to say that the primary object of law-making was the preservation of peace, the protection of the trading interests of the foreign power and the maintenance of the status quo. Of course, the force of this observation would vary depending on how enlightened and how benevolent the foreign ruler was. Many illustrations can be traced of extremely harsh and repressive laws which had been imposed by colonial powers in South-East Asia with a view to protecting their trade monopolies and their trading interests generally, and which were certainly not designed to benefit the local inhabitants.

78. This attitude, which identifies law with undesirable features of past government, is certainly not conducive to the establishment or furtherance of the Rule of Law. In any effort to establish a stable and democratic government, it is necessary to fight this distrustful attitude of the people towards the law. It is further necessary to show by positive example that the law is an institution for the benefit of the people. It is also necessary to improve the image of the lawyer himself.

79. Traditionally, East-Asia—particularly China and countries influenced by Chinese political philosophy—is the centre of the antithesis to the Rule of Law conception of the polity. This position is best presented in the works of Confucian scholars written in opposition to the Legalist School in China. Although he spoke before the Legalist School came into existence, the remarks of the third century B.C. Chinese philosopher Hsün Tsu are typical of these views:

There is a ruling man but not a ruling regulation. . . Law cannot stand alone and regulation cannot be exercised by itself. By getting the (right) man, it lasts; by losing the (right) man, it perishes. Law is the tip of government, and the great man is the source of governing. Therefore by having the great man (in control) although the law is incomplete, it will be sufficient to cover everything. Without a great man, even if the law is complete, the sequence of its application will be in disorder and will be unable to meet the change of events, and will lead to disorder.

80. This line of reasoning, while it did not deny the need for some law to order society, assumed that the emphasis ought to be placed on creating a special class of virtuous rulers who should be allowed to

direct society as he felt best without being hamstrung by an extensive body of rules passed down from ages past. It was very much a philosophy of the rule of men and not of law; its ideals were rendered incarnate in an intellectual elite of benevolent philosophers. The states which attempted to realize these Confucian principles were characterized by:

- (a) Relatively few statutes or similar materials; such as there were, were couched in broad general language, which tended to be an injunction to comply with certain ethical principles rather than detailed substantive legislation. Normally, these statutes remained in effect for long periods of time without extensive amendment.
- (b) Non-publication of administrative materials circulated internally within the government between officials.
- (c) A bureaucracy, assumed to be drawn from the intellectual elite, which occupied one of the highest if not the highest prestige position within the society.
- (d) Unification of the judicial and the legislative functions in the hands of the executive.
- (e) A general dislike for litigation felt by the people and a corresponding lack of "rights consciousness" fostered by active policies of the government. Use of unofficial means of resolving disputes, such as mediation, was encouraged in place of recourse to courts.
- (f) Non-existence of a legal profession. Those who sought to argue principles of law while representing the interests of parties were looked upon as pettifoggers and parasites and as making no useful contribution to society.

81. Attitudes similar to the Korean and Chinese attitudes have contributed in varying degrees to the total or partial breakdown of the Rule of Law in other parts of Asia.

82. Among other factors that have contributed to a departure from the Rule of Law in Asian countries are lack of political consciousness and general ignorance of the voters themselves. Votes are often cast for a candidate, not on the basis of his personal merits or party policy, but for other considerations such as race, religion, caste, social position, friendship or personal advantage. In countries where bribery, intimidation and undue influence are widely resorted to in election campaigns, many voters are influenced by considerations even more ignoble. The result is that the wrong type of person, whose primary concern in politics is personal advancement and not the interests of the people at large, is often voted into power. When in power they sometimes tend to seek ways and means of perpetuating this power regardless of popular will. This can have disastrous consequences for representative government.

83. Observations have already been made on inefficiency and corruption in the administration, resulting in military take-over and abandonment of the Rule of Law in some Asian countries. These observations have a bearing on the causes that led to the final victory of the Communist Party in Mainland China over the Kuomintang regime. The development of the Rule of Law in China had been stifled by the long period of anarchy and disorder that marked the history of twentieth century China prior to the Communist victory. The victory of the Communist Party effectively barred all possibility of the establishment and promotion of the Rule of Law in Mainland China, where the Rule of Law does not exist today.

Notes on Some Special Forms of Government in South-East Asia

84. Two special forms of government in South-East Asia, though not Communist, represent substantial departures from the Rule of Law. They are the *Guided Democracy* of Indonesia and the *Burmese Way to Socialism*. These are in reality two labels used by the rulers in these countries to describe the form of government obtaining in each of them.

85. President Soekarno calls his concept guided democracy, or democracy with leadership. The "heart of the guiding" in a "Guided Democracy", he has said, is deliberation, but a deliberation that is guided by the inner wisdom of perception. Although there is no question about his recent consistent opposition to political parties and majority rule, President Soekarno has not clearly articulated what form guided democracy should assume.

86. There has been no elected legislative assembly since the dissolution of the Constituent Assembly in July 1959 and the abrogation in the same year of 1950 Constitution. The present "mutual help parliament" is made up of appointees from political parties and functional groups.

87. Other features of the government of Indonesia are dealt with in the Country Survey on Indonesia (Pages 100-104 of the Country Surveys).

88. The term "Guided Democracy" would appear to suggest that it is a particular species of democracy. The "democracy" of Indonesia, if one were to analyze the expression, is guided, but it is by no means clear as to who does the guidance and how. Democracy, as the term is commonly understood, is indeed always guided by those who prepare party programmes which are placed before the electorates. But where the government is guided by an individual or group exercising arbitrary power without reference to the people, one cannot see how such a government could be described as a democracy at all.

89. Following the military coup d'état in Burma on March 2, 1962, the Revolutionary Council, which was the body through which the military leaders proceeded to govern the country, issued a policy declaration entitled "The Burmese Way to Socialism". In general this declaration affirms traditional Socialist (as distinct from Marxist) objectives; democracy will be developed only in such form as will promote and safeguard the socialist development envisaged. Although this policy declaration is critical of parliamentary democracy and asserts that the aim of the Revolutionary Council is to establish a "socialist economy based on justice", the socialism it visualizes is vague and lacks definition.

90. On July 4, 1962, the Revolutionary Council adopted "The Constitution of Burma Socialist Programme Party for the Transitional Period of its Construction". The object of this document appears to be the creation of a single party based on Burmese culture. They considered that the creation of a strong socialist single party would help preserve Burma as a sovereign entity.

91. Many Burmese politicians voiced their opposition to the use of the contemplated Burma Socialist Programme Party as an instrument of one-party rule. For a long time the Government took no steps to form this party, but after it had been formed, the Revolutionary Council declared all other political parties illegal by decree. As a result, Burma is now a one-party state, that party too, being not only government-sponsored, but supported by public funds.

92. Inasmuch as there are no elections in Burma, it would be perhaps incorrect to describe the country as being even a one-party state. The Burma Socialist Programme Party is not a party consisting of representatives of the people, but a party created by the Revolutionary Council with a view to bolstering up its own political position.

93. The policy declaration issued by the Revolutionary Council and referred to earlier states that *parliamentary democracy has been tried out and tested in Burma and failed*. Although the declaration goes on to say that the Revolutionary Council must develop only such a form of democracy as will promote and safeguard socialist development, the actions of the Council in regard to institutions and procedures vital to any form of democracy have amounted to a negation of democracy. In March 1962, the independence of the Burmese Judiciary was seriously interfered with when the Supreme and High Courts were abolished by decree and nine judges including the Chief Justice were dismissed. A new Chief Court was set up to exercise the function of the former Supreme and high Courts.

94. Another disquieting step was the promulgation in June 1962 of the Special Criminal Courts Act. By this Act special criminal courts can be created by "notification" stating their place of sitting and their

jurisdiction. A notification creating a special court can vest the court with jurisdiction to try any of the offences punishable under the existing law.

95. The Burmese Constitution contains certain guarantees of fundamental rights similar to those contained in most other modern written constitutions. The law recognizes certain procedures for the detention and trial of individuals. Nevertheless, disregarding all these, the Revolutionary Council placed a number of important persons, including parliamentary leaders and the Chief Justice himself, under preventive detention in March 1962. Subsequently, between August and November 1963, several more persons were taken into custody.

96. Recent developments in Burma indicate that nationalization of private enterprises both foreign and local, both large and small, is part of the philosophy of the "Burmese Way to Socialism".

97. It is not suggested that a democratically elected government has not the right to nationalize by fair procedures such enterprises as it deems essential to nationalize in the interests of the people it represents. In regard to Burma, however, the Revolutionary Government is in the first place set up by force and therefore not representative of the people. Secondly, its decrees relating to nationalization both in their substantive and in their procedural aspects are neither just nor reasonable by Rule of Law standards.

98. It is relevant in this connection to refer to the following extract from an article published in *Bulletin* No. 17 of the International Commission of Jurists (December 1963, entitled "The Burmese Situation Deteriorates"):

Sudden decisions to nationalize made, as in Burma, without adequate notice to those persons or bodies likely to be affected and without giving such persons or bodies an opportunity of being heard cannot be justified whatever may be the merits of the ultimate objective. But they are still less justifiable when decisions as to the quantum of compensation payable can be altered or modified by the Government at will. The new Nationalization Law denies the affected party the right to have a decision of the Compensation Committee reviewed by a court of law and gives him at most a precarious right to the compensation ordered.

99. In connection with the foregoing summaries of the present situation in Indonesia and Burma, mention should also be made of the situation in Pakistan. Although there has been no complete departure from the Rule of Law in Pakistan inasmuch as there is some form of elective representation and inasmuch as the power of review of the Supreme Court and the independence of the Judiciary have not been interfered with, it is nevertheless true to say that there has been a substantial departure from the Rule of Law in certain important fields such as universal franchise and freedom of the Press. The nature and extent of the curbs on the freedom of the

Press have been dealt with in an article entitled " Press Curbs in Pakistan ", appearing in *Bulletin* No. 17 of the International Commission of Jurists, published in December 1963.

100. In the " Country Surveys ", which form part of the Appendix to this Working Paper, there is at pages 48-63 a fairly extensive review of the political situation in the People's Republic of China. The position of this State in regard to the Rule of Law and to the concepts of democratic government have not been treated in this Working Paper, because these concepts, as we know them, simply do not exist there. Comparison and analysis would therefore serve no useful purpose.

Summary

101. There has been a general trend in South-East Asian countries to veer away from the Rule of Law and turn authoritarian. The reasons for this general trend have already been considered when discussing " The Factors Challenging the Rule of Law in South-East Asia ". Observable factors include the following:

- (a) Distrust of the West and Western political process
- (b) Disrespect for and suspicion of the law and legal processes in some areas
- (c) Distrust of politicians
- (d) Restriction of the franchise
- (e) Abolition of elected parliaments
- (f) Military rule
- (g) Dictatorships
- (h) Impatience of criticism
- (i) Suppression of constitutional oppositions
- (j) Repression of freedoms generally, especially of opinion and the Press
- (k) Increasing resort to preventive detention, often for political ends.

102. But deeper forces are at work which in the long run may lead these societies to function democratically, though not necessarily on the pattern of Western democracies. This is evidenced by:

- (a) Strong internal urges for modernization which bring in their turn wider education and a wider outlook, as in the case of scientists, technicians and military officers who have to look outwards for new methods and techniques.
- (b) The psychological urge to " belong " in the society of nations and measure up to its standards.

- (c) The desire to pay tribute to the term "democracy" by using it to style new forms of government, for example, "Guided Democracy" and "Basic Democracy".
- (d) The meticulousness with which the outward forms of constitutional process are attempted even when existing Constitutions are overthrown.
- (e) The disintegration of the traditional order with its centralization of power and concentration of wealth and prestige in a small privileged elite and the rise of new intellectual, economic and social groupings that tend to form themselves into new political elites that diversify the sources of political power and make for the emergence of political oppositions.
- (f) Industrialization which demands modern techniques, not only in the scientific field but also in the managerial methods.
- (g) The demand for economic advancement, universal public education, equality of access to posts in business offices and the public administration and equality of opportunity.
- (h) The reaction, even though latent, against harsh and repressive measures and the suppression of opinion.
- (i) The general desire among the people for greater recognition of individual rights and freedoms.

PART III
**BASIC REQUIREMENTS OF REPRESENTATIVE
GOVERNMENT UNDER THE RULE OF LAW**

COMMITTEE I

Constitutional Protection

103. It is the Commission's view that the best safeguard for the protection and respect of personal liberty is an enlightened democracy. A representative democratically elected parliament, an informed electorate, public discussion, a free press, fair operation of the radio and television systems and an educated public opinion are basic attributes of democracy. But even in the most enlightened democracy abuse of powers by the Executive, by the Administration, or even by Parliament may and do occur. Such abuses may be incidental; they may not have been contemplated when a particular law was enacted. Or they may have been anticipated but disregarded because they only affected a small number of people. They may have been motivated by an honest, but mistaken view of what was for the "common good". Nevertheless, even in a well-regulated democracy, abuses for political purposes do occur and have to be guarded against.

104. The modern trend towards socialization, coupled with ever-expanding scientific development, increases the occasions for State interference in the life of the individual. The discharge of the State's duty to look to the needs of the weakest sections of the population, while providing necessary social services, also gives rise to more occasions for maladministration, whether due to political motives or to administrative bungling.

105. Accordingly, no matter how democratic a State may be, it is nevertheless necessary to provide effective machinery, like constitutional safeguards, for the protection of the rights of the individual.

106. In parts of the world where democracy is new or is not solidly entrenched the same problems exist, but to a greater extent. They are much more difficult to resolve because there is no democratic tradition and usually no public opinion capable of making itself felt.

107. In areas of the world which were under colonial rule before emancipation the problem is particularly difficult. There is an in-

evitable tendency to resort to the methods which the colonial powers used—arbitrary arrest, suppression of freedom of expression and so on. The rulers of such areas often tend to copy, far too easily, the methods of their former rulers; the ordinary citizens still tend to regard themselves as “subjects” who have no individual rights.

108. British lawyers have relied principally on the remedial aspects of constitutional law. An enlightened public opinion and an independent Judiciary rather than a written constitution have been the bulwark of personal liberty. Magna Carta, the Habeas Corpus Acts, Trial by Jury, the Independence of the Judiciary and “Judge-Made Law” have been the principal legal safeguards of civil liberty in England. Long usage and tradition have made it work and an enlightened public opinion and press have been its watch-dogs. However, the British constitutional system should not be regarded as a workable prototype for newly developing democracies.

109. It should be borne in mind that, while long standing constitutional conventions and traditions may provide adequate protection for personal liberty and democratic rule in countries where they have operated for a long time, they are of no avail in newly independent States or in States where such long-standing traditions or conventions do not exist. Hence, the need for written constitutions.

110. At best a written constitution:

- (a) defines clearly the functions and powers of the Legislature, the Executive and the Judiciary;
- (b) defines in clear terms the rights guaranteed to the individual;
- (c) provides procedural remedies for the protection of the rights guaranteed.

111. All the countries of South-East Asia, as well as Australia and New Zealand, have written constitutions. In the case of New Zealand, however, it should be noted that, although this country has a written Constitution consisting of an Act of the United Kingdom Parliament, its Constitution is neither federal nor one which limits the powers of the New Zealand Legislature. Since its amendment requires no special procedure, the substantial position in New Zealand is much more akin to that of the United Kingdom than to that of Australia and the other countries of South-East Asia. As regards the constitutions of South-East Asian countries some further observations must be made. In Indonesia, the Constitution of 1950 was abrogated by President Soekarno in 1959. In South Vietnam, the Constitution of 1956 was abolished by the Military Revolutionary Council in November 1963. In Burma, the Constitution of 1947 has not been revoked or suspended by the Revolutionary Council, but the Council ignores the provisions of the Constitution and rules by decree. This can be construed as amounting to a *de facto* abandonment of the Constitu-

tion. In Thailand, the Constitution of August 1952 has been supplanted after martial law was declared in 1958 by an *interim* Constitution, promulgated on January 28, 1959. Active steps are now being taken by the Government to draft a new constitution with a constitutional monarchy and many liberal provisions, and it is hoped to promulgate this constitution soon. In Pakistan, the Constitution of 1956 was abrogated when the military regime under the leadership of General Mahomed Ayub Khan assumed power in October 1958. In March 1962, a new Constitution was adopted for the country, providing for the election of a President indirectly through the system of "Basic Democracies" and providing for unicameral, national and provincial legislative assemblies. In view of the fact that the present Government of Pakistan hopes to gradually introduce a greater measure of political rights and individual freedom and is proceeding in that direction, the Constitution of 1962 can be regarded as transient.

112. The Constitutions of the following countries embody guarantees of fundamental rights in varying degrees: Burma, Cambodia, India, Japan, South Korea, Laos, Malaysia and the Philippines. The Constitutions of the following countries have no entrenched guarantees of fundamental rights: Australia, Ceylon and New Zealand. Although these countries, unlike the United Kingdom, have written constitutions, the principles and procedures by which the Courts safeguard individual liberty and freedom are similar to those obtaining in Great Britain. Prerogative writs of Habeas Corpus, Mandamus, Certiorari, Quo Warranto, and Prohibition are available to the citizen in the same way.

113. Accordingly, it will be noted that the constitutional provisions in the countries of South-East Asia and the Pacific compare not unfavourably with those of the Western world. A major problem, however, arises with regard to the effective reality which is given to the paper constitutional provisions. We know, for instance, that in the case of China and Burma high-sounding constitutional guarantees are meaningless; indeed, these countries are a good illustration of what Dr. Osten Unden, the Swedish statesman, pointed out: "Let us not attach undue importance, however, to the fact that human rights declarations are incorporated in national constitutions. A dictator who seizes power can find innumerable ways of giving a new twist to old ideas. We need only look at the contemporary declarations which, while appearing to proclaim democratic principles, in fact deprive them of all substance or give them a meaning diametrically opposed to that accepted in democratic countries."

114. Some reference must be made to the position of constitutional protection and constitutional guarantees under a state of emergency. It is extremely difficult to lay down any definite rule as to the extent to which the curtailment of individual freedom is justified under a state of emergency for the reason that considerations will naturally

vary depending upon the nature and extent of the grave situation or crisis involved. In fact, even such instruments as the European Convention of Human Rights recognize that a signatory country may suspend the operation of the Convention within its territory when the life of the nation is threatened. However, the Convention requires that restrictions imposed on individual rights by reason of such suspension should not exceed those which are strictly required to cope with the extraordinary situation. Four general principles should be observed in regard to states of emergency, namely,

1. A state of emergency should be declared only where circumstances make it absolutely necessary to do so in the interests of the nation;
2. The period of emergency should not be prolonged further than is absolutely necessary.
3. Restrictions placed on fundamental rights and freedoms should be only such as the particular situation demands.
4. The legality of emergency legislation and emergency orders should be subject to review by the ordinary courts of the land.

115. It will be noted that there are in the South-East Asian and Pacific area a number of States which can be described as being transitional constitutional States; States in which, by reason of instability of one kind or another, dictatorial powers have been assumed. These States themselves may be sub-divided into those in which there is a genuine attempt being made to evolve towards a representative or constitutional democracy and those in which, despite high sounding declarations in a constitution or otherwise, no such attempt has been made.

Independent and Impartial Tribunals

116. Whether in the field of constitutional protection or of administrative law, the ultimate protection of the individual depends upon an enlightened, independent and courageous Judiciary which is respected. Article 10 of the Universal Declaration of Human Rights regards the existence in every country of an "independent and impartial tribunal" as essential. The Commission at the New Delhi Congress in 1959 set out its view of the requirements for an independent and impartial Judiciary:

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

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

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

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

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

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

117. One of the best initial safeguards is the availability of a sufficient number of trained jurists of high intellectual and moral calibre from whom the Judiciary can be chosen. This is one of the many factors which emphasizes the need for legal, educational and training facilities.

118. If there are an adequate number of jurists of sufficiently high calibre available in a country, the likelihood that judicial appointments will be made on a political patronage basis will be reduced. It is usually difficult for the appointing authority making judicial appointments to by-pass jurists of high calibre if they are available.

119. It is of vital importance that Judges in the areas where the Rule of Law is not sufficiently well entrenched should be of high calibre and

should discharge their duties in such a manner as to earn the respect and confidence of both the authorities and the public. They should regard the public discharge of their judicial functions as occasions which will inspire public confidence.

120. Normally, more attention is given to the selection and the method of appointment of the higher ranks of the judiciary than is given to the magistracy and lower judicial echelons: this is natural as the responsibility for the ultimate protection of rights rests with the appellate jurisdictions. However, it is highly desirable that at least equal attention should be paid to the selection and method of appointment of district judges, magistrates and presidents of rural courts; it is they who come into close contact with the people. At local level, and particularly in remote areas, the image of law depends largely on the impression made at local level by the lower courts. The fair and proper administration of justice at the local level is of very considerable importance in instilling a proper understanding of and appreciation for the Rule of Law. Ill-trained local magistrates are not capable of commanding the necessary respect and confidence in the administration of law. It is also essential that the ranks of the lower judiciary should be adequately paid (*a*) to ensure that they shall be above the suspicion of corruption and (*b*) to attract persons of adequate calibre.

121. It is not possible to lay down a hard and fast rule as to whether better results are obtained by recruiting members of the judiciary (higher and lower) from practising lawyers or from among specially trained "service judges". What is important is that, whichever method obtains in a given area, the appointees should have received adequate training in the discharge of judicial functions. In areas where the qualification for appointment to the bench includes active practice in courts for a substantial period (5 to 10 years), those appointed will usually be adequately equipped for their judicial work. However, in areas where appointments are made from lawyers with little or no practical experience, or from specially trained "service judges", some probationary period of training for the Bench would be highly desirable. In addition to administering justice, the judges, particularly at local level, can perform a most important function in the process of civic education.

Free Elections

122. The purpose of an election is twofold: to enable the people to choose the policy to be pursued by the government and to choose a government to implement that policy.

123. The Universal Declaration of Human Rights sets out the essential requirements of free elections and government authority in the following terms:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

124. In some countries there are most elaborate rules relating to the conduct of elections. Thus, Japan has rules forbidding door to door canvassing, which is regarded as a potential threat to voter's freedom of choice. Similarly, the publication of public opinion polls on the chances of different parties is prohibited on the ground that these may influence voters to back a likely loser or winner as the case may be for psychological reasons only, i.e., simply because he is a likely winner or loser. Whether such provisions are necessary depends on the political experience and temper of a community.

125. Most parliamentary democracies seek to devise a means whereby a government, once in power, is not free to perpetuate its power by tampering with voting rights or constituency boundaries. The methods whereby this is done, if it is done, are either to entrench relevant safeguards in the Constitution or to provide for an all-party Commission of the Legislature to keep such matters under review and to advise the Legislature accordingly.

126. Ceylon has adopted another method of preventing the rigging of parliamentary constituencies. Under the provisions of the Constitution a Delimitation Commission has been set up and care is taken to avoid appointments based on political affiliations. The members have often held judicial office, and the detachment of the Commission is accepted. India and New Zealand, to give but two examples, have legislative provisions which effectively safeguard against the rigging of constituencies.

127. Effective superintendence of the electoral rolls and the conduct of elections themselves is also necessary to ensure free elections. Mention may be made in this connection of the Election Commission of India which enjoys adequate powers of superintendence. The members of the Commission are appointed by the President and their independence and impartiality are ensured by the fact that they enjoy the same security of tenure as judges of the Supreme Court. The main functions of the Election Commission of India are set out as follows in Article 324 (1) of the Indian Constitution:

The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States shall be vested in a Commission (referred to in this Constitution as the Election Commission).

128. Apart from direct election abuses, which are usually guarded against by electoral legislation, more subtle devices should be guarded

against. These include the use of patronage by the party in power and the unfair use of mass media of communication.

129. The franchise and the voting system are the basic criteria of free elections. The Rule of Law postulates equal voting rights, regardless of sex, religion, colour or race, but also recognizes as legitimate disqualifications, alien status or civic degradation consequent upon a fair trial.

Freedom of Expression

130. Freedom of expression forms part of the essential requirements of democracy and of the Rule of Law. Indeed, it is hard to conceive how free elections could be held without freedom of expression. A free and responsible press is, in the modern age, an essential means of informing and educating public opinion. Public discussion and criticism plays an important role in the democratic process. This is the reason why those who wish to destroy democracy, or to prevent it from taking root, always begin by suppressing newspapers or by assuming control of the principal organs of expression; some dictatorships even use both methods. These are well recognized techniques employed by authoritarian regimes, be they of the right or the left, be they colonialist or nationalist.

131. Legal provisions and procedures always exist whereby newspapers which transgress the norms of responsible journalistic conduct or which advocate violence can be prosecuted. They are thus given an opportunity of defending themselves before an independent and impartial tribunal.

132. No country recognizes the absolute freedom of the Press to say whatever it pleases regardless of harm done to private reputations or to the security of the State. However, under cover of imposing legitimate restrictions, the expression of opinion and the publication of information displeasing to the government in power have often been stifled. Too frequently tendentious reporting, which as bad journalism is deserving of professional censure, incurs the government's wrath followed by repressive measures.

133. The question of national and international codes of ethics for the Press and journalists has been receiving active consideration by the International Press Institute; in a number of countries Press Councils have been constituted and have adopted Press Codes of Conduct. This is a welcome development and the formation of such Press Councils should be encouraged. They can serve the dual purpose of raising the standards of journalism and of protecting the liberty of the press.

134. The freedom of the Press exists, not to ensure profit to newspaper proprietors, nor for the benefit of journalists, but for the protection of

the public interest through the skilled and honest reporting of "all the news that's fit to print". It is the one way in which the people may learn of facts and informed comment on facts which would otherwise be given to them in the proportion and in the form the government of the day finds most desirable.

135. Even where the freedom of the Press is guaranteed as such by the Constitution, or where it is guaranteed within the wider rubric of freedom of expression, the reality often fails to correspond to the theoretical position. Where restrictions are imposed in the public interest, it is essential that the public interest be defined in legislation in detail and not under some vague catch-all phrase. The public interest in relation to the freedom of the Press has been defined in some international conventions as well as in many national constitutions (see, for instance, Article 10 of the European Convention on Human Rights). It is also important to ensure that a government should not have unchecked power to suppress in the name of the public interest whatever it considers should be suppressed. The public interest is sometimes identified with the interests of those in power.

136. Not infrequently, in countries in which the freedom of the Press is guaranteed by constitutional provisions, papers are suppressed or subjected to censorship under emergency powers. In some cases editors and journalists are even imprisoned under preventive detention powers. Sometimes governments have declared, or continued, states of emergency in circumstances which did not justify it with the object of silencing criticism and opposition. Accordingly, it would be desirable that the declaration or continuation of such states of emergency should be subject to review by the Courts.

137. In addition to suppression or censorship of newspapers two other forms of indirect interference are also resorted to by authoritarian governments:

- (a) Government-owned papers are either subsidised or given special privileges which enable them to compete unfairly with non-governmental papers.
- (b) The use of patronage by way of government advertising to subsidise government-sponsored or favoured newspapers.

In areas where illiteracy is widespread and the economic viability of papers is often precarious, economic sanctions to influence or kill a newspaper are potent weapons.

138. The problem of press and news monopolies may, and do, create problems in the region. Governments which do not have available to them a friendly Press, not unnaturally, resent that the Press in their countries is controlled by a virtual monopoly. In such a case, a clear and special duty is cast on the Press and news services to ensure

that both news and views are reported impartially in a fair manner. However, the existence of such a problem does not justify either the suppression or censorship of news, views or criticism.

Freedom of Association and the Function of the Opposition

139. Closely linked with the right of freedom of expression is the right of free association. The right to communicate information and opinions involves the right to assemble, to receive the information and views communicated. Hence, the rights of assembly and of association are specifically guaranteed by most constitutions and by the Universal Declaration of Human Rights. In the Free World, trade unions, political parties and other associations now enjoy the right of association without question. Where limitations are imposed they are only for valid reasons of public order or morality. Freedom of association involves the right to form political parties which may support or oppose the government in power and place their policies before the people.

140. The distinction must be borne in mind between a country where there is only one powerful political party which represented and continues to represent the national aspirations of the people and in which there is no legal or constitutional bar to the formation of other political parties, and a country where all political parties other than that sponsored by the government are banned by law. Under no circumstances can it be said that the Rule of Law prevails in the latter country. In other words, it is not essential to representative government that there should be a formally organized opposition, but it is essential that there should be the possibility within the law for an opposition to be formed. The desirability and importance of an opposition in the working of the democratic process must, of course, be stressed.

141. The possibility of a legally constituted opposition is an important attribute of parliamentary democracy. "Opposition" implies an electoral contest for power and authority within a state and such a contest is desirable, not only for the purpose of imposing restraints on the power of the ruling party which might otherwise tend to be exercised arbitrarily and without reference to the opinions of minority groups, but also to ensure that measures proposed by the government will be debated and examined in all their important aspects before they pass into legislation.

142. The conduct of democratic and responsible government, therefore, requires the service of an opposition which is both a driving force behind the constitution and a safeguard for its provisions. In this connection it may be noted that Article 21 (1) of the Constitution (Basic Law) of the Federal Republic of Germany provides:

The political parties participate in the forming of the political will of the people. They may be freely formed. Their internal organisation must conform to democratic principles . . .

143. If a section or sections of the community are dissatisfied, the best and most effective method of voicing their dissatisfaction is through the opposition in Parliament. If the cause for dissatisfaction is grave enough and a party other than the party in power can offer better solutions, the creation of public opinion against the party in power can result in a party in opposition being voted into power at the next general election. In a society where freedom to express one's point of view is recognized as a fundamental right, a party in power is always held in check by the fact that it cannot rule for all time and must face its electors at the polls, whose support can no longer be expected if the public has been generally made aware through the Press and the opposition that the party in power has failed in its duty to the country.

144. An opposition in parliament sometimes consists of a single political party but is more usually composed of several parties. In some South-East Asian countries, where there is yet a tendency to support parties on the basis of personalities rather than programmes, many small parties have sprung into existence, thereby weakening the role of the opposition in the machinery of government. The creation of parties on a communal, religious, or regional basis is also quite common. Even in some European countries, such as France, the existence of a wide range of political groups of a fluid nature have had serious repercussions on the stability of governments; some countries have attempted to counter this phenomenon by stipulating a minimum membership and certain other minimum conditions before a party can be recognized.

145. Notwithstanding the problems which arise in the working of the party system, the existence of such a system is by far the surest and most effective means by which the views of the people can be given legitimate and meaningful expression.

Civic Education

146. In order that government through the democratic process can be made more effective and capable of yielding the best results in the political field and more particularly in the fields of social and economic development, it is necessary that the people should not only be literate, but should have a proper understanding and appreciation of the principles of democracy, the functions of the different branches of the government and the rights and duties of the citizen vis-à-vis the State.

147. An opportunity should therefore be provided to every citizen for an adequate civic education, equipping him to exercise his political rights on the basis of informed political judgment rather than emotional considerations.

148. One method of promoting a correct understanding of political values is to make the study of civics and political institutions compulsory in all schools.

149. Mass public information media are a valuable means for creating an informed public opinion and for imparting civic education. Care should be used, however, to ensure that the media are used impartially and objectively. Since radio and television programmes are controlled in most countries by the Government or by a government sponsored authority, governments are sometimes tempted to use these services for their own political advantage. The distinction between a political speech for party purposes and an address by a member of the government concerning government policy is sometimes difficult to draw. What is essential, however, is that political parties are given, as far as practicable, proportionately equal access to mass media of communication.

150. In some of the areas under discussion linguistic and literacy problems render it uneconomic to publish newspapers. In such areas the authorities, after consultation with the opposition parties and local leaders, could do much by promoting local information and civic education courses.

151. Summary

- A. While it is not necessary for the proper functioning of the Rule of Law in Asian countries that they should have replicas of Western democratic institutions, it is essential that they should have functional equivalents that will secure the elements of the Rule of Law and of representative government outlined above.
- B. It is considered that the Rule of Law can operate successfully only under a representative form of government.
- C. By representative government is meant a government deriving its authority and power from the people, which power and authority are exercised through representatives freely chosen by them and responsible to them.
- D. Free periodic elections, therefore, are fundamental to the Rule of Law. Such elections should be based on universal and equal suffrage and should be held by secret ballot.
- E. In a State to which the Rule of Law applies there should be effective machinery for the protection of fundamental rights and freedoms, whether or not these rights and freedoms are guaranteed by a written constitution. It is desirable that the rights guaranteed and the judicial procedures to protect them should be incorporated in a written constitution. While governments should of their own volition refrain from actions infringing the

constitutional provisions guaranteed, the ultimate determination as to whether the law or an executive act infringes constitutional guarantees should be vested in the Courts.

- F. The ultimate protection of the individual in a society governed by the Rule of Law depends upon the existence of an enlightened, independent and courageous Judiciary.
- G. Freedom of expression through the press and other media of communication is an essential element of free elections and is also necessary to ensure the development of an informed and responsible electorate.
- H. It is essential to the Rule of Law that there must be the possibility within the law for the formation of an opposition capable and free to pronounce on the policies of the government.
- I. In areas where the standard of civic education is inadequate, it is essential that the authorities should undertake an intensive programme of civic education making use of all mass media of communication.
- J. There are no basic factors in the South-East Asian and Pacific areas which prevent the maintenance and promotion of the Rule of Law.

PART IV
ECONOMIC AND SOCIAL DEVELOPMENT
WITHIN THE RULE OF LAW

COMMITTEE II

Need for Economic Development

152. Hunger and dire poverty are not elements conducive to the stabilized development of organized society. Furthermore, hunger and poverty lead to situations in which populations tend to turn to extreme remedies and to follow irresponsible leaderships. These situations may in turn result in cycles of violence and repression; finally, they may result in the imposition of authoritarian regimes of the left or the right in which all civic liberty is destroyed.

153. The aim of economic development is to banish want and insecurity so as to ensure the dignity and worth of the individual. The Universal Declaration of Human Rights specified in Articles 23, 24 and 25 the economic standards that should be achieved. For instance,

Article 23 (1) provides:

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

Article 23 (3) provides:

Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented if necessary by other means of social protection.

Article 25 (1) provides:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

154. The task of formulating economic plans to remedy the endemic economic conditions that exist in South-East Asian areas is primarily one for economists; the task of applying the remedies is the responsibility of governments. Since lawyers have an important role to play in the process of economic development, they should have a clear understanding of the problems involved.

155. Economic development has two main meanings, firstly, the growth of aggregate output and secondly, the growth of *per capita* output. A growth in aggregate output which does not reflect a growth in *per capita* output will do little to raise the living standards of any country. This is particularly true in South-East Asia, where a rapidly rising population raises serious problems in maintaining existing living standards, let alone improving them.

156. Most of the countries in South-East Asia have a basically agricultural economy and many show the classic characteristics of an underdeveloped economy. Although the glamour of an industrial economy is frequently the great attraction in plans for economic growth, agriculture inevitably remains the basis of many economies, and despite the considerable advances made in industry in India, Indian political leaders, including the late Prime Minister of India, Jawaharlal Nehru, have frequently drawn attention to the fact that India's economy will remain basically agricultural. Indeed, it has been pointed out that "if one attempts to generalise a situation in most of the developing countries, one can see quite remarkable enclaves of industrial and modern urban activities coincident with stagnation or very slow progress in the countryside." (*The Hindu*, October 19, 1963: "Rural Growth—A Major Stimulus to Economy", by W. W. Rostow.)

157. Economic planning is recognized as a necessity throughout South-East Asia, but "planning" has a number of meanings. It may mean nothing more than the fixing of economic targets over a period of time, with little state direction of the economy. On the other hand, it may mean dictatorial enforcement and the complete subjection of all economic activity to the requirements of a plan down to the smallest detail. The first kind of planning is now in most cases no longer considered adequate for South-East Asia. The second kind of planning is characteristic of the People's Republic of China. Between these extremes there are different shades of state intervention ranging from the varying widespread nationalizations of Burma and Ceylon to the largely capitalist structure of Thailand and Japan. But, whether the society be regarded as primarily socialist or primarily capitalist, there is always some kind of state intervention to coax or compel development in certain key areas of the economy. In any event, economic development is designed to increase national resources, but this is of little value unless it seeks to achieve a rise in general living standards.

158. The following quotation is of interest in connection with economic planning under a democratic structure:

India is, perhaps, the first country in the world which has tried to undertake economic planning in a comprehensive way at the national level under a democratic structure.

Earlier, planned economic development had been associated with a regimented and highly centralized political system. But India has tried to follow the

middle path by combining economic planning with democracy and respect for individual freedom. The basic objective of democratic socialism is to be achieved by endeavouring to harmonize individual interest with the need of the community and the State.

Indian planning has also attempted to synthesize ancient cultural traditions with modern science and technology. As the Third Five-Year Plan put it: "At all times there should be due stress on the moral, human and spiritual values which give meaning to economic progress." ("Planned Economy Working" by Shirman Narayan, a member of the Planning Commission of India—Special Supplement on India's Developing Economy—*New York Herald Tribune*, of Saturday-Sunday, March 7-8, 1964).

159. Some of the most successful economic plans were carried out in Western Europe in the post World War II period (e.g. the Vanoni Plan in Italy) in countries where the concepts of democratic government and the Rule of Law are jealously guarded. Thus, it is clear that economic planning can be undertaken successfully in states wedded to the principles of democracy.

160. The question of incentives given for the development of particular sectors of the economy may not itself raise any problem relevant to the Rule of Law. Whether or not a state loan or grant is obtainable to enable the establishment of a particular industry or to assist the migration of a labour force is essentially a matter of practical economy and political wisdom which does not touch upon basic human rights. It does, however, carry within it the seeds of potential discrimination and care must always be taken to ensure that what can be regarded as preferential treatment does not reflect a preference given to a section of the community which is identifiable for any reason other than the economic activity in which it is engaged.

161. To some extent economic development involves experiment. When experiments fail, a democratic society is free to try other experiments. Dictators are reluctant to admit failure and consequently to try different experiments. The absence of a free interchange of ideas and comments results in a situation where mistakes are not recognized and as a result ill-judged policies are sometimes persisted in to the point when revolution or national bankruptcy may result.

162. For these reasons it is believed that, despite its imperfections, democracy presents the most pragmatic and rational solution to the problems confronting any nation. Those who encourage or compel only favourable comments and opinions and sometimes even facts become out of touch with the needs of the people they govern and with the true balance sheet of the nation. The democratic form of government does at least provide a practical way in which broad solutions may be chosen or rejected, and, provided that the essential concomitants of the outward forms of democracy are present, the choice will be made after the dialogue between government and opposition, between technical experts of different views and between the various sections of a free press. In terms of sheer practical efficiency alone the solution

that finally emerges carries with it greater possibilities for success than uniformed and unresponsive adherence to autocratic methods.

163. This is not, of course, the ultimate justification of democracy, but in areas where sufficient to eat is by no means assured and is therefore regarded as more important than freedom of speech, it is essential to remember that through free discussion, there is a better possibility of arriving at sound economic programmes. Filling one's stomach at the expense of basic human dignity is a point from which most human beings would recoil, unless hunger necessitates an abandonment of non-material values. There is no evidence in terms of economic growth that dictatorships deliver the goods more efficiently than democracies. Facile comparisons between the statistics of a "people's democracy" and a real democracy are not to be taken at their face value for a number of reasons. One is that different criteria of evaluation are applied; another is the difference in emphasis between the development of heavy industry and the production of consumer goods. If one or the other happens to show a more spectacular rate of economic growth, it does not follow that this is due to the system of government that has been chosen. For example, the drought that afflicted the Chinese People's Republic and brought disastrous famine had nothing to do with Communist theories of economic development. It did, however, show that propaganda claims made by the government of that country concealed a suicidal neglect of the basic necessity of sensible agricultural planning and development in a large agrarian society which depended on its own agriculture to feed its population. A pre-occupation with the development of heavy industry as the shortcut to economic growth can be checked in a democratic society when the nation's food supplies become imperilled. The melancholy experience of totalitarian societies is often that a disaster has to happen before those in power are satisfied or even have the means of being informed of the real dangers that their policy presents. The interplay of free ideas, some irrational, some mixed and some sensible, provides no guarantee that disasters of this kind will be averted; it does, however, vastly increase the chance of so doing.

164. Thus, for example, India and Ceylon have chosen the path of socialist democracy in the sense of fair shares for all. Both have adhered to representative democracy as the means of so doing. The press of both countries and the parliamentary reports of both countries are replete with criticism of government policy in the economic field. In Pakistan, where the press is not entirely free and parliamentary opposition is not entirely free, criticism of the government's economic planning is freely made. Criticism may or may not be well-founded, but in the long run it is aimed at those who will sooner or later have to decide whether, in view of the government's record and the alternatives put forward, existing policies should be continued in the attempt to achieve economic democracy.

165. The fact also remains that whilst the rights of all individuals must to some extent be circumscribed for the common good, there comes a point at which human dignity may be lost in a quest for economic development at all costs. Whatever the material achievement of any regime may be, the system of purging by arbitrary execution elements actually or potentially dangerous to the regime can never be justified in terms of the collective good, nor can arbitrary imprisonment and the regimentation and depersonalization of the human spirit that have taken place in the Chinese People's Republic. Whether or not the present Chinese regime has outstripped other Asian countries in terms of economic growth as distinct from military strength, the terrible price that had to be paid in terms of human suffering to achieve this economic growth must cause all to pause.

166. The following is a classification of some of the causes of under-development:

- (a) Natural obstacles, such as lack of raw material, sterility of the soil and unfavourable climate. These obstacles are not necessarily insurmountable. Although some countries do not produce any substantial quantity of raw material, they may still have a highly developed economy. Irrigation and drainage may often assist to increase the soil fertility, but these are long-term projects requiring very high investment. Specialized industries can also be developed.
- (b) Structural and social obstacles arising from a number of different indigenous factors such as:
 - (i) System of land tenure
 - (ii) Concentration of land and wealth in unproductive hands
 - (iii) Inadequate utilization of land resources
 - (iv) Inadequate utilization of manpower
 - (v) Lack of skilled labour
 - (vi) Inadequate scientific and technical "know how"
 - (vii) Insufficient capital formation and investment
 - (viii) Inadequate transport and communication
 - (ix) Poor administration
 - (x) Caste and tribal system

167. A reference to the "Country Surveys", which form part of the Appendix to the Working Paper, will give some indication of factors which operate in the countries under discussion.

168. A careful examination of each of these factors is required in order to determine the particular remedies required. In countries where there is a wealthy and educated minority, every effort should be made to induce them to participate actively in the economic development programme. Where necessary, particular inducements may have to be given to encourage them to undertake projects that form part

of the development programme. Their experience and education and the capital which they control should be availed of.

169. Those who occupy a privileged position in an under-developed area should realize that their social responsibility as well as their self interest requires them to give a lead in raising economic standards and in modernizing their society.

170. Dr. Raúl Prebisch, Secretary-General of the United Nations Conference on Trade and Development, set out the problems of developing countries in the following terms:

Generally speaking, there are three main obstacles in the way of propagating technological advances and which therefore obstruct the growth of productivity and per capita income in the developing countries: land tenure; limited social mobility and the ignorance of the masses; and the concentration of income in the hands of relatively small population groups.

171. Productive investment forms a most important part of economic planning. Ideally, such investments should be obtained from domestic sources, and every effort should be made by governments to create the climate of stability that will induce home investments. But the amount of investment required in the underdeveloped countries of South-East Asia is so large that in most cases it is necessary to seek external loans or long-term credits. There again it is essential to create conditions of internal stability that will encourage foreign investment. Much has been done by specialized international agencies to provide both financial aid and technical assistance.

172. In order to attract such financial aid or technical assistance, it is essential to inspire confidence not only in the economic programme but also in the manner in which such aid or assistance will be utilized. In some cases foreign aid has been ill spent on prestige projects or through maladministration; this has a most adverse effect on the possibility of securing further international aid or foreign investment and tends to prevent the inflow of domestic investment. While substantial public investment for the development of a necessary infra-structure is required, care should be taken not to divert such investment into purely prestige projects for political purposes. Apart from necessary infra-structure and social investment for educational, health and housing purposes, the test should be the productivity yield and employment potential of the investment.

173. In order to ensure that capital investment in development projects is not misused, a full return of the expenditure on such projects should be furnished to parliament and submitted for examination to the public accountant and auditor. This would help both to reduce waste or maladministration and to create a favourable climate for capital investment, domestic and foreign.

174. It would perhaps be correct to say that people are the major resource of most under-developed countries. They are also the only

resource that is in excess of the requirements. Therefore, one of the best methods by which underdeveloped countries can progress is by harnessing the people's energies for active participation in the economic field.

175. In South-East Asian countries which are mainly agricultural a high percentage among rural communities are unemployed, under-employed or represent surplus labour. While a greater and more intensified utilization of land resources could absorb some of those who are unemployed or under-employed, experience has taught that with modernization of agricultural techniques increased employment in the agricultural sector is seldom possible. Accordingly, surplus agricultural manpower can be absorbed with advantage in new development projects. Major development projects involving international cooperation can add substantially to the productivity of large regions and contribute to the improvement of living standards. The Meekong River Project, undertaken under the sponsorship of the United Nations, is a good illustration of this type of project.

176. One cannot, of course, overlook the fact that economic development in many parts of South-East Asia is seriously impeded by international tensions necessitating the maintenance of military strength which the countries involved can ill afford. It is obvious, for example, that India's economic progress must be adversely affected by the international tensions with Pakistan and China. Indonesia, Malaysia and Vietnam are also facing a military burden which is bound to impose severe strains on their economies. In the case of Indonesia, the economic boycott of Malaysia harms not only the Malaysian economy but also the Indonesian economy itself. A number of countries in the area have either suffered or are suffering from the ravages of war with disastrous effects on the living standards of the people. North and South Korea were both badly hit by the Korean War and both countries had serious problems of reconstruction as well as development. Vietnam saw first the ravages of a colonial war against the French and now the fight between North and South Vietnam. In such places much needed funds are channelled into the war effort or into post-war reconstruction, and economic progress as well as civil and political rights are often jeopardized by states of emergency.

Nationalization

177. Nationalization subject to certain essential prerequisites is not in itself contrary to the Rule of Law, nor are restrictions on the use of private property including capital. Many countries in Asia and elsewhere have decided after free elections that certain sectors can no longer be left in private hands if the public interest is to be safeguarded. The provisions for nationalization have followed upon political debates in which a majority authorized by the electorate to proceed with its

election programme has done so on payment of compensation and after, in some cases, litigation in the courts or argument before compensation tribunals as to the quantum of scale of compensation. Side by side with nationalization have come curbs on monopolistic practices. Both are techniques for preventing powerful accumulations of capitalist interests from dictating the trends of the economy, either in key areas or generally. In the Western world, Britain has chosen the former solution and the United States the latter. In South-East Asia blends of both are to be found. On the other hand nationalization has too frequently been used to rally flagging support by appealing to anti-imperialist sentiments in cases where foreign capital has been involved.

178. Foreign capital, in the absence of specific assurances to the contrary, is no more sacrosanct than capital in the hands of nationals of a given country, and there is no intrinsic reason why key sectors of a country's economy which are dominated by foreign capital should be exempt from nationalization for that reason alone. On the other hand, there is sometimes reason to feel that nationalizations of foreign companies are carried out primarily in a spirit of demagoguery which expresses rather the desire to identify the ruling party with the spirit of the nation than any true economic necessity or desirability. In the long run such measures cause a great deal of harm to the country where this happens by discouraging foreign investment which is frequently a vital necessity. Indeed, the phenomenon is not unknown of political leaders nationalizing foreign assets and at the same time appealing for foreign investment in their country. From the point of view of both the true interests of the country and political expediency, it would seem that programmes of nationalization should be worked out in advance, presented to the electorate, and then implemented. There is no justification whatsoever for the use of nationalization as a political weapon against another country.

Land Reform

179. Inasmuch as the countries of South-East Asia as well as Australia and New Zealand are largely agricultural, the principal economic and social problems of these countries relate to land tenure and methods of agriculture. In order to establish the basic social foundation upon which the superstructure of economic development can be built, it is vital therefore to grapple with these problems, complex though they be, and find solutions which will ensure fair distribution and greater productivity.

180. The following observations of Dr. Raul Prebisch, Secretary-General of the United Nations Conference on Trade and Development, are significant in this connection:

The forms of land tenure generally to be found in the developing countries are plainly incompatible with technological progress. This is particularly so, when a large part of the productive land is concentrated in the hands of a few, while a very large number of small and medium-sized holdings generally make up a tiny proportion of the cultivable land. All this conspires to frustrate development; in some cases, because the high rent already received by the landowner makes him reluctant to take the trouble of introducing modern techniques, and, in others, because the very size of the holdings and the shortage of resources for investment are often such that contemporary techniques cannot be fully and properly used.

181. Although problems relating to land vary vastly in the different countries of South-East Asia, it is generally true to say that most of those problems originate from their feudal or colonial past and have become intensified by the growing population pressure. Concentration of land ownership, feudal forms of land tenure, excess rural population, landlessness, the general low level of agricultural methods, share cropping, precarious tenancies and inadequate credit facilities can be listed as some of the principal problems. Fragmentation of land into uneconomic units resulting from inheritance laws or misconceived schemes of land distribution is yet another problem. Arising from these problems are secondary problems such as usury and indebtedness among peasants and neglect of cultivable land, all of which are most injurious to the economy of an agricultural country. Simplification of land tenures and devolution of land holdings are in many areas an urgent need.

182. It is not practicable to deal exhaustively in this Working Paper with the various agrarian problems in the different countries of South-East Asia and their solutions, but the situation in regard to land tenure in each of these countries has been examined in the "Country Surveys" which form part of the Appendix to this Working Paper.

183. Reference may usefully be made to the successful land reform measures in post-war Japan. These measures may not correspond to the land reform needs of all other Asian countries. However, they do show that the problem of land reform can be tackled successfully provided the problems involved are well examined and the remedies well conceived. For land reform to be successful it is also important that landowners and rural communities be educated to appreciate the importance of transition to more modern agricultural patterns. This transition can best be achieved by democratic processes under the Rule of Law.

184. By the terms of the land reform law of 1946, village and prefectural land commissions were elected with tenant, owner-farmer, and landlord representation to select land for purchase and to select eligible purchasers from among tenants. The Government then bought the land at pre-inflation prices and sold it to the tenant. Absentee landlords were forced to sell all their holdings, while cultivating landlords were limited to 2½ acres. In a period of four years, there was an

increase of almost two million in the number of farmers who owned their own land and of more than 460,000 of those who owned at least half the land they tilled. More than 40% of the total number of farms were involved in this substantial upward revision of the number of land-owning families.

185. It must be remembered, however, that the way for reform was made easier by the post-war demand for food, which resulted in prosperity for the farmers by the war-time movement of the surplus agricultural population into the army and industry, and by the measures which the Japanese Government had taken during the war to ensure that all Japanese sacrificed equally for the nation.

Administrative Power and its Control

186. In the developing countries of South-East Asia the exercise of administrative power continues to grow more and more important. This is because the functions of government keep expanding and new departments, new boards and new public bodies keep springing into existence. These new departments, boards and public bodies call for the appointment of competent administrators with a good educational background or with specialized knowledge and technical training. Persons with a legal training are considered specially competent to fill some of the higher administrative posts which call for the exercise of administrative discretion and quasi-judicial powers.

187. The need for administrative discretion is recognized in all countries that subscribe to the Rule of Law. This need is all the greater in a developing country, where several important administrative decisions in such fields as planning and development have frequently to be made. Some illustrations of acts involving the exercise of administrative discretion are decisions to expropriate land for industrial development, decisions to grant trading licences and even town-planning decisions.

188. In developing countries a greater degree of state control than in developed countries is inevitable. Far more occasions arise in the former calling for the exercise of administrative discretion. All this is often necessary in the general interests of the community and does not constitute a violation of the Rule of Law, so long as the main purpose is economic and social development and not the denial of fundamental freedoms, and, so long as any restriction of individual freedom is no more than is absolutely necessary to achieve objectives of development. However, the fact that administrative decisions of an important nature have to be more frequently made in developing societies naturally gives rise to the possibility of more frequent transgressions of the Rule of Law and to greater Rule of Law problems and therefore more vigilance is required in such societies to ensure that the Rule of Law is not infringed.

189. Checks are therefore necessary on the abuse of administrative power, on decisions that are made in excess of authority and even on the improper exercise of a discretion. Besides these checks, it is definitely desirable that certain limits be imposed on administrative discretion.

190. The placing of limits on administrative discretion is a matter for the legislature which grants the discretion. Administrative officers and bodies should exercise discretion in the making of official decisions only by virtue of the power to do so granted to them by statute, and the ambit within which this discretion can be legally exercised should be clearly prescribed by statute. It is essential to the Rule of Law that an individual or body adversely affected by an administrative decision should be in a position to appeal against it, either to a higher administrative organ or to a Court of Law, if that individual or body felt that the discretion was exercised either intentionally or mistakenly outside the limits of the discretion imposed by the statute. For in such a case the discretion would have been wrongly exercised and the decision *ultra-vires*. The right of appeal should be equally available in cases of abuse of administrative power, decisions made in excess of authority and cases of improper exercise of discretion.

The Need for Efficient and Trustworthy Administrators

191. Whatever the merits or demerits of colonialism, it did result in several countries in the training of an official civil service which had sufficient time to develop traditions and experience before independence. This is especially true of India, Pakistan and Ceylon. It must be observed, however, that in countries where the higher echelons of the administration are staffed in large numbers by those who have enjoyed university education and where illiteracy and low educational levels still present a wide-spread problem, occupational arrogance presents a serious hindrance to efficient administration. This is particularly true if the countries concerned have no strong liberal democratic tradition and the tradition is to respect authority, whether it be good or bad.

192. In many South-East Asian countries attention has been focused on the need for technologists. But there is often serious concern over the lack of personnel trained in the almost indefinable art of management and administration.

193. In countries with linguistic and deeply-felt religious differences, considerable anxiety has often been voiced over the selection of public officials. It is sometimes felt that administrative discrimination is practised by placing members of favourite groups in administrative positions, regardless of their qualifications. Where such practices exist they are to be condemned not only as discriminatory but also as an early step on the way to the spoils system. The spoils system, where

it exists in either a rudimentary or advanced form, is squarely opposed to efficient and disinterested administration, since the loyalties that exist are to the dispenser of the spoils and not to the service and expert advisers are often replaced by yes-men. By introducing an element of corruption in the very appointment, the spoils system breaches one of the first principles of proper administration. From there it is but a short step to more rampant and obvious forms of corruption, where the fruits of office are unscrupulously picked.

194. It is impossible for the Rule of Law to work smoothly so long as the public service is infected by corruption and its twin brother, the spoils system. Corruption is a serious problem in the public service of many South-East Asian countries. Most countries have legislation severely punishing corruption when it is detected. Recent experience in the Soviet Union has brought to light large-scale corruption in the very heart of economic enterprises in a society which, after forty years of striving to eliminate cupidity by overall public ownership, has failed to do so. In a society where state economic controls operate in appreciable sectors of trade and industry, the power wielded by officials over the fortunes of business men and industrialists is very important and also potentially dangerous. The pressures to which an official becomes subject range from kinship and friendship to downright bribery. Obviously strong character is needed to resist them. Qualities of character should also be reinforced by adequate remuneration. It can scarcely be expected that public officials whose salaries do not enable them to live decently will always be able to resist the immoral inducements that come their way.

195. The question of monetary rewards in the public sector has raised difficulties in countries both in and outside South-East Asia and it is generally accepted that, whilst salaries should be sufficiently high to attract persons of high calibre, such salaries will never be able to compete successfully with the glittering prizes of some careers in private industry or of private practice in the more lucrative professions. The compensating factors that a career in the public service can offer are security of tenure and social security benefits which do not always exist in the country at large, but the fundamental principle in public service is that there should be a sense of duty in public officials which overrides questions of greater financial rewards elsewhere. It is important to strike a balance between a level of remuneration that discourages all save the mediocre, and salaries which, though aimed at attracting the best man, a country can ill afford.

196. The importance of an efficient administration adequately equipped to cope with the tremendous social and economic problems of developing countries cannot be over-emphasized. Administrative law is a vital area and two points in particular should be made on the function of administrative law. Firstly, protection of the individual from power is important if power is being abused or illegally exercised.

Secondly, it must at the same time be remembered that within the powers conferred by law, the administration not only may act but must act if social justice is to be achieved.

197. To sum up, social and economic development requires efficient and trustworthy administrators, adequately equipped to perform their particular specialized functions. Competence alone is not enough. Administration should have a proper understanding of the problems of the masses and should approach their duties in the light of that understanding. Direct contact with the public at the local level is one of the best ways of acquiring that understanding.

198. Countries that suffer from lack of qualified personnel to fill the important administrative and technical positions will have to establish more higher educational and technical institutions designed to provide the personnel necessary, and may have to recruit foreign personnel until such time as their own institutions can supply the deficiency. The establishment of administrative training centres providing practical training in administration, including instruction in the basic principles of the Rule of Law, is one of the best methods of meeting the problem of the lack of suitable administrators.

Liability of the State for Wrongful Acts

199. In some of those countries which adopted the British system prior to the introduction in Britain of the Criminal Proceedings Act, the Government was immune from liability in tort, and could not be held responsible in law for breaches of duty or for wrongs committed by its servants in the course of their employment. For instance, a civilian could not recover damages from the State for injuries caused by the negligent driving of a government employee in the course of his duties. The Continental system of Administrative Law, however, do not recognize such government immunity. The Conseil d'Etat has gone even as far as to lay down that in undertaking dangerous operations which might cause damage to the public, the Government is liable in compensation, regardless of fault. It is felt that the interests of the Rule of Law demand the recognition of government liability in the field of tort. The Ceylon Section of the International Commission of Jurists is now advising the Government on the introduction of legislation for the purpose of making the Crown liable in cases where the citizen has suffered damage by reason of wrongs committed by public officials in the execution of public functions.

The " Ombudsman " Concept

200. No discussion of necessary checks on administrative power can be complete without reference to the institution of the 'Ombudsman' which has been adopted by New Zealand and is now functioning in that country.

201. The Ombudsman was first conceived in Sweden and was later adopted by Denmark, Norway and Finland. Of the countries participating in this Conference, New Zealand is the only country which has adopted this institution. Other countries such as India and Pakistan are, however, seriously considering its desirability.

202. The Ombudsman can be described in short as a "grievance man" to whom any citizen aggrieved by an administrative act or order can make a complaint. He is chosen by the country's parliament for a period of years and is responsible only to parliament. The appointment is a non-political one and carries a status of independence. The person appointed should be a person of outstanding merit and integrity who could look into the complaints presented to him without fear or favour.

203. The Ombudsmen in New Zealand and in the Scandinavian countries have already had such a splendid record in securing redress for the individual citizen against the authorities and in protecting him against the growing might of multiplying officialdom, that it is natural that an interest in creating such an office is developing in many South-East Asian countries and in Australia.

204. It is the Ombudsman's function to recommend redress where he finds—to use the words of Sir Guy Powles, the first Ombudsman appointed in New Zealand—"mistakes, carelessness, delays, rigidity and perhaps heartlessness" which are often occupational failings of administrators.

205. The authority of the Ombudsman extends to the whole public service including the staffs of ministries and government departments. Anyone may complain to him and he can, if he chooses to, not wait for complaints but act on his own initiative and examine any government or military activity, inspect any government office and call for any official files. If its work reveals administrative flaws or failings, he can propose measures to parliament to set them right.

206. He has no power to alter or reverse administrative decisions himself, but he can make recommendations to have them altered or reversed. However, the authorities almost always act on his recommendations.

207. Two other useful aspects of the Ombudsman's functions are brought out in the following extracts from reports by Sir Guy Powles:

Many people whose complaints I have had to classify as unjustified have been satisfied to receive a full and careful explanation of the reasons behind decisions. They have realised that they have not been so badly treated and have written to tell me so.

I have had occasion to make recommendations to reverse departmental decisions where the citizen had failed to do something through ignorance of departmental requirements. Loosely worded circulars, omissions from

explanatory pamphlets and inadequate information by one department of another's contact with the particular circumstances are cases in point. In some cases I could only make recommendations to avoid such situations in the future.

208. Apart from being a watch-dog over the exercise of administrative power, the Ombudsman can also act as an important check on inefficiency, dishonesty and corruption in the public service by reporting to parliament wherever he finds such dishonesty or corruption.

209. At a recent anti-corruption conference in New Delhi, the Union Minister of State, Mr. Hajarnavis, drew attention to the urgency of dealing with official lapses firmly and comprehensively so that "dishonest public servants are eliminated, the shaky prevented from falling a prey to temptation and honest officials allowed to discharge their duties with courage and a spirit of public service". It is felt that the appointment of Ombudsmen in India and in other countries of Asia which are faced with the problem of corruption would contribute in no small measure to achieve these ends.

210. Appended to this Working Paper will be found a most useful Report by the British Section of the Commission, "Justice", dealing with this subject, entitled "The Citizen and the Administration".

211. Summary

- A. In a society governed by the Rule of Law it is essential that not only the political rights of the individual but also his social and economic rights should be recognized and fostered.
- B. The Rule of Law therefore requires the establishment of certain basic social and economic standards in such a society.
- C. The problems of hunger, poverty and unemployment are serious problems in South-East Asia and solutions to these problems must be found in order that the Rule of Law operate successfully there.
- D. Inasmuch as under-development is the root cause of hunger, poverty and unemployment, sound economic planning is recognized as the best means of solving these problems.
- E. The most lasting and effective way of reaching the social and economic goals necessary for the smooth operation of the Rule of Law is by methods and procedures which themselves conform to democratic practice and to the Rule of Law.
- F. The adoption of other methods or procedures entails a disregard of individual rights and promotes inefficiency and maladministration.

- G. It is recognized in general, and more particularly in the case of the developing countries of South-East Asia, that in order to achieve greater economic and social benefits for the individual, some measure of interference with existing rights becomes inevitable, but such interference should never be greater than is absolutely necessary and should be subject to safeguards afforded by the Rule of Law.
- H. Nationalization by a democratically elected government of such enterprises as the government deems necessary to nationalize in the interest of the people it represents, is not contrary to the Rule of Law, provided it is done through fair procedures and on the payment of compensation.
- I. Economic progress demands that every citizen should be conscious of his social responsibility and should make a fair contribution to the national effort. One effective method of securing this is by creating in the individual a greater awareness of his rights, freedoms and duties under the Law and the benefits that will accrue to him as a result of economic development under the Rule of Law.
- J. Both from the point of view of inspiring confidence and of reducing the possibility of maladministration in regard to capital investment in public economic development projects it is recommended that full accounts be submitted to parliament and be subject to expert examination.
- K. Apart from investment for developing the necessary infrastructure and for educational, health and housing purposes, it is suggested that the criterion to be applied in investment projects should be the productivity yield and the employment potential of the proposed investment.
- L. It is essential to the Rule of Law and to economic progress that social inequality arising from circumstances of birth or discrimination arising from ethnic, religious, linguistic, regional or communal considerations should be overcome.
- M. Political, racial, social, religious and other types of intolerance impede the unified effort required for economic progress. It is therefore essential that governments promote and encourage a spirit of tolerance among all sections of the community.
- N. Preferential treatment in the granting of incentives or state support for development projects based on factors other than a country's economic or social needs to unfair discrimination. Governments should allow equal opportunities for all citizens to participate in the national effort for economic development.

- O. Ignorance and illiteracy are impediments to economic progress and to the smooth working of the Rule of Law. It is therefore the duty of the State to take adequate measures to provide the educational facilities necessary to eliminate these impediments.
- P. Complex problems of land tenure and distribution, which hinder the full utilization of the land and manpower resources, exist in many South-East Asian countries. Inasmuch as these countries are primarily agricultural, it is essential that high priority be given to land reform programmes.
- Q. In order to safeguard the consuming public it may be necessary to adopt price control, fair-trading and anti-trust legislation; such measures are not contrary to the Rule of Law.
- R. It is essential for the effective operation of the Rule of Law in developing countries that there should be an efficient administration adequately equipped to cope with the vast and complex social and economic problems that exist.
- S. The fact that administrative decisions of an important nature have to be more frequently made in developing societies naturally gives rise to the possibility of more frequent transgressions of the Rule of Law and to greater Rule of Law problems. Greater vigilance is therefore required in such societies to ensure that the Rule of Law is not infringed.
- T. Economic and social development requires a diffusion of initiative and decision-making to a growing number of bodies, individuals and societies.
- U. Such diffusion of initiative and decision-making is not contrary to, and is indeed in consonance with the Rule of Law, provided that there are adequate checks and limitations to protect the individual against the abuse of power.
- V. It is important for the Rule of Law and for economic and social development that the public service should be imbued with a sense of duty which overrides financial and other considerations.
- W. Corruption among public officials not only undermines confidence in the public service but is a positive hinderance to economic and social progress. It also leads to miscarriages of justice, thereby affecting the proper operation of the Rule of Law
- X. Administrative decisions affecting the rights and freedoms of the individual should be subject to review.
- Y. In a State governed by the Rule of Law, it is essential that the Government should be responsible to the citizen for damages caused to him by reason of wrongs committed in the execution of public duties.

- Z. In the light of the experience gained in Scandinavia and in New Zealand, it is recommended that nations in the South-East Asian and Pacific area should examine the possibility of adopting the "Ombudsman" system to correct administrative errors and to minimize the possibility of corruption.

PART V—THE ROLE OF THE LAWYER IN A DEVELOPING COUNTRY

COMMITTEE III

Introductory

212. In this part of the Working Paper the role of the lawyer will be discussed with special reference to his role in the developing countries of South-East Asia. Before proceeding to discuss this subject, however, it will be useful to review some of the more important Conclusions relating to the duties and responsibilities of the lawyer, determined at previous Congresses and Conferences held under the aegis of the International Commission of Jurists. At the first such Congress on the Rule of Law, held in Athens in June 1955, the primary functions of the lawyer were considered and the following declaration relating to lawyers was included in the “ Act of Athens ”:

Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial.

213. At the next International Congress of Jurists, held in New Delhi in January 1959, one of the four Committees devoted itself to the consideration of “ The Judiciary and the Legal Profession under the Rule of Law ”. The Committee reached, *inter alia*, the following Conclusions, which were adopted by the Congress:

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

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

- (i) wherever a man's life, liberty or reputation are at stake he should be free to obtain legal advice and representation; if this principle is to become effective, it follows that lawyers must be prepared frequently to defend persons associated with unpopular causes and minority views with which they themselves may be entirely out of sympathy;
- (ii) once a lawyer has accepted a brief he should not relinquish it to the detriment of his client without good and sufficient cause;
- (iii) it is the duty of a lawyer which he should be able to discharge without fear of consequences to press upon the Court any argument of law or of fact which he may think proper for the due presentation of the case by him.

214. The African Conference on the Rule of Law, held in Lagos, Nigeria, reaffirmed the above Conclusions arrived at in New Delhi.

215. From Athens to Lagos the Conclusions relating to the role of the lawyer were focused on the more classical aspects of the lawyer's position and his functions, such as the need for an independent legal profession, the duty of the lawyer towards his client, his duty to ensure fair trial and his obligation to render legal aid to the indigent.

216. At the Congress held at Rio de Janeiro in December 1962, new horizons were opened up in regard to the role of the lawyer in a changing world. His responsibilities were no longer considered as being confined to matters arising from the day-to-day practice of his profession, but were construed as being of much wider application. In fact, the Congress considered that the lawyer of today was a social engineer and should not content himself only with the conduct of his practice and the administration of justice, but should be prepared to give guidance and leadership in the creation of new legal concepts, institutions and techniques required to meet the challenges of a changing and inter-dependent world.

217. The Conclusion of Rio relating to the role of the lawyer ushered in new aspects of the lawyer's responsibilities which were so revolutionary that a consideration of some of the more important of them is necessary at this stage:

- I. The skill and knowledge of lawyers are not to be employed solely for the benefit of clients, but should be regarded as held in trust for society.
- II. It is the duty of lawyers in every country, both in the conduct of their practice and in public life, to help ensure the existence of a responsible Legislature elected by democratic process and an independent, adequately remunerated Judiciary, and to be always vigilant in the protection of civil liberties and Human Rights.
- IV. Lawyers should be anxiously concerned with the prevalence of poverty, ignorance and inequality in human society and should take a leading part in promoting measures which will help eradicate those evils, for while they continue to exist, civil and political rights cannot of themselves ensure the full dignity of man.
- V. Lawyers have a duty to be active in law reform. Especially where public understanding is slight and the knowledge of lawyers is of importance, they should review proposed legislation and present to the appropriate authorities programmes of reform.
- VI. Lawyers should endeavour to promote knowledge of and to inspire respect for the Rule of Law, and an appreciation by all people of their rights under the law.
- VII. If lawyers are to discharge their obligations under the Rule of Law they will need to exercise individual initiative and to act through every available organization, including in particular self-governing lawyers' associations. Such associations must be entirely free of interference and control by the Executive.

Assistance in Economic Development and Social Progress

218. It will be seen that of the Conclusions set out above, Conclusion IV is perhaps the only one that makes specific reference to the lawyer's moral obligation to concern himself with social and economic problems, such as poverty, ignorance and inequality. The preamble to the Conclusions contains, however, the following most important statement:

The lawyer today should not content himself with the conduct of his practice and the administration of justice. He cannot remain a stranger to important developments in economic and social affairs if he is to fulfil his vocation as a lawyer: he should take an active part in the process of change. He will do this by inspiring and promoting economic development and social justice.

219. In countries facing vast problems of organization and development the lawyer also has important responsibilities in making his contribution towards this development. The introduction of public organs for the promotion of economic and social development requires considerable insight into public administration, public law and the law applicable to the particular activities for which a new organ is to be set up. It would be disastrous if the only contribution to be made by lawyers were in defence of private interests against such schemes, and it is essential that the highest skills of the legal profession should be available to the individual and to the government. The lawyer in the public service can contribute much towards a harmonious solution of the problems involved and can help avoid at the very outset arbitrary procedures and ill-considered solutions.

220. While the obligation of a lawyer to interest himself in social and economic problems is a universal one, this obligation is all the more important in developing countries such as the countries of South-East Asia, where the services of the lawyer are more often and more desperately required in this field. It is one of the objects of this Conference to examine and determine what are the obligations and responsibilities of the lawyer in the social and economic field, and what assistance he should give in the shaping of legislation and in the making of administrative decisions in societies which are undergoing a rapid process of change, and which are endeavouring to reach those social and economic goals which are essential for the proper functioning of the Rule of Law.

221. The role of the lawyer is usually intimately connected with the role of law in a welfare state and it is almost impossible to think of the one except in terms of the other.

222. The Hon. P. B. Gajendragadkar, Chief Justice of India, made the following excellent observations on the role of law in a recent lecture delivered by him at New Delhi on "Law as a Dynamic Process to Meet Social Challenges":

Law has a dynamic role to play in welfare state democracies and in establishing social and economic justice. Law is a mighty weapon in the hands of demo-

cracies to resolve socio-economic conflicts. If it is shown to the common man that poverty, ignorance, disease, squalor and unemployment can be conquered, the Rule of Law and the democratic way of life will prevail.

223. Speaking at Allahabad shortly afterwards at the inauguration of a Symposium on "The Frontiers of Law and Life" organized by the regional centre of the Bar Association of India, the Chief Justice, dealing with the connected subject of the role of the lawyer, said:

...the intellectuals—lawyers in particular—must face the threat posed by hunger, poverty and ignorance by taking proper steps for moulding public opinion and helping the country to resolve these problems by a process of harmonious synthesis.

224. The process of change from "laissez faire" societies to Welfare State societies, with an increasing emphasis on planning, social welfare and public enterprise, began in the Western world in the nineteenth century and has continued with ever-increasing tempo during this century. At first, the lawyer was mentally and technically not quite prepared to make a contribution towards this process of change. Thereafter, however, the lawyers of the Western world did play an important part in the shaping of modern planning and welfare legislation, making their contribution in their capacity as politicians, members of law revision committees, advisors on legislation and legal draughtsmen. Today, a far greater and more systematic contribution is expected from lawyers towards the re-fashioning of law in developing societies whose patterns and whose needs differ greatly from patterns and needs of earlier times.

The Lawyer's Responsibility in the Field of Legislation

225. In the field of legislation the lawyer's responsibility involves the examination of the existing laws and the suggestion of new legal structures, which are more conducive to social and economic development, to replace them. In other words, the duties of the lawyer in the field of law-making should not be confined only to couching legislative decisions in correct legal terminology, but extends to the suggesting of legislation itself. It is felt that, by reason of his special training and experience, a lawyer can be of immense assistance to both local and central legislatures in the fields of law-amendment and of making laws suited to the needs of a developing country. The advice of members of the legal profession in the field of legislation can be rendered individually and, sometimes more effectively, through organized Bar Associations.

226. As has just been pointed out, the lawyer's obligation to take an active interest in legislation is not confined to constitutional legislation nor to the technical aspects of legislation, but extends to the taking of an active interest in social and economic legislation for the betterment of the community. This obligation naturally carries with it

the obligation to study the particular social and economic problems of his country and to consider methods of solving those problems. Unless a lawyer is armed with this knowledge and is generally well-informed about conditions around him, he can make little contribution in the field of social and economic legislation.

227. This presupposes that organized bodies of the legal profession should also devote some part of their time to the study of special social and economic problems and to the finding of suitable solutions to these problems within the law. This can be most effectively done by appointing sub-committees to study and report on particular problems and to suggest suitable legislation to solve them. Sub-committees could also be appointed to recommend, (1) new legislation designed to create a climate favourable for economic developments and social reform, and (2) the repeal of old laws which still appear in the statute books but have the effect of obstructing such progress and reform. Apart from bar associations, solicitors' associations and other such official and semi-official bodies, it is felt that other legal groups or associations can make a similar contribution towards economic development and social reform. For instance, national sections of the International Commission of Jurists can occupy themselves with advantage with problems of this nature and make their recommendations to the authorities. Assistance from a source such as this will always be welcomed in countries where there is a crying need for social reform and adequate competent advice is not readily available.

228. The needs of economic growth in the countries of South-East Asia necessarily entail revision and sometimes even radical reform of the laws of some of those countries. It is often not sufficient to revise or rescind existing laws or to introduce new laws as the mere consequence of social and economic change. It is necessary to go even further and introduce laws designed to promote social and economic change, so that these changes would be the consequence or the result of the laws themselves. In the field of suggesting the introduction of such laws, the lawyers, by reason of their special knowledge and training, their experience in the handling of the affairs of corporations and individuals, their capacity to appreciate the legal and practical difficulties and problems involved in new measures and their special position as vital instruments of social order, are more competent than perhaps any other group in society.

The Lawyer's Responsibility in the Administrative and Civic Fields

229. In the developing countries of South-East Asia the field of administrative law continues to assume more and more importance. As the business of government becomes more complex and as government departments and agencies multiply, the occasions for making administrative decisions and exercising administrative discretion increase.

Such questions as the need for administrative discretion and the limits that should be placed upon it are discussed in the part of the Working Paper dealing with Administration. It is necessary to point out here that a lawyer, by reason of his training, is better equipped than a person not trained in the law to make administrative decisions, many of which call for a judicial approach. Administrative discretion too has to be exercised often judicially and at all times reasonably. For these reasons the developing state requires more and more lawyers to function as administrators. This then is another important realm of responsibility for the lawyer of today.

230. Apart from the need for lawyers to function as administrators, the administration badly needs highly trained lawyers with the experience and wisdom to advise on institutions and procedures where the politician has conceived only the need, and in general terms, the means. This need exists not only at the birth of new creatures of administrative law, but also while administrative machinery is set in motion. Unless the government can call upon the services of highly competent lawyers to fulfil these tasks, there is a danger that fundamentally meritorious schemes will come to grief and that important social legislation will thus be unnecessarily sacrificed on the altar of private interests. Needless to say this calls for a spirit of public service on the part of lawyers, who are often more readily attracted by lucrative private practice. The Commission has repeatedly pointed out that the lawyer is engaged in a profession which involves much more than the earning of fees and that his special position in the community imposes upon him important public responsibilities.

231. Yet another way in which lawyers can render useful public service is by serving on commissions and public boards. In fact it is considered highly desirable that the personnel of every commission or public board should include at least one lawyer even though the questions with which the commission or board is concerned are highly technical in nature.

232. Lawyers and bar associations can also render useful service to the community by taking an active interest in suggesting and promoting schemes for civic education.

Service to the State and the Individual

233. An ever-increasing function of the lawyer in modern societies is the shaping and formulation of policies and drafting of important agreements such as agreements between his government and that of another country, or between a public authority and a private party. The implications of trade agreements do not have economic aspects alone. Even in the earlier stage of negotiation it is the lawyer who is generally one of the principal representatives of his country. In

transactions between developed and developing countries there is often an intricate mixture of policy issues and questions of public law, private law and administration. All this requires a new type of lawyer with a different approach and a different background of knowledge from his predecessor. Given the basic facts, he can, by reason of his training in organized thinking, make a most valuable contribution in these fields.

234. While there is, as has already been mentioned, a general duty resting upon the members of the legal profession to interest themselves in legislation, it is considered that a special duty rests upon those members of the profession who are members of parliament or other legislative bodies, or are legal advisers to such legislative bodies. It is the duty of such members of the profession to examine the nature, content and purpose of proposed legislation and to initiate suitable legislation themselves. An illustration of a step taken in the right direction by the lawyer members of the Legislature of an Asian country is a recent decision by the government parliamentary group in Ceylon to appoint a 15-member Law Committee composed of lawyer-members of Parliament to study and advise on draft legislation.

235. It is the duty of a lawyer to be of service not only to the State but also to the individual. His duty towards his client has already been considered at earlier Congresses and Conferences held under the aegis of the International Commission of Jurists. His obligation to accept unpopular briefs has also been considered. His civic responsibilities too have been discussed.

236. Special reference will now be made to two aspects of his responsibility towards his fellow citizens, namely his duty to protect the interests of minorities and his duty to render free legal aid in appropriate cases. Lawyers should be a bulwark of the Rule of Law, and it is impossible to say that the Rule of Law operates effectively in a society where minorities, whether racial, religious, linguistic or regional, suffer from disabilities or are subject to discrimination or where the indigent do not have a fair opportunity of making their claim or defending their rights before the Courts of the land.

237. The Law Minister of India, Mr. A. K. Sen, in inaugurating the All-Assam Lawyers' Conference on December 29, 1963, urged lawyers to work for a system of legal aid "within the reach of the common man". Stressing the importance of legal aid, he said:

The common man feels that justice is still too expensive and too dilatory. This leads to the necessity of setting up a proper system of legal aid for the poor, and until we do so, the rich man will continue to have an advantage over his poor adversary who can only afford to have junior counsel or possibly not even that.

238. The Introduction to the recent Memorandum of the International Legal Aid Association opens by asserting that "nobody should be denied a legal right because of insufficient financial resources". The Introduction goes on to explain that this is the fundamental

principle which forms the basis of the work of the Association and of every legal aid association.

239. The International Congress of Jurists, held in New Delhi, considered that, although an obligation to provide legal aid rested upon the State and the community, the primary obligation to ensure that adequate legal advice and representation were available to those in need of such advice or representation rested with the legal profession. It will be useful to refer here to Conclusion 10 of the Fourth Committee of the Delhi Congress which runs as follows:

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

240. It will be fitting to conclude this section by quoting the final clause of the Conclusions of the Congress of Rio relating to the role of lawyers in a changing world:

At all times the lawyer should strive to be a visible example of the ideals of his profession—integrity, competence, courage and dedication to the service of his fellow men.

Legal Education

241. The Fourth Committee of the Congress of Rio devoted itself to the consideration of "The Role of Legal Education in a Changing Society". It is not proposed to reiterate the various Conclusions arrived at by this Committee. These Conclusions will be made available to the participants. Their applicability to the developing countries of South-East Asia and their special importance in the context of the need for social and economic development must, of course, be recognized.

242. Special mention must, however, be made of the following portion of the Introduction to the Conclusions of the Fourth Committee at Rio:

For the legal profession to be able to perform its social function satisfactorily it is necessary that the teaching of law should lay special emphasis on three points:

- (1) reveal the processes through which law can evolve, promoting orderly and significant changes in the social and economic organization of society leading to improved standards of living;

- (2) stress the study of the principles, institutions and proceedings that are related to the safeguarding and promotion of the rights of individuals and groups;
- (3) imbue students with the principles of the Rule of Law, making them aware of its high significance, emphasizing the need of meeting the increasing demands of social justice, and helping develop in the student the personal qualities required to uphold the noble ideals of the profession and secure the effective enforcement of law in the community.

243. The Conclusions went on to consider how the highest levels of legal education could be attained by Faculties of law, and dealt with "Legal Studies", "Students of Law", "Teachers of Law", and "Regulation of the Teaching of Law".

244. The fact that real importance is being given to the subject of legal education in many South-East Asian countries is brought out by an extract from an article written by The Hon. A. R. Cornelius, Chief Justice of Pakistan, on "The First Asian Judicial Conference". This Conference was held in the Philippines and the participating countries, namely Nationalist China, India, Japan, Malaysia, Pakistan, Thailand, and South Vietnam, were represented by the Chief Justices in the case of Nationalist China, India, Malaysia, Pakistan and Thailand, and by associate Justices in the case of Japan and South Vietnam. The Chief Justice of Pakistan writes:

I was impressed too by the real importance being given to the subject of legal education in the participating countries, and the prestige which their bar associations enjoyed. Lawyers by aiding in correct exposition and implementation of such laws are true agents of liberty. I have become conscious of a real need for overhauling our system of legal education, on the academic as well as the professional side, and I am resolved to do all I can to raise our standards in both respects.

245. Summary

- A. In examining the role of the lawyer in a developing country, it is important to take note of the Conclusions of the Congresses of Delhi (1959) and Rio de Janeiro (1962) and the Conference of Lagos relating to the role of the lawyer.
- B. Inasmuch as this Conference is primarily concerned with the role of the lawyer in the developing countries of South-East Asia, special emphasis should be placed on the Conclusions of Committee III of the Congress of Rio de Janeiro relating to "The Role of Lawyers in a Changing World".
- C. While the obligation of a lawyer to interest himself in social and economic problems is a universal one, this obligation is all the more important in developing countries such as the countries of South-East Asia where the services of the lawyer are more often and more desperately required in this field.

- D. The lawyer enjoys a special position in society as a vital instrument of social order and, by reason of his special training in legal problems and organized thinking, is capable of making and, indeed, is under an obligation to make a most valuable contribution to social and economic development.
- E. This obligation naturally carries with it the obligation to study particular social and economic questions, such as nationalization, land reform, utilization of resources, socialization measures, improvement of the economy, unemployment, poverty and the raising of living standards, and to keep himself well informed about his surrounding conditions.
- F. It is the duty of organized bodies of the legal profession to devote some part of their time to the consideration of special social and economic problems and their solution within the law.
- G. In the field of legislation this obligation involves the examination of the existing laws and the suggestion of new legal structures, which are more conducive to social and economic development, to replace them.
- H. The advice of lawyers in the field of legislation can be rendered individually as well as through bar associations and through organizations of lawyers.
- I. The needs of economic growth in the countries of South-East Asia necessarily entail revision and sometimes radical reform of the law.
- J. A special duty to interest themselves in legislation rests upon lawyers who are members of parliament or other legislative bodies or are legal advisers to such legislative bodies.
- K. It is considered highly desirable in the interests of the Rule of Law that the personnel of every commission or public body should include at least one lawyer.
- L. The developing State requires an increasing number of lawyers to discharge the functions of administrators. The study of Administrative Law and the need for and limitations upon administrative discretion must therefore be recognized as a vital field of legal study.
- M. The importance of the application of the Conclusions of the Congress of Rio de Janeiro (1962) relating to "The Role of Legal Education in a Changing Society" to the developing countries of South-East Asia is recognized and emphasized.

PART VI
**REGIONAL CONVENTIONS AND COURTS OF
HUMAN RIGHTS FOR ASIA AND THE PACIFIC
AREAS**

ADVISORY GROUP

General Desirability

246. While the Universal Declaration of Human Rights adopted in 1948 represents the objectives of the Member States of the United Nations, it has not yet acquired the status of a binding international convention. It is, however, recognized as setting forth the desired standard required for the protection of human rights. Some of its provisions have been incorporated in some national constitutions. In some jurisdictions it has received judicial recognition.

247. As the evolution towards the application of the Universal Declaration on a world-wide basis is likely to be slow and difficult, the adoption of regional conventions based on the Universal Declaration has been under active consideration in different parts of the world.

248. In 1950, fifteen European nations entered into an internationally binding Convention on Human Rights. Since then, two other European States have subscribed to this Convention. This Convention is largely based on the Universal Declaration. The European Convention is not only binding, but it provides procedural machinery to which recourse can be had. The two organs created by the Convention for the Protection of Human Rights, the European Commission of Human Rights and the European Court of Human Rights, have now been functioning for some years.

249. At the African Conference on the Rule of Law held under the aegis of the International Commission of Jurists in Lagos in January 1961, it was decided to promote the adoption of a regional Convention on Human Rights for Africa. The Conference in its Declaration, known as "The Law of Lagos", provided by Article 4:

That in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States.

250. Two other projects for regional Conventions on Human Rights are also under active consideration:

- (a) The Inter-American Draft Convention on Human Rights adopted by the Inter-American Council of Jurists, which is still under discussion by the Organization of American States.
- (b) The Central-American Draft Convention on Human Rights which is sponsored by the Organization "Freedom through Law".

251. The possibility of a Commonwealth Convention on Human Rights has also been discussed, but so far it is only an idea which requires further examination.

252. The possibility of sponsoring a Convention on Human Rights for Asia, or parts of Asia, has been mentioned on a number of occasions but so far no concrete steps have been taken in this direction.

253. Among lawyers there should be general agreement as to the desirability of such a Convention. It is thought that the South-East Asian and Pacific Conference would wish to express its approval for such a project and, so to speak, launch the idea formally.

254. The actual drafting of a Convention need not be undertaken at this stage. Four matters, however, do require examination now:

- (a) whether there should be one or more conventions for Asia;
- (b) which States in Asia—and the Pacific—would be likely to consider such a project favourably;
- (c) which State or States would be prepared to take a positive initiative in the matter;
- (d) what steps could be taken, as a follow-up of this Conference, to get the idea "off the ground".

Appointment of Advisory Group

255. It is proposed that, at the Opening Session of the Conference, an Advisory Group be appointed which would examine the four questions raised above and would consult other participants during the course of the Conference. The recommendations of the Advisory Group would then be placed before the Conference at its Final Plenary Session for discussion and for transmission to the Commission. The question of preparing a suitable draft Convention could thereafter be considered. If necessary, such a draft could be prepared by the Commission in the light of the answers to the questions (a) and (b) above and the recommendations received.

256. Copies of the European Convention, of the Inter-American Draft Convention and of the Central American Draft Convention will be available at the Conference.

SOUTH-EAST ASIAN AND PACIFIC CONFERENCE OF JURISTS

ECAFE Building, Sala Santitham
Bangkok, February 15-19, 1965

PROGRAMME

- Sunday, February 14* Arrival and Registration of Participants
at the Royal Hotel
- Monday, February 15*
- 8.00-10.00 a.m. Registration of late arrivals
- 10.00-11.00 a.m. Formal Opening Session addressed by
H.R.H. Prince Wan Waithayakorn and by
H.E. Foreign Minister Thanat Khoman.
Inaugural Speeches
- 11.00-11.30 a.m. Break
- 11.30-12.30 a.m. Presentation of Working Paper. Appoint-
ment of Committees
- 2.30- 6.00 p.m. Meetings of Committees
- 6.00- 8.00 p.m. Reception given by H.E. the Prime Minis-
ter of Thailand, Field Marshal Thanom
Kittikachorn
- 8.00 p.m. Supper offered by the Director for Asia
and the Far East of the World Veterans'
Federation and Mrs. Rex de Costa
- Tuesday, February 16*
- 9.30-12.30 p.m. Meetings of Committees
- 2.30- 6.00 p.m. Meetings of Committees
- 6.00 p.m. Reception given by the Women Lawyers'
Association of Thailand
- 9.00-10.00 p.m. Meeting of Steering Committee

Wednesday, February 17

9.30-12.30 p.m.	Meetings of Committees
2.30- 6.00 p.m.	Meeting of Drafting Sub-Committees
6.30 p.m.	Reception given by the Philippine Ambassador to Thailand and Mrs. José D. Ingles
9.00-10.00 p.m.	Joint Meeting of Steering Committee and Committee Officers to consider Reports of each Committee

Thursday, February 18

9.30-12.30 p.m.	Committees meet to consider Final Reports
2.30- 6.00 p.m.	Plenary Session for Discussion of Reports
8.00 p.m.	Formal Dinner offered by the Commission. Guest of Honour: H.R.H. Prince Wan Waithayakorn
10.30 p.m.	Meeting of Steering Committee

Friday, February 19

7.00 a.m.	Visit to Bangkok Floating Market. Sightseeing
1.00- 2.00 p.m.	Lunch in Hotel
2.30- 4.30 p.m.	Closing Plenary Session
5.30 p.m.	Reception at the Royal Palace Gardens by Their Royal Majesties King Bhumibol Adulyadej and Queen Sirikit
7.30 p.m.	Buffet Dinner given by the Thai Bar Association

Saturday, February 20

Departure of Participants

CONFERENCE OFFICERS

Honorary President of the Conference

Hon. SANYA DHARMAKTI, President, Supreme Court
of Thailand

Chairman of the Conference

Hon. Justice T.S. FERNANDO, C.B.E., Q.C., Ceylon

Vice-Chairmen of the Conference

ARTURO A. ALAFRIZ, Solicitor General, Republic of the
Philippines

BOUAVAN NORASING, Minister of Justice, Laos
Sir GUY POWLES, K.B.E., C.M.G., E.D., Ombudsman,
New Zealand

M. C. SETALVAD, former Attorney-General, India
Hon. H. B. TYABJI, former Chief Justice of Sind, Pakistan
DATO S. M. YONG, Chairman, Bar Council, Malaya

Secretary of the Conference

INDRAVADAN N. SHROFF, Attorney-at-Law, India

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OPENING PLENARY SESSION

February 15, 1965

The Honorary President, the Hon. **SANYA DHARMAKATI**, President of the Supreme Court of Thailand, called the meeting to order and invited the representative of His Excellency the Prime Minister, His Royal Highness **PRINCE WAN WAIATHAKORN** to deliver an address.

PRINCE WAN: "Mr. Chairman, distinguished participants, Excellencies, Ladies and Gentlemen. The Prime Minister regrets that he is unavoidably prevented from being with you himself. I have the honour to read his message to you as follows:

" I feel highly honoured by the kind gesture on the part of the Chairman in inviting me to come and address this Conference, for I know that I would be in the presence of distinguished jurists from this part of the world. As for the Government and the people of Thailand, the South-East Asian and Pacific Conference of Jurists for which you are here assembled provides a splendid opportunity of offering to you the hospitality and facilities of our country. Therefore, on this auspicious occasion, on behalf of His Majesty's Government and the Thai people as well as of myself, I have great pleasure in extending to all of you our warm welcome to Thailand.

As you are already aware, this Conference is a regional session of the International Commission of Jurists which has, since its inception, been dedicated to the support and advancement throughout the world of those principles of justice which constitute the basis of the Rule of Law. It is indeed gratifying to all of us in this region of the globe to be able to assemble among ourselves and seek ways and means of attaining the laudable goals embraced in this concept and, in particular, to consider the dynamic aspects of it. I shall not dwell too long on its various implications, for all these must already be familiar to you. I feel that all I need say in this connection is merely to affirm my conviction and, I am sure, that of all of us here—that in order for the Rule of Law to prevail and thereby make the society a well-governed and orderly one, not only the political rights of the individual but also his social and economic rights should be recognized and fostered. This, I believe, is the essence of that concept. However, what is of special interest to me is that the path which would lead to the realization of such ideals should and does lie before this gathering of eminent men and thinkers, jurists and lawyers like yourselves. I can visualize no society in our time that can afford to dispense with the intellectual nourishment it is entitled to receive from its professional men. In the particular field which you are about to discuss, much, if not most, of the worthwhile contribution towards progress will have to come from the legal profession, academic and practising lawyers alike. I therefore noted with pleasure that you will devote part of your discussions here to the consideration of the vital role to be played by your profession.

It is also a source of great satisfaction to learn that you will have occasion to explore the possibilities for the elimination of the many obstacles that still

stand in the way of the general prevalence of the Rule of Law. It has been suggested time and time again that advancement of this concept is hindered by the existence of international tensions and that peace and stability are the essential ingredients for its growth. Since it has always been the avowed objective of the Thai Government to work and strive for the elimination of tension in international relations, I am proud and happy that this policy of ours based on conviction and experience will also contribute towards the eventual realization of the Rule of Law.

We in the South-East Asian and Pacific area are far from being a homogenous group in any respect, comprising as we do some thousand and seven hundred million people representing more than half of the world population. There is no single race, creed, historical or cultural background common to the whole of the region. Our problems differ one from the other and, in many cases, from those of other parts of the world. But in spite of all these, it is my earnest hope that the work of this Conference will show that our present problems are solvable, and that the solutions can effectively be sought through the establishment and observance of the Rule of Law."

Ladies and Gentlemen, on behalf of the Prime Minister I now have the honour to declare this Conference opened.»

The Hon. SANYA DHARMAKTI then called on the President of the International Commission of Jurists, Mr. VIVIAN BOSE of India, to give an address.

Mr. BOSE: "On behalf of the International Commission of Jurists, I welcome those of you who have responded to our invitation to come, many from long distances, to attend this Conference. I also extend the thanks of the Commission to the authorities in Thailand for the courtesy and consideration that they have extended to us and for the co-operation that we have received from them. In the first place our thanks are due to the Royal Government of Thailand for their invitation to us to meet here and for the many favours and facilities that they have extended to us. His Excellency, the Prime Minister, Field Marshall Thanom Kittikachorn, had kindly agreed to open the Conference, but as he is not here, his speech was read by His Royal Highness, the Deputy Prime Minister, Prince Wan Waiathakorn, who is one of his country's distinguished representatives in high international positions. We are also indebted to His Excellency, the Foreign Minister Colonel Thanat Khoman, a distinguished jurist who has kindly agreed to address us today. We have also had valuable assistance from his collaborators, in particular Mr. Jotisi Devakul, Head of the International Organizations Department, Mr. Thanom Nophawan, Head of the Division of International Conferences, and Nai Sompong Sucharitkul, who is his personal Secretary. The President of the Supreme Court of Thailand has kindly agreed to be the Honorary President of this Conference. The Secretary-General of the Supreme Court and Secretary-General of the Thai Bar, Sansern Kraichitti, has worked in close contact with our Geneva Secretariat on the many detailed arrangements that had to be made to assure the success of this Conference. The Members of the Thai Bar and in particular of the Sub-Committee of International Relations, the ladies of the Committee of the Women Lawyers' Association and

all others who have extended their hospitality and co-operation, have also to be thanked. Thank you very much."

The Hon. President then addressed the meeting:

"This is an auspicious occasion on which it is a very great privilege and pleasure for me to be here. It is a privilege to be called upon to speak to this distinguished gathering. It is a very great pleasure to me as a representative of Thai Lawyers to greet you and to extend a very warm welcome to you all. We greet you not as strangers, not as mere visitors, but as our learned and dear colleagues. Indeed we are delighted and proud that you are here. Ladies and Gentlemen, you are now in Thailand, or as we call our country, muong thai, that is, the land of the free. Why the land of the free? The reason is clear and simple—that we, the Thais, ever since time immemorial, so love freedom that we name our nation after it. It has always been our tradition and belief that the secret of true well-being and happiness is freedom. Everybody should be entitled to enjoy a full and free life. Our forefathers moved down from the north where their original homes were centuries ago—down, downwards to seek more freedom. Our kings and ancestors frequently fought good fights and gave their life to safeguard freedom. Through their great efforts, sacrifices and unrelenting spirit we have been able to keep the flame of freedom burning through the centuries. In the modern age freedom also plays a prominent role in the Thai mind. We decided that democracy must be our way of life. We have been trying to shape our way of thinking accordingly. Freedom under law is of course, a cornerstone of democracy. This is, indeed, in perfect harmony with the Thai traditions. We have been doing to the utmost of our ability to promote and respect such freedom. For all of us in the free world, the heart of the question is how can we attain the higher standards of maintaining freedom under law? The Rule of Law which was conceived and evoked through a democratic process produces the right answer. It is a golden rule which is both instructive and constructive. Should the Rule of Law be made acceptable by all peoples in all lands? Although this remains a subject of controversy in some quarters, no one can wisely choose to ignore it. And the Rule of Law has been more and more accepted in various parts of the free world.

For this, the main credit must go to the International Commission of Jurists. It is they who have enlightened and inspired us with the term the Rule of Law, which has now become a most familiar word in all legal circles. It is they who are still reminding us that the Rule of Law is the password which opens the gate of freedom to us. Above all, it is due to the untiring efforts of the International Commission of Jurists that the Rule of Law has come to stay and will remain to stir the conscience of the legal profession in this part of the world and beyond. It is timely that the South-East Asian and Pacific Conference of Jurists is being held here. Its benefits will indeed be substantial for all law-abiding peoples in this region. Its

reflection will also be of inestimable value to the generations unborn in their search for freedom under law. Let this Conference be the first in a series to lead us to this end. Let this Conference be a great success and an inspiration to all of us who love freedom so dearly. Thank you."

He then called upon His Excellency the Minister of Foreign Affairs, Colonel Thanat Khoman, to give an address.

H. E. THANAT KHOMAN: "As a student of law who maintains a keen interest in legal developments, I consider it a high privilege to be invited to take part in the Opening Session of the International Commission of Jurists' South-East Asian and Pacific Conference, and to address this learned gathering of jurists. I should like also to join His Royal Highness, Prince Wan, the Deputy Prime Minister of Thailand, and the Chief Justice in extending a warm welcome to this Conference. As is plainly evident, both the Thai nation and Government feel honoured and pleased that the Commission has chosen this capital as the venue of its current meetings. As may be seen from its invaluable record of independence and objectivity, the Commission has served well, particularly through its reports on Hungary, Tibet, South-Africa and Panama, the cause of human liberty and the respect for law. Its presence in our midst is therefore highly appreciated and welcomed. It is our sincere hope that the prevailing atmosphere of freedom and friendliness and the available facilities in this country may be conducive to fruitful deliberations.

In more than one respect, Thailand shares the Commission's concern for and dedication to the Rule of Law. Long before it moved to the present abode, the Thai nation, many centuries ago, had already lived in an organized community in the southern part of China. But then, under pressure from Kublai Khan's hordes it was forced to undertake south-westward migrations. After the migrations, it began to organize again as soon as circumstances permitted, a new society. Its first new establishment in South-East Asia was the Kingdom of Sukothai, which some 7 centuries ago represented in its time a rather remarkable example of a functional state endowed with elements of organized services. This goes to show that the Thai people even in those days had a marked inclination for organized life and therefore for the Rule of Law. Naturally the source of law and the authorities who applied it differed somewhat from those of the present day. The facts, however, remain that with an aptitude for organization, the Thai nation has continually shown a preference for an orderly and regulated life. And this national heritage offers at least a partial answer to the questions as to why in the days of Western colonial expansion the Thai nation managed to escape from the grip of Western domination, and also why amidst the turbulence and turmoil which presently surround it Thailand succeeds in maintaining peace and order and continues to represent an important element of stability

and progress. Nevertheless, we cannot feel satisfied that through our persisting efforts and vigilance we have successfully upheld the Rule of Law in our country, while all around us our neighbours are beset with disturbances and lawlessness which are threatening their free existence and tend to spread far and wide to engulf even our own haven of peace and tranquility. The Thai nation and Government are therefore profoundly interested in upholding and strengthening the Rule of Law not only within our boundaries, but elsewhere, particularly in this wider region of South-East Asia. It is our earnest hope that the International Commission of Jurists, which draws its strength from the support of international public opinion freely expressed as well as from its unflinching dedication to preserve the physical, moral and intellectual integrity of human beings, may do what it can to alleviate the gravely deteriorating situation in this part of the world and to contribute to helping us build a firm basis on which the Rule of Law may most securely thrive and prosper.

The task that the Commission has set for itself, namely to secure the proper application of the Rule of Law, is certainly not the easiest one. Momentous and varied obstacles stand in the way, ranging from historical, administrative, economic, social to the political ones. However, judging from past records of the Commission's activities and the demonstration of its firm and flexible grasp of the elements of the problem, we cannot help feeling that with determination and keen comprehension the Commission is moving, if not as rapidly as it would wish, but steadily towards the desired objective. In spite of the impediments elaborated in the Working Paper, it would not seem unreasonable to hope that, because fundamentally human beings have been created to live under the Rule of Law rather than in disorder and lawlessness, they would ultimately find an interest in electing the orderly process of Law. Once this realization dawns clearly in the multitude of minds, men and nations may join force in establishing and re-affirming the Rule of Law. It might also be permitted to look at the Rule of Law from a sociological viewpoint, as a habit-forming process in which the first steps appear more difficult and painful, but once these first steps are firmly established and a Rule-of-Law-abiding habit formed, its further development and cultivation may follow with greater ease. Such a course would not be impossible, for even those areas where the Rule of Law is presently satisfactorily implemented seemed to have gone also through a similar process. There is therefore no cause for despair, for with the redoubled efforts from all sides, other parts of the world may gradually find it advantageous to live under secure legal institutions. In these endeavours the Thai nation wholeheartedly joins with the members of the International Commission of Jurists and like-minded men of good-will, and wishes this Conference a full success. "

The HONARARY PRESIDENT then called upon the Vice-Chairmen of the Conference to offer their greetings.

ARTURO A. ALAFRIZ, Solicitor-General, Republic of the Philippines, expressed the conviction that the deliberations of the Conference would have a strong impact on the peoples of the Region, and especially of the emerging countries both in the Region and elsewhere, many of which had just been liberated from colonial rule and were now beset by political, social and economic upheavals. That impact must be made through the hearts and minds of free men rather than by means of force.

Sir GUY POWLES, Ombudsman of New Zealand, said it was particularly appropriate that the Conference should be meeting in the headquarters of ECAFE, the organization which typified and moulded together so many of the common aspirations of the peoples of the area. He went on: "It is fitting to note that the Conference region is divided horizontally by the line known as the Equator, above which the great cultures of mankind bloom and fade and bloom again, but below which the outposts of humanity appear to be given over to football and horse races. Nevertheless, all is not without hope, even in those remote southern parts, because there are some hearty souls who foster and cherish the Rule of Law and sincerely hope for the success of this Conference, that it may mark a further and significant step in the growth of human understanding amongst the peoples of the area."

Mr. M. C. SETALVAD, former Attorney-General of India, stressed the part conferences such as the present could play in advancing the Rule of Law by the cultivation of public opinion in the region and internationally, and by the promotion of ideals which favour the growth of the Rule of Law. He pointed out that in their Region particularly the main enemies of the Rule of Law were poor social and economic conditions, and expressed the view that the mere enunciation of the Rule of Law at assemblies and conferences would not effectively advance its cause unless lawyers, jurists and others concerned with the maintenance and promotion of the Rule of Law entered into other fields of activity and showed an interest in the social, economic and cultural fields so that the Rule of Law could have a basis on which it could thrive and flourish.

The Hon. H. B. TYABJI, former Chief Justice of Sind, Pakistan, drew attention to the fact that the questions that the Conference was going to discuss were of vital importance to the Region, and wished it the greatest possible success.

DATO S. M. YONG, Chairman of the Bar Council of Malaysia, pledged the support of Malaysia for any reasonable steps which the Conference might decide to take towards the implementation or fulfilment of the principles of the Rule of Law and offered the hospitality of Malaysia as host country for a future conference organized by the International Commission of Jurists.

After a recess during which the representatives of the Thai Government met the participants informally, the Hon. Justice T. S. FERNANDO, of Ceylon, took over as Chairman of the Conference and said:

“ I must give expression to the very deep sense of responsibility I feel at this moment when I assume at the request of the Executive Committee of the International Commission of Jurists the task of performing the duties of Chairman of this Conference. When I consider the sincerity and devotion of those who have laboured long months over the bringing together of jurists not only from this region of the world but also so many others sympathetic to the cause of the maintenance of the Rule of Law, and when I see the talented band of Chairmen, Vice-Chairmen, Rapporteurs and Secretaries of Committees, I feel no little confidence that my own task will be simplified.

As a member of the Commission myself, you will permit me to shed modesty for a moment to reiterate that we in the Commission are devoted to the task of piloting the cause of the Rule of Law as we understand it and as declared at our several Conferences and Congresses, though the sailing may have to be undertaken irrespective of fair or foul weather. You will all recall the Act of Athens of 1955, the Declaration of Delhi of 1959, the Law of Lagos of 1960 and the Resolution of Rio de Janeiro 1962. It may happen that our point of view is not accepted immediately by a Government here and there, but we must go on, confident in the belief that Governments sooner or later come to appreciate and respect that point of view even in those instances where they cannot, for reasons of expediency, emergency or otherwise, give effect to it.

If I could be forgiven by you all for taking this opportunity of striking a personal note, I should like to say how happy I am, as a participant at this Conference, that this particular Conference is being held in the capital city of Thailand, the Land of the Free. Coming as I do from a country the people of which share with the people of Thailand the common heritage of the message of the Compassionate One, the Buddha, it is as if I am on a pilgrimage to a Country which has had and continues to have very close bonds with my own, bonds which have lasted unbroken for several centuries.

We have already—even before 48 hours have elapsed from the time we set foot here—experienced a genuine feeling that we are welcome in this happy land, a welcome born of the confidence the people of this Country appear to feel that they more than hold their own among their neighbours.

After this morning's work has been completed, we will, as you know, be assembling in Committees. There are three Committees that will conduct their discussions separate from each other under the guidance of their respective Chairmen. You, ladies and gentlemen, hardly need to be reassured that there will be entire freedom to express your particular views, and the only limitation will be that of time—which will be regulated by our own Standing Orders repro-

duced in the programme with such modification as the Chairmen of the Committees may wish to make to suit any unforeseen situation.

We strongly feel that it will only be through full and frank discussion that any worthwhile conclusions can be reached. It is unnecessary to appear to preach any further on matters of procedure to a body of persons as distinguished as this, persons who are only too well acquainted with settled procedure.

When this Plenary Session adjourns at 12.30 p.m. today, I must remind you, it will resume on the afternoon of Thursday, the 18th February, at 2.30 p.m. to consider the reports of the Committees.

In a moment or two I shall be calling upon our very distinguished Secretary-General, Mr. MacBride, to introduce to you the Working Paper with which I hope you are all now familiar. If I may be permitted to say so, it is an excellent document, completed with the co-operation of many persons who have devoted much labour towards it.

It will be but poor comfort to the citizen of this world if no serious attempt is made to bring into existence those conditions in which alone the Rule of Law can thrive and have meaning. The stages of the formulation of the Rule of Law may be taken for practical purposes to be complete. We have now to discuss the conditions in which this formulation can bear fruit in the shape of blessings to those for whom it is intended."

On the invitation of the CHAIRMAN, Mr. PHOUVONG PHIMMASONE (Laos) then read a message from the Minister of Justice of Laos, who had been unable to accept an invitation to attend the Conference. After sending his greetings and best wishes to the Conference and drawing attention to the problems it would have to deal with, the Minister of Justice put forward three ideas.

First, he referred to the community formed by the countries of Indo-China, which lay in the centre of the region and fell into two groups, yet had a unity based on historical, geographical and cultural elements. They consisted of the British-influenced countries of Burma, Malaysia and Thailand in the west, and the French-influenced countries of Cambodia, Laos and Vietnam in the east. Could the countries of this Indo-Chinese community provide an equilibrium between East and West in this part of the world, he asked. This was a subject worth thinking about in connection with the maintenance of peace in the South-East Asian Region by means of a better understanding between East and West.

Secondly he pointed out that under a dictatorial regime or an arbitrary government which invoked reasons of state to camouflage its abuses, national courts were often defective and unable to protect the individual when his rights were infringed. At the present time there was no other means of recourse before an international tribunal

set up for the protection of the injured individual. If an international tribunal with regional jurisdiction of this nature existed, this judicial institution would be an organ of international co-operation for the prevention and suppression of acts committed in violation of the fundamental rights and freedoms of man. He was of the opinion that in the present circumstances it would be desirable to consider the creation in the Region of an Asian Court of Human Rights along the lines of that created by the European Convention on Human Rights which constituted a key element of a United Europe.

Thirdly, in connection with economic justice, which is a factor in securing social peace for the developing countries, he thought the problem consisted in working out appropriate methods for the employment and co-ordination of foreign aid for the harmonious development of their respective economies and conduct of an effective war against poverty with the object of eliminating all the inequalities which separate man, the first of all being economic inequality.

The CHAIRMAN then read the following message from His Excellency TUNKU ABDUL RAHMAN, Prime Minister of Malaysia:

« I am happy to extend my very best wishes for the success of the South-East Asian and Pacific Conference of Jurists, being held in Bangkok. I am glad to know that Malaysia will be strongly represented by able jurists from both Malaya and Singapore, for in Malaysia we have a profound respect for the Rule of Law, as a real bastion of peace and order in society. As a true democracy, Malaysia believes that the independence of the Judiciary and high objective standards of professional practice by men of law are essential safeguards for the basic rights and freedoms of all our citizens. Irrespective of rank or title, race or creed, or whether they may be rich or poor, all citizens are equal in the eyes of the law. The Rule of Law is and must remain a constant and vigilant protector of rights and responsibilities, yet at the same time flexible and conscious of the rapid changes taking place in this modern era, especially in fields of economic development and social justice. Jurists therefore must be men and women of wide interest and understanding able to relate the basic concepts of law to new and necessary changes in the nature of society. It seems to me that this correlation is the essential element of the theme of this Conference: Dynamic Aspects of the Rule of Law in the Modern Age. I wish to congratulate the International Commission of Jurists for arranging this Regional Conference to discuss the wide-ranging complexities of life today in relation to law. I am sure that the deliberations of so many eminent jurists in Bangkok will be most productive and fruitful for the benefit and enhancement of the whole of South-East Asia and the Pacific.»

He also read cables of good wishes from Libre Justice and from Justice, the French and British Sections of the International Commission of Jurists, and called on the Secretary-General to introduce the Working Paper.

Mr. SEÁN MACBRIDE: "... This is the 7th major Conference of Jurists organized by the Commission. At each of these Conferences we have sought to examine and elaborate various aspects of the Rule of Law. Law, as all other human institutions, is never static. With changes in human society resulting from progress, the Rule of Law

constantly undergoes an evolutionary process to meet change and changing circumstances. This is what we mean by the term "the dynamic aspect of the Rule of Law". From the outset the International Commission of Jurists recognized that the applicability of the Rule of Law was not limited to a specific legal system, to a specific form of government, to a particular economic order, to any particular cultural tradition or to any one period of history, but was in this sense a dynamic concept. At its various congresses the Commission defined the expanded modern concept of the Rule of Law. At Delhi it was declared that the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible, and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized. This was to a certain extent amplified by the Congress of Rio in 1962, which declared that in a changing and interdependent world, lawyers should give guidance and leadership in the creation of new legal concepts, institutions and techniques, to enable men to meet the challenge and the dangers of the times and to realize the full aspirations of all people.

It is in pursuance of this expanding concept of the dynamic aspect of the Rule of Law that the Commission decided on the theme of this Conference: "How far existing conditions in the areas under study are conducive to the maintenance and promotion of the Rule of Law in those areas: in what ways further improvements can be effected in the observance of the Rule of Law in the context of such conditions." These are the questions which are being posed to this Conference by the Commission. It is a quest for answers to the questions posed in this theme which inevitably leads to the realization that political, economic and social factors are closely linked to the proper application of the Rule of Law. In other words, such evils as hunger, poverty, dictatorships, feudal land tenures, corruption, inefficient administration, inadequate educational provisions and an inadequate Bar and Bench are all factors which militate against the proper application of the Rule of Law and which in some areas reduce the respect which the Rule of Law should command from the ordinary man in the street. It is in this sense that we regard the eradication of these evils as forming a vital part of the responsibility of lawyers and as coming within the framework of the dynamic aspect of the Rule of Law in the modern age.

The South-East Asian and Pacific area comprises some 1700 million people, more than 57% of the world population. In vast portions of this area the subsistence levels are alarmingly low. In some countries the concepts of democracy under the Rule of Law are either virtually unknown or inoperative. The existence of these conditions constitutes one of the world's major problems. Viewed in this light, the theme of the Conference constitutes an exciting challenge to governments,

lawmakers, judges and lawyers alike, but for the mass of the people in a large portion of the area the solution of the problems to be discussed means the difference, for them, between slavery and freedom. The dignity, personality and freedom of the individual cannot survive in circumstances that deny to him his individuality, his political, economic and social rights, or in conditions that shut him away from the progress and benefits of this age. For us lawyers, who are dedicated to the democratic way of life under the Rule of Law, the solution of these problems is essential for the survival and advancement of our ideals. In introducing the Working Paper there are two matters I would like to emphasize and ask the participants to bear in mind. The first one is this: we have taken as a starting point for our enquiry in the Working Paper the decisions of earlier Congresses and Conferences; in other words, we felt that it would not be necessary, nor indeed desirable, that the Conference should go over the same ground as had been so competently covered at Delhi, Lagos or Rio. These earlier decisions are taken for granted and the discussion is directed to the problems of the application of the principles and the rules already agreed upon. We would suggest that that should be the starting point of the deliberation of the various Committees. The second point I want to make clear is that the Working Paper is merely an instrument to focus attention on the issues which the Conference will wish to consider. It does not purport to provide answers to the problems raised but merely to ensure that the problems are raised and stated with such background information as we could gather. It is for the Conference and its Committees by the use of their combined experience and wisdom to consider and suggest ways and means of applying the dynamic concept of the Rule of Law to the situations which exist in the South-East Asian and Pacific area. The Working Paper and the Country Studies are merely working tools—what will matter is your own experience, your own knowledge of conditions and your own wisdom.

Of course, it is the Part of the Working Paper relating specifically to the work of each Committee that will be the working document of the Committee concerned. I would earnestly suggest that each participant and observer should study the issues raised against the background analyzed in Parts I and II. In particular, in Part II, which deals with South-East Asian problems, we have sought to analyze the reasons for the lack of confidence in legal institutions, a lack of confidence that seems to exist in many regions of the area. A thorough appreciation of these factors is an essential pre-requisite to the prescription of remedies for these situations. It may be that you will find our diagnoses inadequate, faulty or incomplete. If so, do not hesitate to amplify them. Probably you will feel that the task entrusted to this Conference is overwhelming. It may depress you at first when you come to consider the tremendous problems that are involved. But if I have referred to poverty, hunger, corruption, inadequate education and to many other problems that exist in the

area, please remember that it is not only in South-East Asia that these problems have existed. They have existed in practically every other portion of the world at one time or another. They are not insuperable. They require an effort, they require thinking, they require planning. They require the assistance of lawyers, of people who are trained, who have trained minds, people who are experienced in the making and application of laws, people who will appreciate the correlation between a legal system and the rights of the individual, between a legal system and the requirements of economic development, between a legal system and the necessary evolution for progress. Those are the tasks which you will have to consider.”

The CHAIRMAN then read out the names of proposed officials of the various Committees and of the Advisory Group. The nominations were unanimously approved. The CHAIRMAN then said that the Committees would meet for the first time that afternoon, and the Plenary Session was adjourned until the afternoon of Thursday, April 18.

MEMBERS OF COMMITTEE I

Chairman: C. K. DAPHTARY, India
Vice-Chairman: KYOZO YUASA, Japan
Rapporteur: YONG PUNG HOW, Malaysia
Secretary: LUCIAN G. WEERAMANTRY, Ceylon (I.C.J.)

ARTURO A. ALAFRIZ, Philippines
VUONG-VAN-BAC, Vietnam
Mrs. RAEM P. BOONYAPRASOP, Thailand
Mr. Justice ROBERTO CONCEPCION, Philippines
K. L. DEVASER, Malaysia
MELQUIADES GAMBOA, Philippines
Sir MICHAEL HOGAN, Hong Kong
HENRY H. L. HU, Hong Kong
IQBAL H. KAZI, Pakistan
PHOTIVONG KHAMMOUY, Laos
ROY G. McELROY, New Zealand
Sir LESLIE MUNRO, New Zealand
L. C. NETISASTR, Thailand
L. P. NITISAR, Thailand
PHOUVONG PHIMMASONE, Laos
H. V. REILLY, Australia
Mr. Justice M. SADASVAIYYA, India
CHEUK YUM SHUM, Hong Kong
PURSHOTTAM TRIKAMDAS, India
JOSEPH K. TWANMOH, Taiwan
H. B. TYABJI, Pakistan
E. G. WHITLAM, Australia

For Observers who participated in the deliberations of Committee I, please see List of Observers appearing at pages 95-98.

PROCEEDINGS OF COMMITTEE I

BASIC REQUIREMENTS OF REPRESENTATIVE GOVERNMENT UNDER THE RULE OF LAW

The work of Committee I commenced with a short statement by the RAPPORTEUR, Mr. YONG PUNG HOW (Malaysia). He dealt with the nature and scope of the matters which the Committee was called upon to discuss and consider, beginning by making reference to the excerpt from a statement of the Finance Minister of his country quoted on page 1 of the Working Paper. He then referred to Paragraphs 9 and 10 of the Working Paper relating to the origin and expansion of the concept of "the Rule of Law". He felt that the Committee's approach to the subjects for discussion should necessarily be on the basis that the Rule of Law required a government representative of the people. Given this premise it was the function of the Committee to consider what were the elements that constitute representative government.

The RAPPORTEUR then drew attention to Paragraphs 22 to 34 of the Working Paper which deal with concepts of democracy. The word "democracy" has been given different meanings in different ages and in different areas. He did not wish at this stage to express any view as to whether any particular form of democracy was essential to the Rule of Law, but it seemed to him that representative government was a prerequisite of the Rule of Law. He referred to the definition of the Rule of Law at the Delhi Congress (1959).

He explained that the reason why "Independent and Impartial Tribunals" were included for discussion by this Committee was that it was felt that they were an essential requirement of government under the Rule of Law.

The Committee then agreed to take up the matters for discussion under the different headings in Part III of the Working Paper, namely, Constitutional Protection, Independent and Impartial Tribunals, Free Elections, Freedom of Expression, Freedom of Association and the Function of the Opposition and Civic Education.

The CHAIRMAN also invited general observations which could help guide the discussions and formulate the Conclusions of the Committee.

1. General

Professor MELQUIADES J. GAMBOA (Philippines) stressed the affirmative aspects of the Rule of Law. He said that all persons should be able to live under the untrammelled Rule of Law, for then only could one expect social, cultural and educational rights to be fully recognized.

Mr. HENRY HU (Hong Kong) pointed out that a consideration of the special political situation prevailing in Hong Kong was important from the point of view of the Rule of Law. His country was experiencing a great economic boom at the moment. There was, however, a lack of civic interest and only a small percentage of the people exercised their voting rights. He attributed this apathy to the failure to grant citizenship more freely. He advocated constitutional reform.

Arising from Mr. Hu's observations Sir MICHAEL HOGAN (Hong Kong) explained that it was true that all the points made in the Summary of Part III of the Working Paper could not apply to Hong Kong as it was not a sovereign state, yet it could not be said that the Rule of Law did not operate there. In order that Sub-Paragraph B of the Summary be made applicable to situations such as existed in Hong Kong, he suggested that the words "most successfully" be substituted for "successfully only" so as to read "It is considered that the Rule of Law can operate most successfully under a representative form of government." Mr. HU agreed with Sir Michael Hogan, pointing out that in Hong Kong the Rule of Law existed but there was no representative government.

Mr. PURSHOTTAM TRIKAMDAS (India) stressed that the position of Hong Kong was special as it was not an independent country. It was perhaps for that reason that no reference had been made to it in the Working Paper. In those Asian countries which won their independence, independence solved just one problem, namely, the elimination of foreign rule, but created many new ones. There was the problem of food created by increase of population. In some countries the offer of bread instead of freedom ultimately created societies which had neither bread nor freedom. In India they decided to have both bread and freedom and set up a democratic constitution which has been functioning since 1950.

Mr. LUANG PRAKOB NITISAR (Thailand) suggested the words "more successfully" instead of "most successfully". The CHAIRMAN, however, said that he was not too happy with the word "more" because to his mind it involved a comparison.

LORD SHAWCROSS (Observer, United Kingdom) suggested in the light of the preceding discussion that Paragraph 151B be worded as follows "The Rule of Law reaches its highest realization and ultimate

expression under a representative form of government." He observed that unless it was worded in this way it would mean that in half the South-East Asian countries there was no Rule of Law. One could not condemn these countries by judging them from the standards of highly developed democracies.

Referring to Paragraph 151A, Mr. H. B. TYABJI (Pakistan) said that he must pay a tribute to the excellent words in which this Paragraph was couched. These were words which Pakistani politicians had been groping for for a long time and here they were.

Sir MICHAEL HOGAN wondered whether there was not some inconsistency between Paragraph 103 of the Working Paper where an enlightened democracy is referred to as the best safeguard for the protection of personal liberty and Paragraph 151A where it is considered an essential requisite. The SECRETARY, Mr. LUCIAN G. WEERAMANTRY, explained that the term "representative government" had been used in Paragraphs 151B and C instead of "democracy" in order to obviate any difficulty which the term "democracy" may create.

Mr. VUONG-VAN-BAC (South Vietnam) referred to Part II of the Working Paper which he said set out remarkably well the special problems in South-East Asia, and the obstacles which stood in the way of the implementation of the Rule of Law in that area. It however failed to mention subversive war as one of the main impediments to the Rule of Law. He described subversive war as open revolt against the established government of a country, abetted, directed and supported by forces from outside. It was commonly regarded as a civil war but was in fact an undeclared war between nations given to conflicting ideologies. Subversive war consisted of a double negation—negation of the existing government as the legal authority in the country and negation of the orderly process of law as a way to operate change. Subversive war led to supreme lawlessness and tended to replace the Rule of Law by the rule of terror. To meet the emergency caused by political agitation and armed uprising, governments often considered the normal process of justice as too slow for restoring peace and order. That was why the Rule of Law was often discarded by the establishing of special tribunals and special procedures which did not fully respect the rights of the defendant.

2. Constitutional Protection

Mr. Justice M. SADASIVAYYA (India) stressed the importance of a written constitution for ensuring the protection of fundamental rights. He said that it was essential that the constitution should be paramount and that it should contain guarantees of fundamental rights. He drew attention to the Indian Constitution as providing an excellent example of a constitution containing such guarantees.

Mr. PHOUVONG PHIMMASONE (Laos) also recognized the importance of a written constitution and described the exceptional situation prevailing in Laos after the abolition of the Constitution on April 24, 1963.

Sir LESLIE MUNRO (New Zealand) speaking on Paragraph 151E relating to the desirability of a written constitution suggested that the second sentence beginning "It is desirable..." should read "It is often desirable..."; but LORD SHAWCROSS preferred the word "usually" to "often".

Mr. HU suggested that the sentence begin "In a developing country it is desirable...". This he said would make it clear that a written constitution was always desirable in a developing country. The RAPPOREUR suggested the following alternative words "In countries where the safeguards afforded by longstanding constitutional conventions and traditions do not exist it is desirable...".

Sir MICHAEL HOGAN pointed out that in a sense almost every country could be called developing, and therefore, while accepting in the main Mr. How's formulation, he suggested "where the subject is not adequately protected by..." in place of "where the safeguards afforded by...". Mr. HU wondered whether "In a newly developing country..." would answer the difficulty, but Mr. E. G. WHITLAM (Australia) pointed out that the word "developing" was generally used in an economic and not in a political sense. Mr. JUSTICE SADASIVAYYA wondered whether some explanatory note might not be helpful.

Mr. Justice ROBERTO CONCEPCION (Philippines) referring to the power of the Courts to determine whether an executive act infringed constitutional guarantees, asked whether the words "executive act" in Paragraph 151E were intended to cover all administrative acts. He said that in some countries the word "executive" was not used to include all branches of the administration. The SECRETARY said that the intention was to cover all administrative acts, but that the position might be made clearer if the words "executive and administrative act" were used. This suggestion was acceptable to Mr. Justice Concepcion.

Mr. TRIKAMDAS, speaking on the same subject, emphasized that the courts should at all stages have the right to determine whether executive or administrative acts infringed constitutional guarantees and should not merely be the ultimate arbiter in such matters. He therefore recommended the elimination of the word "ultimate" in the last sentence of Paragraph 151E.

3. Independent and Impartial Tribunals

Mr. TRIKAMDAS said that judges were faced with a difficult problem where the Legislature kept passing laws of an oppressive nature.

Where the Legislature passed such laws, could judges in a democratic society say that they were not prepared to administer them? Another problem in democratic societies was the encroachment by administrative tribunals into the functions and the sphere of the Judiciary. Further, there was a tendency in certain developing countries for the Legislature and the Executive to become impatient with the Judiciary. He alluded to the recent reference to the Supreme Court by the President of India of the issue of contempt of the Legislature by the Courts. He felt that careful thought should be given to the powers of the Judiciary and to the extent of the supremacy of the Legislature.

Mr. R. G. MCELROY (New Zealand) also expressed considerable concern over the tendency in many countries for administrative tribunals to whittle away the jurisdiction of the Courts. He pointed to the fact that in many jurisdictions statutes progressively denied the subject the right of access to the Courts.

Dr. ARTURO A. ALAFRIZ (Philippines), speaking on independent and impartial tribunals, said that tribunals should not only be independent and impartial but there should be speedy administration of justice. Justice delayed, he said, was justice denied. He therefore suggested that the words "and the provision for speedy and effective administration of justice" be added after the words "independent and courageous Judiciary" in Summary 151F. Mr. IQBAL KAZI (Pakistan) also stressed the importance of speedy justice. The CHAIRMAN, while agreeing completely with Dr. Alafriz and Mr. Kazi, said that it was also important to guard against speedy injustice and that while it was important that justice should be speedy, he would not like to see fair trial sacrificed for speed.

Mr. K. L. DEVASER (Malaysia) stressed the importance of ensuring that judges' salaries were sufficiently high in order to have an independent and impartial Judiciary.

4. Free Elections

Mr. E. G. WHITLAM (Australia) said that he agreed with the statement in the Working Paper that it was essential that there be free periodic elections, but he felt that the Committee should go further and emphasize the importance of the need for periodic redistribution of seats arising from increase in or shifting of population. He felt that the Committee could spell out that free elections involved also a periodic redistribution of seats so as to ensure as far as possible that each individual vote carried the same value. Mr. MCELROY, agreeing with Mr. Whitlam, considered a boundaries or delimitation commission necessary to ensure as far as was practicable that one vote had one value. He referred to the New Zealand Boundaries Commission. Mr. E. WHITNEY DEBEVOISE (Observer, U.S.A.) referred to the Committee appointed in the State of New York to study the entire question of the reallocation of constituencies. This

Committee had submitted a lengthy report which was now being studied. He asked whether the Conclusions should not be drafted generally enough to permit freedom as to the methods by which the desired result was to be achieved. There were many methods or combinations of methods by which this could be done. For instance one method may be by the redistribution of constituencies and another by the abolition of the upper house.

Mr. TRIKAMDAS agreed with Mr. Whitlam and said that it would open the door to laxity if it were not specified that there should be equal value for the vote. He also said that even if restriction on the right to vote was contrary to the Rule of Law, he felt that restriction of candidates for parliamentary election was not opposed to democratic practice. So far as candidates were concerned there should be a proper selection. It was essential because voters could not be misled. Certain educational qualifications for candidates were therefore desirable. One had to ensure that parliament was not flooded with incompetent men. He deplored the indifference of the professional classes towards general elections. In order to ensure that elections were both fair and free it was also necessary to have some control over the amount of election expenses.

Mr. WHITLAM strongly opposed Mr. Trikamdass' suggestion of restriction of candidates and expressed the view that the Rule of Law required not only free elections but freedom for persons to come forward as candidates. He felt that there should be no restriction whatsoever on the right to stand for election. He referred in this connection to Paragraph 129 of the Working Paper. The CHAIRMAN agreed with Mr. Whitlam and felt that if any restrictions on candidature were imposed it would amount to a step backwards.

Mr. Justice CONCEPCION, referring to Paragraph 151D, suggested that after the words "such elections should be based on universal and equal suffrage" the words "exercised without hindrance or pressure" be added.

Mr. NITISAR was of the view that, while democracy could not thrive without the Rule of Law, it would be wrong to say that the Rule of Law could not thrive without democracy. He felt that it was incorrect to overemphasize universal suffrage because in many countries there were classes or groups who, not by reason of discrimination but on the basis of deep-rooted tradition consonant with their respective cultures, did not enjoy the franchise. In Thailand for example Buddhist monks were not expected to participate in politics and therefore had no right to vote. He objected to the word "universal" in the phrase "universal and equal suffrage" in Paragraph 151D.

Mr. TYABJI said that he was greatly impressed with the fairness and accuracy with which the position of Pakistan was dealt with in the Working Paper. The exact situation in which Pakistan found itself and the way that situation was handled are referred to. What Pakistan

is trying to achieve and how is fully set out and could not be better expressed. He then traced the political history of Pakistan from the time of Liaquat Ali Khan and said that political instability compelled Pakistan to introduce the system of Basic Democracy. It was felt that the British system of government could not be worked successfully in the absence of adequate universities and schools and in the absence of the necessary atmosphere. It was essential to get the right type of electorate in order to have a suitable government. There was universal franchise in Pakistan but the franchise was indirect. He then explained how Basic Democracy worked in Pakistan. Mr. KAZI supported the points made by Mr. Tyabji.

Mr. JOSEPH K. TWANMOH (Taiwan), in dealing with the position regarding elections in his country, observed that the economic situation in Taiwan was extremely good as opposed to the position in mainland China and said that the comparison between the two was like a comparison between Heaven and hell.

Mr. JOSÉ T. NABUCO (Observer, Brazil) made a suggestion that in the carving out of constituencies "a district or proportional system" should be adopted. He said that experience had shown that this system was the best suited to conditions in his country. LORD SHAWCROSS thought it hardly appropriate to speak of particular electoral systems in the Conclusions.

Mr. TRIKAMDAS suggested the addition in Paragraph 151D after the words "equal suffrage" the words "and shall conform to democratic principles".

Dealing with the problems of citizenship and franchise in Hong Kong, LORD SHAWCROSS said that the problems of Hong Kong were special to itself. The population had doubled. There was the danger of conflicting allegiance resulting in bitter dissension and division. In most respects, however, the Rule of Law was firmly established there. England had not achieved the representative character of its government overnight. One could not close one's eyes to the fact that in South-East Asia great tensions exist on account of communist activity. The ultimate goal was clear but it was unrealistic to imagine that fully representative government could be established overnight by legislative enactments. He felt that the real threat in South-East Asia was not the absence of representative government so much as the communist threat that hung over the whole area. Mr. HU, however, felt that Lord Shawcross' fears were quite exaggerated. Mr. C. Y. SHUM (Hong Kong) added that the supposed communist minority in Hong Kong did not really exist and that even if it did this should not be made an excuse for not granting citizenship rights.

Sir MICHAEL HOGAN felt that in the light of the preceding discussion it would be preferable to say that free periodic elections were conducive to or important to the Rule of Law rather than to say that they were fundamental to it.

5. Freedom of expression

Speaking on freedom of expression and of communication, Mr. WHITLAM said that these freedoms were illusory unless they were coupled with the opportunity for political and other views freely expressed to be given adequate publicity. He therefore favoured legislation to ensure that all political parties had equal access to the radio and other mass media of communication. Sir LESLIE MUNRO explained that in his country scrupulous care was taken to see that all political parties had equality on the radio. He was, however, somewhat apprehensive about specifying equality in the press in broader terms than in the Working Paper. He felt, therefore, that it might be unwise to generalize regarding all mass media in the Conclusions. In answer to certain questions raised, Mr. WHITLAM said that he would be satisfied if the requirements relating to mass media were restricted to the active period of an election campaign.

Mr. Justice CONCEPCION said that he was impressed with the points made by Mr. WHITLAM in his thought-provoking comments. Opportunities for all parties and, from a practical angle, for all minorities to air their views through equal access to mass media such as the press and the radio should be provided.

Mr. MCELROY observed that, in regard to proportional access to mass media of communication, it was the desperate dilemma of South-East Asian countries whether or not they should recognize communist parties which were parties that themselves failed to recognize democratic principles and which, if voted to power, would create the situation in which democratic rights and principles were destroyed.

6. Freedom of Association and the Function of the Opposition

Mr. K. L. DEVASER observed that there were some countries that had become independent in name but not in reality. In Malaysia, for example, the right of assembly was recognized, but a police permit was necessary to hold even a peaceful meeting. Such clauses as "but it can be restricted or removed in the interests of peace and order" and "but cannot be challenged in any Court of Law" have the effect of denying rights which are granted *ex facies*. Mr. NABUCO replied that there were police regulations of different kinds. Police regulations relating to time and place of meetings imposed for traffic reasons or reasons of public convenience could be justified. Mr. DEVASER said that he conceded this, but he was referring to regulations which prevented persons from holding meetings at all. He said that the British Government was responsible for introducing these regulations.

LORD SHAWCROSS, referring to Mr. Devaser's comments, said that his criticism of the British was undeserved. Since 1957 the Constitu-

tion of Malaya allowed the Government to amend or appeal any legislation which it did not like and if there were unfair restrictions on the freedom of assembly the Malaysians were completely free to do away with them. However, the Malaysian Government found it necessary to preserve or impose certain restrictions on fundamental freedoms in order to fight communist subversion.

Mr. KAZI said that in Pakistan political meetings could be freely held and that the police, far from imposing restrictions, were helpful and afforded protection to such meetings.

Mr. WHITLAM felt that under freedom of association adequate consideration should be given to the rights of trade unions and to ensuring that they had equality of access to the authorities and equal opportunities of meeting and of making representations on their behalf.

Sir MICHAEL HOGAN, speaking on the function of the opposition, felt that the words "representative government" should be substituted for the words "the Rule of Law" in Paragraph 151H so that the Paragraph would read "It is essential to representative government that there must be the possibility within the law for the formation of an opposition capable and free to pronounce on the politics of the government." In answer to Mr. HU, who felt that from the point of view of Hong Kong such a substitution would not be suitable, Sir MICHAEL HOGAN said that the substitution would not create an adverse influence against Hong Kong because Paragraph 151H concerned itself with parliamentary government.

LORD SHAWCROSS suggested the following formulation:
"A representative government involves the possibility within the law and as a matter of accepted practice of forming an opposition party or parties capable and free to pronounce on the policies of the government, provided that they themselves conform to the democratic principles of the Rule of Law."

Mr. KAZI suggested "must be the possibility" in place of "involves the possibility", but Sir LESLIE MUNRO thought that "involves the right" would be the best formulation. Mr. Justice CONCEPCION also favoured putting formation of an opposition on the basis of a "right" but felt that "implies the right" would be a better formulation than "involves the right". His suggestion met with general acceptance in the Committee.

Mr. DEVASER felt that the proviso suggested by Lord Shawcross was dangerous because it would give governments a handle to suppress political parties which they disliked under the excuse that they did not conform to democratic principles. Mr. H. V. REILLY (Australia) said that he considered that the proviso was one of the most vital recommendations which the Committee could make having regard to the general conditions prevailing in South-East Asia. Mr. Justice

CONCEPCION, however, was in agreement with Mr. Devaser. Mr. KAZI suggested that the difficulty arising from the possibility of governments misusing the proviso could be obviated if provision were made for challenging any ban on a political party on the basis of the proviso in a Court of Law.

LORD SHAWCROSS said that the arguments advanced by Mr. Devaser and Mr. Justice Concepcion were indeed respectable arguments honestly put forward by persons who only wanted to be fair and decent. However, anti-democratic parties were not themselves fair and decent and one had so many illustrations of their having climbed to power time and again through democratic methods only to destroy the very institutions through which they rose to power. He gave as illustrations the Nazis in Germany and the Fascists in Italy. He felt that it was the inherent right of a democracy to say that, if a party arose whose avowed purpose was the destruction of democracy, that party should be banned. He suggested as an alternative formulation "provided their policies conformed to the Rule of Law". Mr. TRIKAMDAS supported Lord Shawcross.

Mr. DEVASER asked "What then about the Government itself?" Sir MICHAEL HOGAN replied that the answer was that we were now considering and providing for the opposition.

Mr. WHITLAM suggested "whose policies conform to the Rule of Law and which is able to take the place of the Government". Mr. TRIKAMDAS thought that the words "and able to take its place" were not really necessary as an opposition party expected to be able to take the place of the government but would be able to do so only if it turned out that it had sufficient strength for the purpose of the next general election.

The CHAIRMAN said that he could not agree with Mr. WHITLAM because it was not always that an opposition may have the strength although it may always have the desire to take the place of the government.

7. Preventive Detention

Sir LESLIE MUNRO said that he did not find any reference to preventive detention in the Working Paper. It was true that this subject had been dealt with before, but he felt that some reference should be made to it again in view of its importance. He had in mind situations existing in several countries in South-East Asia such as Burma and Indonesia where several leading citizens were still under preventive detention. He felt that the Conclusions might contain at least a re-affirmation of the Conclusions of Lagos on preventive detention. Mr. TRIKAMDAS pointed out in this connection that the Indian Constitution forbade preventive detention.

Sir MICHAEL HOGAN felt that one could not be indifferent towards the problem of preventive detention and agreed with Sir LESLIE MUNRO that it should be specifically referred to.

Professor GAMBOA observed that in general preventive detention affected persons belonging to minority parties. He felt that it might be useful to add to Paragraph 151E even one sentence which would uphold the right of a Court to consider the validity of the ground for declaring an emergency and the grounds for preventive detention.

Mr. WHITLAM said that although there was no preventive detention in Australia, there were other executive acts which were arbitrary and against which complaint could be made. This was perhaps true of almost every country. He suggested that it be specified that "preventive detention and other executive acts were not done capriciously or in secrecy". He also suggested that executive acts be subject to periodic review by an impartial body and also by the Legislature. He felt that the position would be incomplete if we dealt with preventive detention alone and not other arbitrary executive acts.

The CHAIRMAN drew attention to the Conclusions of the African Conference of Jurists (Lagos, 1961) relating to preventive detention and it was agreed that the Committee reaffirm these Conclusions, recognizing the widespread prevalence of preventive detention in the South-East Asian region. Mr. Justice CONCEPCION wondered whether the period of six months mentioned in Conclusion 5 (ii) of Committee II of Lagos was not excessive. It was pointed out that this was a maximum period.

Sir LESLIE MUNRO felt that in addition to reaffirming the preventive detention Conclusions of Lagos, some reference should be made to the sustenance of relatives of persons under preventive detention. Mr. DEBEVOISE suggested a reaffirmation of Lagos coupled with an additional note or paragraph.

8. Civic Education

Mr. NITISAR stressed that it was essential to have widespread civic education first in order that democracy could work smoothly. It was not right to say that one must have democracy first and then have civic education along with it. His observations should not be understood to mean that one must wait till everybody was educated to have democracy, but if educational policies were implemented with immediate effect there would soon be no illiteracy, thus paving the way for the smooth working of democracy. Mr. C. Y. SHUM agreed and said that education was the solution to many of the problems posed and this was clearly brought out in the Working Paper.

Mr. REILLY said that it was sometimes felt desirable to postpone universal suffrage until conditions were brought about in which

universal suffrage could work satisfactorily. Governments should endeavour to remove illiteracy through compulsory education. It was essential for the ultimate achievement of representative government based on universal suffrage that governments should provide free compulsory education for all children up to a standard when illiteracy would be removed. He suggested a Conclusion on this basis. If there was any conflict or overlapping in the Conclusions reached by Committee I and Committee II on this point, this Committee's Conclusion may be dropped in the Plenary Session.

Mr. NABUCO felt that it was the responsibility of the State to provide free adult education as well.

Mr. NITISAR drew attention to Paragraph 146 and said that in the light of that Paragraph, Paragraph 151 I might be amplified.

The CHAIRMAN said that while civic education was important, it was essential to guard against indoctrination by the party in power.

A draft of the Conclusions together with a suitable Preamble was prepared on the basis of the views expressed and the suggestions made. The draft Preamble and Conclusions were then discussed and the final text was agreed upon. (See page 177)

MEMBERS OF COMMITTEE II

Chairman: CHAUDRI NAZIR AHMAD KHAN, Pakistan

Vice-Chairman: VU-QUÔC-THÚC, Vietnam

Rapporteur: JEREMIAS U. MONTEMAYOR, Philippines

Secretary: Dr. JÁNOS TÓTH, Switzerland (I.C.J.)

GEOFFREY ABISHEGA-NADEN, Malaysia

SYED ISHTIAQ AHMED, Pakistan

U HLA AUNG, Malaysia

JOSEPH A. L. COORAY, Ceylon

ANTHONY R. DICKS, Hong Kong

GEORGE CLIFFT DOOLE, New Zealand

LAURENCE M. GREIG, New Zealand

PETER R. GROGAN, Australia

Mr. Justice MOHAMMAD HIDAYATULLAH, India

S. P. KHETARPAL, Malaysia

JEAN C. J. MORICE, Cambodia

M. PHAVONGSAY, Laos

Sir GUY POWLES, New Zealand

CHELLIAH SELVARAJAH, Malaysia

Prof. DONG WOOK SHINN, Korea

S. GOVIND SWAMINADHAN, India

E. S. VENKATARAMIAH, India

For Observers who participated in the deliberations of Committee II, please see List of Observers appearing at pages 95-98.

PROCEEDINGS OF COMMITTEE II

ECONOMIC AND SOCIAL DEVELOPMENT WITHIN THE RULE OF LAW

The CHAIRMAN, CHAUDRI NAZIR AHMAD KHAN (Pakistan), in his opening welcomed address the participants and stressed the importance of the tasks ahead. The Congresses and Conferences of the International Commission of Jurists had clarified the modern meaning of the concept of the Rule of Law. The New Delhi Congress stated that the Rule of Law included both civil and political as well as social, economic and cultural rights. At the present Conference, the task allotted to Committee II was to survey and clarify the legal aspects of social and economic development, to translate the principle of the Rule of Law into practice, to specify what the Rule of Law means in the social and economic field and to formulate basic principles on how the Rule of Law can be implemented in this domain. This is a challenging subject to discuss, it is decisive for the future of developing countries, all the more so since this Conference is the first occasion that the legal luminaries of the world are probing their knowledge and experience to see that all social and economic progress is motivated by the spirit of the Rule of Law.

The RAPPORTEUR, Dean JEREMIAS U. MONTEMAYOR (Philippines), then introduced his Report. The main points of the Report, the proceedings and discussions of the Committee are reproduced in the following summary which for purposes of clarity is arranged under appropriate headings.

Introductory Report (Summary)

For the first time an international juristic body of great competence and prestige is undertaking a practical study of how socio-economic problems affect the Rule of Law in this part of the world and how the principles of the Rule of Law may be better applied for the solution of these problems. It is fortunate that the work of the Committee combines both economic and social development. The two are so closely related to each other that the problems of one can neither be understood nor properly treated without relating them to those of the other.

The *land problem* is the most widespread and most basic problem in South-East Asia today. Its economic, social and political aspects react on one another so intimately that what was once a cause has now become also an effect and what was once an effect has become also a cause. This situation almost always imprisons remedial measures in a vicious circle.

The measures of reform for necessary development can be classified under two headings: *justice* and *technology*. The advocates of technological priority are pressing to increase the size of the cake, maintaining that, once the cake is big enough, the question of justice and problems of division will disappear of itself. On the other hand, other people claim that while the question of justice is less tangible and perhaps more perplexing, it is really more fundamental and urgent and must be given the first priority. Assuming that the cake can be increased to a size sufficient for all, unless the question of justice is first solved, greater discontent will result even with greater production. They point to the increasing poverty and discontent in the world in the midst of increasing progress brought about by technological advances. But the more direct challenge of the advocates of the priority of justice is the question: can production really be increased unless justice is first made to govern the relations of men? It is pointed out that only justice (in the sharing of work and profits) can provide sufficient and lasting incentives for the parties to work and produce, while technology is merely an instrument or tool which the parties decide to grasp and use only after they are properly motivated. While both technology and justice are necessary, justice is more basic and must have priority. However, some technological changes may be undertaken simultaneously with measures to remove injustice.

Social justice is the more important aspect of the question of justice in Asia. In order to remove obstacles to and promote socio-economic development, social justice in its practical aspects must be updated.

a) Updating the concept of property.

In most countries of the Region, the right of private property is generally recognized. Heretofore, however, relatively little effort has been made to define the precise limits of that right. It seems obvious that the extent of the right of ownership of property depends, among other things, on the nature of the property involved.

What is the extent of the right of ownership which any person can claim over land? When land was plentiful and people were few and the needs of individuals and society were simple, the question of the precise extent of the right of ownership over land was rarely put in issue. But with the increase of population, the relative shortage of land and the complicated needs of modern society, the question has become very important. Land constitutes a basic and fundamental need of man and society, thus any individual right over land can neither be perpetual nor absolute, but must be limited and its exercise always subject to

the regulation of society. Some people claim that the measure of the right of ownership of land should be the amount of labour and/or capital which a person puts into it to make it productive. From this a corollary is drawn: that if the owner has taken back the amount of his labour and/or capital from someone else who tills the land, and the said owner does not continue to invest labour and/or capital in the land, his right over that land decreases and dwindles until sooner or later the person who continues to work the land acquires a greater right over it. This is the philosophical basis of the slogan: "Land to the tiller". In some countries of Asia the foregoing principle underlies (albeit vaguely) land reform measures undertaken by the government, such as those providing security of tenure for the tenant, reduction of agricultural rent, and compulsory transfer of the land in ownership to the tenant.

b) Re-examination of the concept of "just compensation"

Just compensation for the expropriation of land cannot always be determined by the market price thereof; this may become an unreliable determinant under unbridled free competition. Compensation, moreover, cannot always be paid in cash, which would also result in grave inflation. Is it just or unjust for governments to impose payment in bonds or shares of stock?

c) Who is entitled to the unearned increment?

A man acquires a piece of land in the suburbs. He does nothing to the land for twenty years. After that, the market price of the land rises two hundred times. Will the owner be entitled to the whole increase in the price of the land, due only to the growth of society in that area? Should not at least the greater portion of that increase go back to society? In many progressive communities of the world this is no longer in issue.

d) Another legal issue that needs re-examination, particularly in Asian society, is the issue of the right to the net profits of any enterprise. It is not easy to determine the right formula that would give a just wage to the labourer and just return for capital. But if the net profit were to be shared between the capitalist and the labourer or among the capitalist, the labourer and the public, in what precise ways and by what specific means should it be distributed or channelled to benefit them? Whether it should be through increases in the wages and return to capital, or through the so-called profit-sharing schemes, or through taxation and government public welfare projects, or any other means, will be a constant challenge to the ingenuity, wisdom and sense of justice of the men of the law.

e) Limitations to rights of succession

A man should have the right to dispose of *some* of his property effectively after his death, particularly for the support and education of his minor children. But in many countries rights of succession have

already been limited considerably. Should not such rights be lessened in many of the countries in Asia, and should not a portion of the estate of a very wealthy deceased person be disposed of by society?

Importance of social organization. The interpretation of justice in concrete cases is extremely difficult not only conceptually but also in actual enforcement; it can only be approximated, and there is a greater probability that this will be done, if the parties involved are properly matched. When one party is very much stronger than the other, the chances are grave that injustice will be committed. And when a big disparity of strength exists among large segments of society for a long time, the danger of a dictatorial regime, either of the tyrannical or benevolent type, becomes imminent. Hence it is essential for democracy that the various segments of society be more or less equitably balanced. How can the helpless masses of Asia acquire the needed balancing strength? They have one obvious advantage: their numbers. But numbers can be put to real advantage only through organization. Hence it becomes obvious that group organizations are essential if the Asian masses are to secure justice for themselves. The need for social organization does not exist merely for the negative purpose of fighting injustice. Social organization has a positive and a far more significant role for developing countries. It is relatively easy to understand that in order to break the vicious circles involved in the socio-economic-political problems plaguing the developing countries, new forces must be generated from within, or from without, or from both. But in either case, the indispensable condition for real and lasting reform consonant with the Rule of Law is that the power structure in the nation must be reformed in such a manner that the proper allocation of power is given to each of the various sectors of society. Unless the structure of power is reformed in this manner, any form of remedial force—whether it be technological measures to increase production or cultural programmes or foreign aid or any other—will only aggravate the situation. In this sense, the reformation of the power structure through social organization is the most important requirement for real reform and development. The peasants and workers who deserve the greatest but actually have the least power today must be organized to acquire the needed balancing strength. This involves great obstacles, but a start could be made by helping and encouraging leaders to “trigger off” the reform. For this task, or to help in this task, the men of the law are specially fitted and equipped. For in the final analysis law is social organization.

Technological programmes can never be considered apart from the people by whom, among whom and for whom they are undertaken. And since people are affected, and in some respects determined, not only by their physical and geographical environment but also, and more significantly, by their cultural traditions and social situations, technological projects and innovations must consider and be adapted

to all of these factors in order to succeed in really helping, rather than merely exciting, the people concerned. It would seem that technological concepts, processes and methods as imported from the West, on the one hand, and the social and cultural habits and traditions of the Asian countries, on the other hand, will have to make mutual adaptations.

All the developing countries of Asia want to industrialize. Industrialization, even for the lasting success of land reform, is necessary. In the first place, the landlords whose lands will be transferred in ownership to tenants will need to invest their money in industry. In the second place, the rural population is expected to increase indefinitely, and unless many people from the farms can be absorbed into the factories, sooner or later there will not be enough land for all. Since most countries of Asia are agricultural countries, it would seem that the best way to start industrialization is to put up, or encourage the putting up of, those plants that process agricultural and local materials. In this way, agriculture and industry will stimulate and strengthen each other and industry can develop on to more advanced stages.

Planning is well-nigh universally accepted as necessary for the development of emerging nations. But the first question that arises is: who should do the planning? Since in a free society government is government by the people, planning should ultimately, albeit indirectly, come from the people themselves. Even with a very efficient government, the active participation of the people is necessary. The planners will be expected not so much to *persuade* the people about a plan concocted at the top, as to derive, compile, systematize and refine the ideas and aspirations that ultimately come from the people themselves. This, of course, involves difficult processes including organized actions, but it is of the very essence of democracy.

There is a vital need for good public administration and competent and trustworthy public administrators. Further, to motivate South-East Asian peoples for socio-economic betterment, purely material incentives are not enough. Certain moral and psychological forces must be promoted, harnessed and properly guided. Among these forces, the RAPPORTEUR dealt with *leadership, nationalism and culture*.

To many countries of the Region, the question of foreign aid or international mutual assistance is important. It has been claimed that the manner by which foreign aid has been given in the past endangered the Rule of Law in many recipient nations. Existing "government-to-government" and other methods have proven to be self-defeating, and should therefore be re-examined. But beyond the proper functioning of foreign aid programmes, the principle of *international social justice* should be considered seriously. With the constant shrinking of the world brought about by technological and other factors and with the increasing interdependence among nations,

there is hardly any position or action of one nation that will not affect the other nations of the world. And just as the individual in any given society has a continuing need of such society and has, therefore, the obligation to contribute positively to the good of society, so also has every nation the obligation to contribute positively to the welfare and good order of the world community.

Under the same principle, all countries of the world, specially the richer ones, have the obligation to contribute their share to the solution of international problems and to the promotion of justice, peace and prosperity among all nations. Likewise, there is a need to lay down rules for the protection of the weaker and poorer nations against exploitation by the richer and stronger nations, analogous to social legislation in individual countries. This is especially true in regard to international trade.

What these rules shall be, who shall draft them, how they would be implemented, are continuing problems facing jurists today. But the answers must be found soon if we are to avoid another global turmoil, just as the corresponding answers to social justice had to be found in order to prevent revolutions in individual countries.

1. Social, Economic and Cultural Rights and the Rule of Law

A general debate dealt with the place of social and economic rights in the legal systems and their role in development programmes. The basic question to which Committee members tried to find an answer was by which methods and procedures should the social and economic standards necessary for the smooth operation of the Rule of Law be obtained. Mr. Justice Hidayatullah (India) deplored that, while political and civil rights are by now recognized in most countries, social and economic rights are rather neglected. States and their Governments in the Region should now concentrate on economic and social reform, in order to establish gradually a welfare state. His opinion that economic development brings about also an improvement in the working of the legal system was shared by Mr. Abishega Naden, Dr. Khetarpal and Mr. Selvarajah (all of Malaysia).

It was admitted that social and economic rights were different in character from civil and political rights, and that accordingly different methods were needed for their protection and implementation. The debate between Mr. Ahmed (Pakistan) and Mr. Joseph A. L. Cooray (Ceylon) was very conclusive in this respect. The specific character of economic and social rights did not prevent a good number of states from including these rights in their Constitution (e.g., India and Ireland) or the United Nations from working out a Draft Covenant on social, economic and cultural rights. In Mr. Venkataramiah's (India) view the implementation of social and economic rights involved the readjustment of the whole legal system and a redefinition of property itself. Such redefinition of rights and readjustment of the

legal system to new social aims becomes necessary at every new stage of historical development. Indeed, the content of property has already undergone far-reaching changes in the course of the 19th and 20th centuries. The Committee's task is to contribute to a new re-definition. In whatever terms the Committee decides to accomplish this task, the conclusions to be worked out should clearly state that law is not a means of exploitation but a tool for social reform.

The participants put forward examples from the experience in their own countries of the extent to which hunger and poverty are enemies of the Rule of Law. Dean VU-QUOC-THUC (Vietnam) cited the example of Vietnam. Hunger and poverty tend to make a truly representative form of government impossible, and promote the emergence of systems of government diametrically opposed to the principles of the Rule of Law, inducing people to accept dictatorship in the hope that they will get more to eat. The ensuing discussion turned on the question whether hunger and poverty as such should be combated or the social or legal systems which produce them.

It was shown, however, that cause and effect are very difficult to distinguish in this as in other respects, and that it is more important to examine the methods by which social, economic and cultural rights may be promoted. In this context Mr. Justice HIDAYATULLAH emphasized that the keyword was democratic practice. Social and economic development should come by the consent of the people. This opinion was shared by everybody but it was felt that the implementation of this principle was faced by heavy odds in the Region. The RAPPORTEUR explained that the promotion of social and economic development was caught in a vicious circle. Development was to be achieved by democratic practices but the great peasant masses of South-East Asia were in fact outside established democratic organizations and apathetic. The big problem is how to break this vicious circle and to make the peasantry an active participant in its country's democratic life. In his opinion a new force should be and could be generated by organizing the peasants in their own organizations, thus making use of the right of association. Such peasant mass-organization under able local leadership might become an inestimable force by which the vast number of peasants could be set into movement for the benefit of their community. While accepting Dean MONTEMAYOR's thesis on the mobilization of the peasantry for democratic life, Mr. AHMED remarked that the organization of peasant masses might become very difficult under an undemocratic government. Mr. GROGAN (Australia) drew attention to the importance of education in democracy. It is through education that an ever-widening circle of the population become active members of the life of the community.

The Committee included in the preamble to its conclusions an enumeration of economic, social and cultural rights as listed in the Universal Declaration of Human Rights and insisted that these rights should be implemented both in municipal and in international law.

The importance of appropriate measures in international law to assure a growing measure of international social justice was expressed by Mr. AHMED's motion suggesting the inclusion in the conclusions of a separate clause stressing the need to establish principles of international social justice in order to prevent undue advantage being taken of the weaker by the stronger nations and to ensure friendly cooperation and mutual help among all nations of the world through an international administrative body under the United Nations.

This proposition started a very lively debate in which Mr. Justice-HIDAYATULLAH, Messrs. FEDERSPIEL (Observer, Denmark), SWAMINADHAN (India), SHINN (Korea) and GROGAN felt that the idea of international social justice was very vague and that the Committee was not in a position to advance an appropriate formulation for it. At the same time, it was submitted that specialized United Nations agencies do exist to realize the principle advanced in the suggestion. By adopting such a conclusion, would the Committee not virtually be telling these U.N. agencies to do their job? On the other hand, the CHAIRMAN, the RAPPORTEUR, the SECRETARY Dr. J. TOTH, and Mr. AHMED, author of the suggestion, were of the view that it was high time to start thinking on these lines. The fact that there are existing international bodies in the United Nations family engaged in this work expresses a minimum of international understanding on this subject and shows that the idea has passed its revolutionary phase and has been accepted by the majority of the member countries of the United Nations. These bodies, however, are tackling the problem only from the economic aspect. Accordingly, it would be very useful if this Committee could start to elaborate its legal aspects. Mr. MARSH (Observer, United Kingdom) summed up the discussion by saying that the Committee members all agreed on international social justice. The problem before the Committee was to find ways and means of translating the principles of the Rule of Law into the international field. Many other international organizations were engaged in the same work. All these efforts, however, did not as yet reach the level which would permit the laying down of concrete ideas going beyond a declaration of support for international social justice. Finally, the Committee adopted Mr. AHMED's additional clause which was later on dropped by the Steering Committee. The outcome of the debates was expressed in the Preamble and Clause I.

2. Social Justice

The basic problem discussed under this heading was the elimination of social inequality. A general consensus very soon arose concerning both the principle itself and its appropriate wording. Mr. MARSH suggested that the social inequalities mentioned should include inequality arising not only from circumstances of birth, but also of wealth. Mr. AHMED enlarged the scope of the principle by asking that

any inequality of opportunity should be overcome so that disproportions in opportunity should be eliminated. Discrimination arising from ethnic, religious and linguistic factors was condemned. It was felt necessary to include in this enumeration regional or communal factors which might lead to discrimination in large countries where different regions have different characters. There was, however, one point upon which some participants had very strong feelings and which may be construed as an exception from the general rule of the prohibition of discrimination, that is to say the need of preferential treatment for economically weak or handicapped regions or groups, stressed by Messrs. U HLA AUNG (Malaysia) and COORAY. In such cases, as for instance in the allocation of development funds, discrimination in favour of such regions is justified.

After having outlined the basic principle of social justice in the case of developing countries in the Region, the Committee was faced with the task of formulating specific rules in order to implement the general principle. Taking into consideration existing social and economic inequalities, it was agreed that a change in the status quo was necessary. The debate centred around the specific legal measures by which such changes could be carried out within the safeguards afforded by the Rule of Law. The RAPPORTEUR suggested that it was not enough and not appropriate to be satisfied by occasional interference with existing rights. In his view, rights should be carefully redefined in the context of their function in contemporary society. This would not mean a cancellation of existing rights, but a new delimitation of their scope which would amount eventually to a certain change in the existing social and economic situation. Mr. GREIG (New Zealand) drew attention to the fact that in many cases real rights were at stake and if these rights were to be considered as contrary to public interest they should not only be redefined, but changed. Mr. COORAY suggested another formula to cope with the problem: interference should not be directed against existing rights, but the exercise of these rights. Mr. Justice HIDAYATULLAH raised the question whether it was possible at all to reshape existing social conditions by procedures conforming to the Rule of Law, a question which he later answered affirmatively. He insisted that the ultimate goal of social reforms in developing countries should be the realization of a welfare state, but at the same time social and economic changes should be gradual and worked out by democratic procedures. Mr. AHMED accepted the idea of a welfare state as the goal of development, but wanted to make it very clear that in developing countries a welfare state is very different from its counterpart in Western developed countries. In developing countries economic planning encompasses more than in a Western type welfare state, it goes beyond progressive taxation and the allocation of social spending by the Government. In such countries interference with existing rights means effective interference with absolute and non-absolute rights protected by the legal system. The discussion showed that partici-

pants were aware of the need to change existing social conditions and that such a change should be realized by limiting some existing rights and creating new ones. The discussion turned to the question of what rights should be limited or cancelled and by what procedure. Mr. COORAY suggested that the term "existing rights" should not include fundamental rights whether substantive or procedural. It should be made clear that interference should never touch basic human rights. Mr. SWAMINADHAN remarked that the problem has become a matter of wording of the rights which can be interfered with. These rights can be specified very easily as property rights. The meaning of the item under discussion in his interpretation is that uneven distribution of property should be adjusted. Sir GUY POWLES (New Zealand) and Mr. MARSH emphasized the importance of procedure in such adjustments, namely that in the realization of social and economic reforms procedures conforming to the Rule of Law must be observed. The CHAIRMAN warned that the term "interference" might lead to misunderstanding and so the phrasing "intervention in property rights" was adopted. The final wording of the conclusions of this debate is found under Clauses II and III.

3. Nationalization

Among specific measures tending to bring about adjustment of existing social and economic conditions, nationalization was discussed in some detail. The subject did not produce serious problems since in many countries of the Region there is a well developed court practice in this respect. Mr. Justice HIDAYATULLAH reminded the Committee that according to the Indian Constitution and legal practice specific rules govern nationalization and prescribe just compensation, though a constitutional amendment recently admitted nationalization without compensation. Messrs. AHMED, COORAY, DOOLE (New Zealand) and MARSH all agreed that compensation should be fair, just and reasonable, while at the same time compensation may in many cases fall short of the market price. Mr. COORAY suggested including in the text the qualification that compensation should be paid in an amount conforming to rules accepted by the United Nations. It was also agreed that compensation should be determined by an independent tribunal on the basis of "principles laid down by the legislature" as Mr. VENKATARAMIAH suggested. It was more difficult to define the competence to decide upon the necessity of nationalization. Such a decision involves both economic and political considerations. The suggestion of the Working Paper was that a democratically elected government should decide in the interests of the people, in which case it is assured that it is the people's sovereignty over its natural and economic resources which is exercised, and that the procedures will conform to the principles of the Rule of Law. The CHAIRMAN and U HLA AUNG expressed doubts concerning the term "democratically elected government". He said first that

every government claimed to be democratically elected, secondly that such a qualification might limit the scope of the basic principle and might open the door for arbitrary reactions, while it is obvious that the requirements stated in the item apply equally to nationalizations by a non-democratically elected government. With the above remarks and explanations, however, the original wording was retained. On the suggestions of Mr. DICKS (Hong Kong) amended by Mr. TUCK (Observer, U.S.A.) it was added that the same considerations should apply to other governmental action taken with similar purpose and effect. As examples for such actions Mr. DICKS cited cases where governments create joint management or joint ownership with private enterprises.

4. Land Reform

In the general part of the discussion Messrs. SWAMINADHAN and VENKATARAMIAH and Sir GUY POWLES emphasized the outstanding importance of the subject. Mr. FEDERSPIEL addressed a note of warning to the Committee concerning the inherent delicacies of the issue, whereas Mr. GROGAN said that the real problem consisted in the fact that land reform should be treated individually in every country. Taking up this idea, members of the Committee outlined the situation in their own country concerning land reforms.

Mr. MORICE (Cambodia) explained that in Cambodia there is no need for redistribution of land since there is ample uncultivated land and the peasants may acquire ownership of land by five years cultivation. In Burma, said U HLA AUNG, the tilling of the land also gives rights to the tiller after three years. The problems arose from the alienation of land to moneylenders which started under British rule but continued even after independence and the Land Nationalization Act of 1946. This land reform distributed land-holdings accumulated in the hands of foreign Moslim moneylenders among Burmese peasants. However, due to the lack of an adequate land credit system, moneylenders continued to rule the agrarian scene. At present the revolutionary government of Burma is experimenting with the collectivization of agriculture and the mechanization of big collective farms. These examples, as well as the example of Indian land reform cited by Mr. Justice HIDAYATULLAH, and the Korean Land Reform explained by Mr. SHINN, demonstrated very clearly that a mere distribution of land amongst peasants is utterly inadequate and misses its aim if it is not followed up by other measures or rules of development, amongst which an elaborate land credit system and the cooperative system were especially mentioned. In Ceylon, as Mr. COORAY outlined, the cooperative system is highly developed. The Cooperative Ordinance established a commission for cooperatives and a cooperative central bank, the importance of which could hardly be over-emphasized since nobody in South-East Asia wants to lend money to the peasants.

The discussion showed that land reform programmes in India and Pakistan abolished feudal landownership and had set ceilings for landholdings. It was emphasized that no specific rules can be laid down concerning the surface and ceiling of land holding since this varies from country to country, even from region to region and with the change in agricultural techniques. Mr. FEDERSPIEL reminded the Committee of the continuous changes in agricultural policy which make the drafting of general rules impossible. The ideal smallholding unit in Denmark had changed completely in the course of the last fifty years when Denmark had to switch over from grain production to dairy products. The RAPPORTEUR reviewed legal impediments in the way of land reform. In his view, the basic obstacle behind these impediments was the resistance of landowners and government officials who in many cases tended to show rigidly conservative attitudes. The best means to overcome these impediments was to enlarge the right of association for peasants in order that through democratic procedures they might obtain realization of their aspirations.

Mr. MARSH suggested grouping the complex problems of land reform under two headings. The first is the transfer of property rights to the peasants and the compensation of the former landowners. This is the stage of readjusting existing social conditions. The second aspect of land reform includes rural development projects to enable new owners to make an efficient use of their newly acquired holdings. This second aspect of land reform, to overcome practical difficulties after a completed land redistribution, may be decisive, and it was an important task for the Committee to consider in common the legal framework for efficient rural development programmes. Whereas it is impossible to lay down general rules for the first aspect of land reform, different types of rural development can be specified in the conclusions of the Committee and a given country may adopt from these recommendations whatever may be necessary in the given situation. A draft proposal concerning land reform programmes submitted by Mr. MARSH was adopted by the Committee after a short discussion and was inserted as Clause V into the conclusions. The outstanding importance of the land problem and the high priority which it should get was expressed in Clause IV which was adopted unanimously without debate.

5. Economic Planning and State Regulation of Economy

The problems of economic planning, price control, anti-trust legislation and the control of public economic development projects were all dealt with successively by the Committee. It was recognized that these measures all refer to the same sector of economic life. Mr. GROGAN even went so far as to suggest uniting in one clause all these institutions belonging to a common group. The CHAIRMAN,

the RAPPORTEUR and Mr. AHMED felt, however, that grouping them into different but consecutive clauses underlined the importance attached to them, and so this was accepted.

The importance of economic planning for developing countries was stressed by many participants. The RAPPORTEUR drew attention to the fact that planning in developing countries cannot be a carbon copy of Western models, but it should be adapted to local requirements. The ends and aims of planning should reflect the aspirations of the people in the given developing country and the solutions of the given economic and social problems should be genuine and not imported. The conclusions of the debate on this topic were adopted as Clause VI.

The suggestion that accounts be laid before Parliament on public economic development projects was adopted as Clause VII after a short discussion. Mr. COORAY suggested that it was imperative that full accounts of public income and expenditure should, when submitted to Parliament, be accompanied by the reports of experts who are independent of executive control and influence. Mr. VENKATARAMIAH outlined the relevant practice in Ceylon, India and Pakistan. It was generally agreed that state control of economic life as such was in accord with the Rule of Law if it was exercised in the interest of public welfare and if it resulted, as Mr. AHMED stressed, in fair and reasonable measures. Among specific aspects of state regulation, price control, control of private trade and anti-trust legislation were singled out to be included in the text of the conclusions. Mr. AHMED suggested that state trading in specific sectors of the economy should also be mentioned in this context.

The importance of boards for settling industrial disputes was emphasized by Mr. COORAY. On his initiative, a special clause, Clause X, was adopted recommending special legal machinery for the peaceful settlement of labour disputes. After some discussion a further recommendation in this clause concerning the ratification of relevant conventions of the International Labour Organization was also adopted. Sir GUY POWLES and Mr. MARSH drew attention to the extreme complexity of labour laws and emphasized that the implementation of international labour conventions might become extremely complex.

6. Efficient Administration

There was a general consensus in the Committee that the carrying out of development programmes depends to a high degree upon an efficient administration adequately equipped to cope with vast and complex social and economic problems. In order to be able to carry out economic and social development, developing states should have a strong executive. Mr. Justice HIDAYATULLAH said that it was also clear that vigorous actions of a strong executive might multiply the

possibility of violations of individual rights. From this aspect the problem was what remedies should be given against administrative decisions. The first part of the discussion was therefore centred around the review of administrative decisions. Sir GUY POWLES was at first of the opinion that in principle review should always be judicial, whereas Mr. Justice FERNANDO (Ceylon) questioned whether it should always be a judicial one. The French system of administrative law, which is in force also in Cambodia, provides, as Mr. MORICE explained, for review in every case before administrative tribunals. In the common law system there are no administrative tribunals and review cannot be limited to ordinary civil courts. Mr. COORAY wanted to enlarge the scope of review for all kinds of remedies. Sir GUY POWLES joined this view by recalling that in many cases non-judicial review can also be effective. Accordingly it was decided that the Conclusions should contain the principle that all administrative action should be subject to review, without specifying, however, the precise nature of the remedy.

Another requirement for administrative decisions was raised by Mr. VENKATARAMIAH. He insisted that administrative organs when taking decisions should communicate the reasons to the interested party. The principle is adopted by the Indian courts following a ruling of Justice VIVIAN BOSE (as he then was). Mr. AHMED was anxious not to burden administration too heavily by prescribing over-elaborate requirements for its functioning, but Mr. COORAY assured him that these requirements are confined to cases in which administrative discretionary power is being exercised. To clarify the line between remedies against arbitrary actions of the administration and cumbersome impediments slowing down efficient administrative action, Mr. MARSH stated that remedies should be designed in such a way as to limit their use for purposes of wanton obstruction of administrative decisions. Stating the reasons for a decision as a logical outcome of the Rule of Law, since the Rule of Law means the prevalence of reason, where as totalitarianism is its negation. He also reminded the Committee of the relevant conclusions of the New Delhi and Rio Congresses which dealt in depth with administrative action within the Rule of Law. Citing recent British legislation, he mentioned the Tribunals and Inquiries Act of 1958 which, following the recommendation of the Franks Committee, adopted the principle that the minister should give reasons for his decision on administrative appeals. The Committee then adopted the conclusion arising out of these debates as worded in Clause XII.

Another aspect of making administration efficient which was discussed in detail by the Committee was the conditions under which public servants are appointed and serve. Mr. COORAY emphasized that in order to obtain the proper and efficient functioning of the public service the best conditions should be obtained for public servants. Recruitment should be on merit, training up-to-date, remuneration sufficient to induce talented people to join the public

service and to assure a decent living for them. He advocated the recommendation for developing countries of the system of appointment adopted by Ceylon, Pakistan and India. In these countries an independent Civil Service Commission performs these functions satisfactorily. Mr. VENKATARAMIAH added that the system in question makes it possible to prevent ministerial attempts at political interference with appointments of the Civil Service Commission. In cases of such nature the Indian Constitution provided the possibility of bringing the grievance before Parliament. The question whether the functioning of an independent Civil Service Commission was compatible with the responsibility of parliamentary cabinet government was raised, and it was argued that, though such a Commission might function satisfactorily in the countries of the Indian sub-continent, to recommend its introduction generally would be going too far. Messrs. AHMED, COORAY and VENKATARAMIAH were anxious to adopt a conclusion which expressed without ambiguity the importance of the impartial shaping of "conditions of service" as Mr. AHMED put it. The Committee was unanimous in endorsing this suggestion and felt that it was essential in multi-racial or multi-religious developing societies that the appointment, promotion, dismissal and disciplinary control of public servants be determined without discrimination. It dropped, however, the recommendation of specific means for this purpose. The final outcome of the discussions is included in Clause XI.

Item Y of title 211 of the Working Paper suggested making governments responsible to the citizen for damages caused by reason of wrongs committed in the execution of public duties. Discussion of this subject showed that in Commonwealth countries generally there is no liability for actions done when performing a public duty. Mr. Justice Hidayatullah remarked that in India the situation was different and there existed a general liability on the part of the state with the exception of acts involving the exercise of sovereignty. Two cases were cited as examples decided by the Indian Supreme Court with Mr. Justice Hidayatullah sitting on the bench. The two cases showed that the Court decisions, while refraining from making the Government liable for everything that goes wrong, have drawn the limits of liability rather widely. Mr. COORAY outlined the development of governmental liability in Ceylon, which existed under Dutch Law, but was dropped under British rule when the Crown could be sued in contract but not in tort. Since independence the view emerged that the Crown should be liable both in contract and in tort, as was eventually enacted by the Crown Proceedings Acts of 1948. In legal systems following the French example, as Mr. MORICE explained, there is full liability for all administrative acts which are damaging the parties (*act préjudiciable en fait et en droit*).

Mr. MARSH recalled the deliberations and conclusions of the Delhi Congress on this topic which went much further than the discussions in the present Committee and made governments liable both in con-

tract and in tort. In the light of the above discussions, the Committee adopted the principle of government liability as embodied in Clause XIII.

7. Ombudsman Concept

Among efforts aimed to raise the efficiency of administration on the one hand and to protect the individual against possible mal-administration on the other, special attention was given to the Ombudsman concept. Sir GUY POWLES, the Ombudsman of New Zealand, outlined the basic principles of this concept. In his view three main characteristics typified the Ombudsman's office:

1. It is totally independent of every branch of state power. This characteristic distinguishes the Ombudsman's office from similar institutions in other legal systems such as the Procurator General of the USSR or the Complaints Bureau in Japan, which are organized within the executive branch.
2. The Ombudsman has full and untrammelled opportunity to investigate, access to files, power to summon witnesses.
3. His power is limited to addressing recommendations to competent organs without the power to decide a question or to execute a decision. At the same time the activities of the Ombudsman do not affect ordinary petitions of Members of Parliament, which retain their full use and effect.

In conclusion, Sir GUY reminded the Committee that institutions as such cannot be exported, only their underlying ideas, and consequently the Ombudsman system is bound to vary in each country. A lively and animated debate showed great interest for the Ombudsman concept. Mr. SWAMINADHAN and U HLA AUNG agreed on its usefulness. They stressed the need to adapt it to large countries since it was originally worked out for small ones. Mr. COORAY felt that in many countries there were fields of mal-administration which were not covered by institutional remedies. This gap could usefully be closed by the Ombudsman's activities. Mr. MARSH outlined the Bill worked out by "Justice", the British National Section of the International Commission of Jurists, proposing the establishment of the Ombudsman office in the United Kingdom. Mr. MORICE drew attention to an institution of the Kingdom of Cambodia, somewhat similar to that of the Ombudsman. The country has an Inspector-General of the Kingdom (Inspecteur Général des affaires du Royaume) who is a member of the Executive with the rank of a Cabinet Minister. He has the power to investigate cases, and deals generally with corruption. He may submit cases to a special commission (Commission d'assainissement) chaired by the Chief of State. The results of the debate were included in Clause XIV.

The Conclusions were then drafted and submitted by the Rapporteur to the Committee which adopted the final text (See page 181).

MEMBERS OF COMMITTEE III

Chairman: EDWARD ST. JOHN, Q.C., Australia
Vice-Chairman: Mr. Justice HENRY WIJEKONETAMBIAH, Q.C., Ceylon
Rapporteur: M. R. SENI PRAMOJ, Thailand
Secretary: Miss HILARY CARTWRIGHT, United Kingdom (I.C.J.)

MAURICE ASHKANASY, Q.C., Australia
Z. A. ZAIN AZAHARI, Malaysia
Miss THONGSY BOULOM, Laos
Mr. Justice CHARLES BRIGHT, Australia
NGUYEN XUAN CHANH, Viet Nam
N. J. V. COORAY, Ceylon
Prof. JORGE R. COQUIA, Philippines
E. A. G. DE SILVA, Ceylon
L. C. GREEN, Malaysia
PYONG CHOON HAHM, Korea
AHMAD BIN MOHAMED IBRAHIM, Malaysia
S. JAYAKUMAR, Malaysia
PHOTHIVONG KHAMMOUI, Laos
AKBAR HYAT MIRZA, Pakistan
AMELITO R. MUTUC, Philippines
N. S. NARAYANA RAO, India
Miss B. S. NORASING, Laos
Mr. Justice H. T. ONG, Malaysia
S. A. PADMANABHAN, India
H. F. M. REDDY, India
H. A. RAHMAN, Pakistan
NAI UTTET SANKOSIK, Thailand
V. ABAD SANTOS, Philippines
KHAMSOUK SAVADY, Laos
M.C. SETALVAD, India
F. KEITH SELLAR, Malaysia
G.S. SHARMA, India
Mrs. NGO BA THANH, Vietnam
LE TAI TRIEN, Vietnam
NAVROZ B. VAKIL, India
PHRA MANUVET VIMOLNART, Thailand
J.C. WHITE, New Zealand
D.R. WOOD, New Zealand
Y. S. SHELLEY YAP, Malaysia
Dato S. M. YONG, Malaysia

For Observers who participated in the deliberations of Committee III, please see List of Observers appearing at pages 95-98.

PROCEEDINGS OF COMMITTEE III

THE ROLE OF THE LAWYER IN A DEVELOPING SOCIETY

The proceedings of Committee III started with the reading of an introductory report by the Rapporteur, M. R. SENI PRAMOJ (Thailand):

“ In this Committee we are concerned with the role of the lawyer with special reference to the countries of South-East Asia. What part a lawyer can play in a growing community very much depends on the requirements of such a community; those requirements, in turn, are associated with the political, social and economic backgrounds and aspirations of the community itself. In this respect, our Committee may have to refer to the findings of Committees I and II for a proper foundation for our conclusions dealing with such matters.

While opinions as to the role of the lawyer in South-East Asia may well differ in that we are here dealing with extremely disparate material, it must be common ground that it can only emerge by giving consideration to some factors fundamental to the area. In this connection, I submit that freedom in this area, as anywhere else in the world, is like life itself. The more it is shared by a greater number of people, the more it grows.

My first fundamental factor is that it would be a mistake to think of the so-called developing countries in South-East Asia in terms of primitive or backward communities. Practically all the countries have had their own indigenous political, social and economic systems dating back to the time before the Rule of Law was conceived. However, one factor common to all the countries in South-East Asia is that one and all find or will find, sooner or later, that the force and penetration of Western materialism is irresistible. In spite of his long-established religious, social and economic background a South-East Asian will some day or another desire to ride in a motor car, tune in to the radio or switch on the T.V., not to mention the possession in his home of an ice-box or an air-conditioning system. The trend will also move gradually from a rural to an urban, industrialized society with all its materialistic implications. I submit, therefore, that the role of the lawyer will have to be considered in the light of such adjustments.

Secondly, the issue probably most directly relevant concerning the South-East Asian lawyer is whether he is going to have faith in the

Rule of Law itself. Before the impact of Western materialism, the economy in South-East Asia was rural and the form of government was largely feudal. At best it was some kind of benevolent monarchy or enlightened paternalism. Under such systems of government the people, practically always existing in isolation from the rest of the community, were left largely free in a primitive state of society, perhaps freer than peoples under democratic institutions. With the coming changeover to an urban and industrialized community, a readjustment must necessarily take place in every aspect of society, calling for greater emphasis on the individual freedom and human values guaranteed by the Rule of Law. I submit that in any country where people have come to live under a new and industrialized economy, the Rule of Law must necessarily become the Rule of Life. Such rule may break down from time to time through accidents of history, as occurred in Germany under Hitler, but if the Rule of Law is to serve as the true safeguard of individual liberty and human value, it will be the role of the lawyer to have the Rule of Law maintained or restored whenever it accidentally breaks down. In order for him to be able to do this effectively, the lawyer must genuinely accept the Rule of Law as the Rule of Life which he is prepared to defend, if necessary with his life.

However, in order to maintain the Rule of Law, the lawyer must know his true enemy. The Rule of Law fundamentally accepts individual freedom and human value as the dynamic facts of life. However, through impatience with the slow progress made under a system of government whereby the wishes and aspirations of all must be consulted, there emerged a new social concept, also a product of the Western thought, which mistrusts humanity. It places its confidence in a doctrine or a kind of social machine, which is really a by-product of Western materialism and the mechanical age. I am referring specifically to Communism which both in practice and theory is hostile to the Rule of Law. The whole world, both in the East and the West, has to face this common danger and the role of the lawyer must also be decided in the light of this new phase. Specifically with reference to South-East Asia, where the peoples have by and large been governed by some kind of paternalism or another, monarchic or otherwise, the danger is that they may easily switch over to this new mechanical paternalism which is Communism before they come to enjoy the benefits of the Rule of Law.

By way of provoking discussion, I submit that this Regional Conference of Jurists might take a step forward from the previous Congresses in regard to one important aspect of present world affairs. Western material civilization has not only brought us the amenities of life and the higher standard of living desired by peoples everywhere, both in the East and West, but it has also brought us the atomic bomb. Modern science has discovered so abominable a weapon of war that if, in the absence of proper checks and controls, it is let

loose with all its world-shattering potentialities, the mutations that result might change the human race into a school of centipedes. The lawyer must realise that contemporary international society is not organised to meet such a danger. International society is, in fact and at present, comparable to the national society at its early primitive stage, without law or order. The role of the lawyer, therefore, should be broadened to cover the danger to the world's existence as well. Without world law and order, human institutions, even more, human civilization itself, may be brought to nought.

With particular reference to South-East Asia, I submit that the role of the lawyer in its personal aspect is more onerous and crushing than anywhere else in the world. With the changeover from the rural to the urban society and with the system of power and government being entirely reorganized to meet the changing conditions, it will become the burden of the responsible lawyer to help establish and maintain the Rule of Law in the face of a slowly awakening peasant society. Against such mass inertia he will have to redouble his efforts.

In a country where the Rule of Law is already established, the lawyer plays no role at all except that of making money, but in a changing community beset by democratic aspirations on the one hand, and elements hostile to the Rule of Law on the other, the lawyer may find that he has to play the role of a martyr. Taking conditions in South-East Asia as they are at present, the responsible lawyer will have enough on his hands even to see that the Rule of Law is properly introduced, established, defended and maintained.

About 80 years ago, in the reign of Rama V, the question was put to the consideration of the Council of the Realm whether or not it was time to introduce Western democracy to the people. Under the Ram Kamhaeng Constitution of 1190, the people were represented by their paternal king who not only guaranteed them their rights but also had the means of an absolute monarch to enforce such a guarantee. So it came about that Siam had her own peculiar Rule of Law under a system of government of the people and for the people. But the system differs from the democratic form of government as we understand it to-day in that Siam's democracy was run by the Thai king under a kind of one-man democracy, with the king representing his people. However in a Western popular democracy, the sovereign power is separated and distributed among the Legislature, the Executive and Judiciary. As a result, the effective arms and hands of government are entrusted to the Executive, while the hearts and tongues only remain with the people's representatives sitting in the Legislative Assembly. Considering the problem in the Council of the Realm, King Rama V is understood to have expressed certain misgivings about the future welfare of his people under such a new-fangled system of government. His words have been put into Klong which is an ancient form of Thai poetry. I ask your leave to cite them in English translation because I think they are truly provocative and

have a very direct bearing on the problem we are discussing. The quatrains were written in Thai by Prince Phityalongorn in 1944 when our country was under alien enemy occupation during the last world war. It was also governed at the time by a military dictatorship under which princes and commoners alike had been sent to prison for saying much less.

In freedom	without supplement,
Progress is suspended	in ignorance.
Power apprehended	for power
Upsets power balance,	only to destroy.

Ere long tyranny tide	will turn.
Speak then who would burn	their tongues.
Its then men will learn	predicament,
To dare or to funk	under democracy.

Under the tide of tyranny which turned at some time or another during the past 30 years of Thailand's democratic regime, there have been a few lawyers who, after having consulted their own souls and consciences, chose to burn their tongues and suffer the consequences. But there have been so few such lawyers. It can only be hoped that under the inspiration of this Conference there will be more."

The RAPPORTEUR was followed by the Vice-Chairman, Mr. Justice TAMBIAH (Ceylon) who outlined the historical developments leading to the present situation facing the countries of the Region. He stressed that, unless the Conference suggested ways and means of ending the appalling conditions in the Region and educating the masses, any rules that they might suggest or resolutions that they might pass for the preservation of democracy would be futile.

He said that those who believed in the democratic process had to show that economic and social justice could be achieved without recourse to totalitarian methods. Conscious efforts had to be made to evolve a system under which the under-privileged would have a stake in their country, but concentration of all power in the hands of the state would inevitably lead to naked dictatorship and the suppression of freedom. Widespread distribution of private ownership of property among the masses, the development of the private sector and agrarian reforms were some of the essential steps that should be taken to preserve democracy.

In a fast-changing pattern of society, the lawyer should not regard himself as a mere workman who was content to get his fees and do the work that had been assigned to him. He had a nobler function to perform. The skill and knowledge that he acquired during the course of his long apprenticeship should be placed at the disposal of mankind. A lawyer should regard himself as a social engineer and one of the architects of the nation; he should therefore interest himself in political and social matters. Lawyers who enjoy their present advantages

in a democratic form of society should realise that these advantages would cease to exist in a totalitarian state. Therefore, if they wished to preserve their independence, and to preserve human freedom, they should help society to preserve a democratic form of government.

In these circumstances, he suggested tentatively the following points for discussion and adoption:

(i) It is the duty of lawyers to study agrarian reform in order to bring about social and economic equality between the privileged and the under-privileged in a changing society.

(ii) It is the duty of lawyers to study schemes such as the Development Savings Banks envisaged in the Loganathan Plan, and other similar schemes adumbrated by economists, and to suggest ways and means of distributing wealth among the under-privileged so that they may have a stake in the industrial and agricultural ventures of their country.

(iii) It is the duty of lawyers to organise an effective system of legal aid under the ægis of the State so that all may be equal in the eyes of the law. They should not adopt any illusory scheme which does not give substantial benefits to the majority of poor citizens of a country.

(iv) In many countries of South-East Asia, there are religious, racial, linguistic and caste minorities. If by the Rule of Law is meant equality before the law, a person should not be discriminated against on any of these grounds. Lawyers who are pledged to observe the Rule of Law should work for the removal of any form of discrimination between man and man.

(v) It is the duty of lawyers to propagate among the masses the principles set out in the Universal Declaration of Human Rights and to propagate the fundamental human freedoms.

(vi) It is the duty of lawyers to take an interest in international relations and world tensions, to study the causes of tension in various countries, to suggest ways and means of avoiding war, and to spread the doctrine of the Rule of Law among all nations.

(vii) It is the duty of lawyers to safeguard human rights in their own country and see that social justice is done to religious, social and class minorities. (The proposal to introduce regional human rights organisations for Asia and South-East Asia is a welcome scheme).

(viii) It is the duty of lawyers to assist the state in any form of social legislation within the framework of democratic government which aims at the amelioration of the conditions of the working class.

(ix) It is the duty of lawyers to agitate for reform through constitutional means to achieve the introduction of fundamental

rights to enable the minority and majority to have equal justice in the eye of the law.

(x) It is the duty of lawyers to suggest to various governments humanitarian and legal methods to end statelessness in their own countries.

(xi) Lawyers should take active steps to harness and educate the youth of their country to work for the preservation of the Rule of Law.

(xii) To achieve these ends, lawyers should work individually and in groups. The lawyers belonging to the local national section of the International Commission of Jurists should take active steps to implement these resolutions and issue yearly bulletins in which the work done for the year should be stated.

Mr. M. ASHKANASY, Q.C. (Australia) then put forward ten propositions as a possible basis for the Committee's deliberations:

1. Every lawyer in every country should regard it as a deep moral obligation resting upon him at all times to uphold and advance the Rule of Law in whatever sphere he may practice or in which he has influence.
2. Accordingly, every lawyer should acquaint himself with the principles and rules embodying the Rule of Law as expounded at the successive conferences of this Commission in Athens, New Delhi and Rio.
3. This task may be performed by his expounding and working for the Rule of Law in the spheres of advocacy, legal practice generally, law teaching, writings upon law both technical and lay, in public life, in legislation, exercise of judicial functions and in administration.
4. Lawyers should carry out these duties regardless of whether they may bring them into disfavour with authorities or to be contrary to current political propaganda.
5. A most important aspect of the maintenance of the Rule of Law is the availability of lawyers to defend the civil, personal and public rights of all individuals and the readiness of all lawyers to act for those purposes resolutely and with unlimited courage.
6. Part of this requirement involves the provision of legal assistance to the poor or destitute and when such provision is made all lawyers should give it their active assistance; and where no such provision is made lawyers should, where this is necessary to prevent oppression or injustice, provide their services voluntarily.
7. Every lawyer in a judicial or an administrative post should in the exercise of his power endeavour at all times to act in accordance with the Rule of Law.

8. Lawyers should endeavour to procure or maintain the power of judicial authorities over administrative authorities.
9. The independence of the judiciary must be maintained without qualification and at any cost.
10. Provision should be made for the teaching and training of an adequate number of lawyers for the effective execution of the foregoing principles.

The Committee then proceeded to the general discussion of the subject before it, followed by consideration of a number of particular topics. The following matters were dealt with in the course of the Committee's work, and both general and particular discussions are, for purposes of clarity, summarized under the appropriate headings:

1. The Lawyer's Responsibility to Society

The discussion on this subject centred around the question whether the lawyer, as a lawyer, had any special role to play outside the specifically legal field.

Mr. Justice BRIGHT (Australia) suggested that two sorts of question faced the lawyer in a developing country to-day, first of those that must be posed to all educated men, and secondly, those that must be posed specifically to lawyers, and which must be answered by lawyers. The questions of the first category were: How much representative government can a country afford? To what extent should the views of an illiterate community be led by an enlightened elite and to what extent should they be left to be influenced by demagogues? How much freedom to solicit votes should be left in a democratic society to those whose aim is to overthrow it, and, if there is to be control, who is to exercise it? What, if anything, is to be done when economic power is in the hands of a few?

Questions of the second category were: What right and duty does a lawyer have to reject assistance to those acting against the best interests of their country, for example by seeking to concentrate power in their own hands? What can be done to restrain the activities of those lawyers giving improper assistance to such persons, in cases not justifying disbarment?

The CHAIRMAN, Mr. EDWARD ST. JOHN, Q.C. (Australia) suggested that a clear division might be made in the conclusions of the Committee between the role of the lawyer qua lawyer and the role of the lawyer as an enlightened citizen.

This proposal was strongly opposed by Mr. VAKIL (India), who stated that every lawyer was a citizen and he could not understand the distinction. There had been a long discussion on this subject at Rio, and no distinction was then made between the role of lawyer and citizen; the lawyer was a citizen, first and last. In his view, it was necessary to take the Conclusions of Rio further. It was not sufficient

to think of direct work in the field of legislation, administrative law, legal aid and education. The lawyer must be concerned with social change. In a situation of tragic over-population and shortage of raw materials, the lawyer must break away from his office and his practice, and use every opportunity to disseminate the principles of the Rule of Law, even where they were only incidental. It was his duty to work for the implementation of these principles through every legitimate avenue. In a later speech, Mr. MUTUC (Philippines) restated the wider responsibilities of the lawyer to society and emphasized the urgency of positive action by lawyers in fighting and overcoming poverty, injustice and inequality if they were to be true to the principles in which they believed and to build and preserve societies in which those principles would find full expression.

Particular emphasis was placed by supporters of this view on the special needs of developing countries which posed special responsibilities. Mr. VAKIL said that in developed countries it was not necessary for the lawyer to play such a role, but in developing countries all agreed that it was essential. They had a particular problem of poverty, ignorance and inequality, and should march forward from the Conclusions of Rio. In the special circumstances of the under-developed countries, it was almost impossible to talk of freedom or human rights to people who were starving, and futile to do so unless they took steps to promote economic justice. Mr. JAYAKUMAR (Malaysia) said that the law must be considered as an instrument of social change and that in the countries of the Region they had special problems which put the lawyer's role in a startling light. He was a member of society, and thus his duties as a citizen were vital. The question was, how could he use his training to play his part as a citizen? He had a duty to take into consideration social and other factors, and could be a guardian of social change. Professor SHARMA (India) said that in India the group of the lawyers, socially conscious and trained, was the only uncommitted group. Politicians and economists had interests to further. Therefore the lawyers alone could really reach people and quantify their demands. They should educate the masses in democracy. The second function of the lawyer, suitably trained—and he must have a social science training—was to see that basic channels of public opinion were in existence, quantifying the peoples' demands and bringing them to the legislator's attention. Mr. PADMANABHAN (India) said that under-developed countries had their own problems, and these problems forced the lawyer into a new role. The lawyer must protect the interest of the people. The conclusions of Rio, in particular those set out in para. 217, sub-paras. 2, 4, 5 and 7 of the Working Paper were important from the Committee's point of view. Only the individual lawyer could spread these principles among the masses, and he must do this in the way appropriate to his community.

The CHAIRMAN said that the lawyer as such was not a policy maker. Yet in fulfilling his duty as a citizen, he had a special knowledge and

skill which he should put at the service of the community. Unless lawyers took up the challenge, there might be nobody else to do it. They were particularly well qualified to see the dangers to and encroachments on the Rule of Law, and the dangers lying in inequality and poverty. The legal profession had often been the buttress of the established order. Now it was suggested that as a citizen the lawyer should move in the other direction, take an interest in his society and take a lead in reform lest it go by default. Mr. DE SILVA (Ceylon) said that economic reforms might affect the Rule of Law, so that lawyers must be concerned with them.

The opposite point of view was first put by Mr. ASHKANASY (Australia) who expressed the view that it was not the role of the lawyer to advocate any particular system of society, but merely to see that the Rule of Law operated within the society in which he lived. The Conclusions of the Committee must not enter upon controversial political fields, or the reputation of the International Commission of Jurists would be compromised. Extending the role of the lawyer into the political field would be a matter for the Plenary Session of the Conference, and the Committee should confine itself to the role of the lawyer as such. He was strongly supported by Professor GREEN (Malaysia) who stated that it was not the role of the lawyer, as a lawyer, to concern himself with social and economic problems. This was the role of all educated citizens. The lawyer's task was confined to the fields of law and legislation, and to seek to extend beyond his proper area of expertise was a dangerous undertaking. The lawyer had no duty to initiate social progress. He was not an essential policy maker. If the lawyer usurped that function, he would become a servant of policy and not of the law. As a citizen the lawyer could act as a policy maker, but not as a Lawyer.

The responsibility of the lawyer to protect the Rule of Law, which is always in danger even when it exists, was emphasized by the RAPPORTEUR. A period of transition, such as the Region was undergoing now, involved great problems, of the masses and of industrialization. The masses were in a state of inertia, and unawakened politically, and an easy prey to "misguided democracy". It was important to pinpoint the peculiar factors in the Region. First, the oriental looks to the saviour, not the saving principle; it is the man, not his principles, that counts. Secondly, there was everywhere the danger of Communism. Thirdly, lawyers do have weight with public opinion, and often have the courage to speak out. The lawyer must step out of his ivory tower and use his position for the good of society. Mr. CHANH (Vietnam) agreed that the lawyer should devote himself to the maintaining of the Rule of Law. He further pointed out that in the Region the lack of a middle class was a fundamental element; there was only a very limited elite, and the masses formed the vast majority. Therefore the problem of creating a true middle class was a vital one, because a middle class must be built up to form a link with

the masses. The true feelings of the people were very little known, and the elite did not know what its aspirations were. This was a field in which lawyers could play an important role.

Mr. IBRAHIM (Malaysia) stated that there was a duty on lawyers to show that the Rule of Law could work for the progress of a developing country. This proposition could not be accepted as axiomatic and the question would be asked, is the judicial method, with its emphasis on legality, the best method of getting things done? Against it, objection could be raised to the use of legal technicalities leading to injustice and the tendency of lawyers to rely on and emphasise technicalities rather than the substance of the issue. It was important to get the Rule of Law accepted.

2. The Lawyer in his Practice

By way of introduction, Mr. KEITH SELLAR (Malaysia) said that this Committee could not go further than Rio. But if the lawyer wished to implement the conclusions of Rio, he must heal himself before he could go any further; he must rebuild his image with the people before he could expand his role. Many lawyers were going out to practice in country districts without any experience of working in a good firm and they did not enhance the image of the lawyer.

The first question to be considered was that of professional ethics. While lawyers may well be unable to influence legislation, it would be possible to establish a standard of professional ethics; it was a subject in which no government was interested, and lawyers could achieve something by strengthening ethical standards without governmental interference. It was vital to deal with the factors that tarnished the image of the lawyer with the public, and they could not move further as social engineers until they had put their own house in order. Meetings could be arranged between lawyers from different countries, especially with those from Australia and New Zealand, where they could discuss ethics in particular, thus making sure that lawyers had the high standards that were required before they could gain the respect of the people. How was one to project the image of the lawyer? One of the things that had tarnished his image most was experience of lawyers who had entered politics and used their office to acquire money. A lawyer who entered politics and held a paid office should be required to cease practice.

Strong support of the need to take effective steps to enhance the image of the lawyer was expressed by Professor SHARMA, who emphasised that until the lawyer was trusted by the common man he would not achieve anything. Lawyers must therefore work out ways to project a new image of themselves so that they would gain the confidence of the public. It was a question of solving two problems; first, how to use modern social techniques to awaken a respect for and trust of legal institutions; and secondly, how to create a new

structure of legal education so that lawyers presented a picture that the public would trust. Mr. HAHM (Korea) pointed out that in many countries the law was unpopular. The legal system was a Western imported one, in sharp conflict with the traditional way of life. The lawyer should know the traditions of his country and try to harmonize the imported legal system with the indigenous traditions. Mr. Justice ONG (Malaysia) said that in order to promote the Rule of Law it was necessary to project the image both of lawyers and of the judiciary, and to consider the use of appropriate propaganda for this purpose. Professor GREEN commented that if the International Commission of Jurists could produce a general advertisement for the profession that might improve its image.

Mr. SANTOS (Philippines) asked whether there was any way in which lawyers could be encouraged to practice in rural areas. Since lawyers tended to concentrate in towns, people living in rural areas were often unable to get competent legal assistance. In response to a question raised by Mr. ZAIN AZHARI (Malaysia) as to whether the interests of justice under the Rule of Law required that the national language of a state be introduced and used in the legal system, Mr. ASHKANASY said, after a discussion on whether the Committee should consider the role of language in maintaining the Rule of Law, that it was a lawyer's duty to ensure that adequate interpretation was available in all courts, so that all individuals understood what was going on, but that to go into the use of language generally went too far and involved political and national controversies. He also proposed that consideration be given to the desirability of the separation of the professions. Pressures on the barrister to maintain high standards were strong, and as he was in the public eye more than the solicitor, his image was particularly important.

Professor GREEN stated that it was important to project the concept that the lawyer is there for the protection of the individual. If that idea could be got across, much would be achieved. Mr. MIRZA (Pakistan) recalled the duty to provide free legal aid. Mr. RAHMAN (Pakistan) emphasised the need to produce a code of ethics for the practising lawyer to follow.

3. The Lawyer and the Administration

Mr. IBRAHIM gave a short outline of the position in Malaysia. He said that there were quite a number of lawyers in the administration and acting as legal advisers to various boards. There was also a legal department which advised other departments on legal matters. They had also found lawyers to be very useful members of various boards. Lawyers also had an important part to play indirectly in ensuring a proper exercise of the powers of the administration. For example, quite apart from litigation, committees of the Bar had made representations as to the way in which particular administrative functions

were carried on. In their industrial tribunals, on the other hand, the view had been taken by consent that a lawyer-like approach was not desired; the members of the court were not lawyers, and lawyers had no general right of audience.

Professor SHARMA asked how the skills of the lawyer could be used in the administration. How could the legal profession have an effective voice in high level executive policy? Could one direct those responsible for administrative policy so that high level officials did not take arbitrary decisions in the exercise of their discretion? Judicial review had not been able to lay down rules to check this. Mr. COQUIA (Philippines) said that in the Philippines important posts were in practice filled by reference to political considerations rather than considerations of merit. Nevertheless the Bar examinations were regarded as a qualification for the public service. Mr. COORAY (Ceylon) said that in Ceylon a large number of junior lawyers obtained employment in governmental boards, and the question arose whether they could appear in court. It was eventually decided that they could do so in connection with cases of their department.

Professor GREEN drew attention to the danger of the lawyer in the administrative field indulging in face-saving rather than law-promoting, for example when a mistake had been made. He agreed that lawyers should be brought into the administration, but they should not descend to becoming administrators with the administrative attitude of mind; they must remain lawyers, adepts of the Rule of Law. Mr. VAKIL agreed that the lawyer must not become a mere administrator: the role of the lawyer must be interpreted in the widest possible terms. Mr. Justice BRIGHT mentioned one rule of universal validity: however honest they might be, it was not right to make lawyers in the administration judges between their departments and the members of the public.

Mr. NARAYANA RAO (India) said that administrative tribunals played a very important role in determining the rights and liabilities of parties, and the Committee should insist that lawyers should be permitted to appear before them. Professor GREEN said that that principle should extend to all aspects of the administration of justice, and include professional bodies with statutory powers. Mr. ASHKANASY agreed that it was of the utmost importance to the Rule of Law that all litigants should have a right to be represented by a trained advocate, and, together with Mr. VAKIL, emphasised that administrative tribunals should be open to judicial review.

4. The Lawyer's Role in the Field of Legislation

The RAPPORTEUR stated that lawyers should not merely suggest amendments to existing laws, but should take the initiative to promote new legislation in appropriate fields, for example, labour law. In the social field too, lawyers, especially women lawyers, were active in the

field of social legislation. He then gave an account of the role the lawyer had played in Thailand in this field. The courts had also played a positive part by annulling unlawful laws. Law teachers had also played a part; they had sometimes stimulated courts to action. A system of checks and balances was necessary. Very often the lawyer had not much opportunity to act by way of legislation. If he were in a position in which he could influence it, he should bear in mind the principles of the Rule of Law. The Conference could bring to lawyers an awareness that they had a responsibility in this field, and by exercising it could play a valuable part in their society.

Mr. HAHM emphasised the importance of ensuring that, when western legal systems were adopted, they were suitably modified to harmonize with local traditions and practice, and the VICE-CHAIRMAN pointed out that this was a field in which the lawyer was an expert, so that his aid was sought. Mr. WOOD (Australia) said that as far as possible laws must be available in a language which the people can understand. The draftsman of legislation should be a lawyer and a well-informed one. He had the opportunity to some extent of guiding policy and seeing that the Rule of Law was observed in the formulation of legislation.

There should be a standing law reform committee in every country. However, it should not be concerned with social and economic change, but should confine itself rather to the "technical matters", and the VICE-CHAIRMAN suggested that lawyers' associations should form sub-committees to study the laws in operation and propose reforms. Some laws were not suitable to present conditions and changes needed to be made. There were many other problems that needed to be faced, for example the unequal distribution of wealth and the need for agrarian reforms.

Mr. PADMANABHAN said that in the field of legislation there were two problems: first the initiation of new legislation, and secondly the reform of existing legislation. In the latter field, the lawyer certainly had a role. So far as social reforms were concerned, this often affected very ancient personal laws, and lawyers who administered them had a special duty to ensure that what was still of value in them was not overlooked. In the field of subordinate legislation, too, lawyers had a duty to be vigilant.

Mr. NARAYANA RAO said that it was the lawyer's duty to see that legislation was not introduced restricting the citizen's liberty. Further, lawyers should use their influence on legislators to secure changes in the laws when they were clearly necessary.

The extent to which lawyers should take the initiative in seeking changes in the law was largely dealt with in the discussion on the lawyer's responsibility to society, but Professor GREEN again stressed that in his view, while the lawyer had a function in draftsmanship and law reform he had no function of social initiation. That was the function of the citizen, the social scientist and the economist, with the

lawyer as an adjunct. The lawyer had no duty to initiate social progress. His function was to give a framework and legal language to the proposals brought forward by others; he must provide the framework of the institutions. Mr. ASHKANASY expressed complete agreement with the view of Professor Green. Professor SHARMA, disagreeing, said that their point of view showed a distinction between their attitude and that prevailing in the countries of South-East Asia. It was the lawyer's job in those countries to direct and advise policy makers or to be one himself, and to try to see at the level of implementation of policy, that is legislation, that it was not arbitrary. Mr. VAKIL pointed out that experience showed that well-trained and active lawyers were in a unique position to take an active lead in the field of legislation, by reason of their training and experience and pragmatic approach. Who, he asked, was better qualified to suggest reforms in taxation law than a leading tax lawyer?

Mr. Justice BRIGHT reverted to the subject of reform. When there was an aroused social conscience, he said, the lawyer could go along with the government for reform. But under a regime that was autocratic, to say that the lawyer must initiate reform meant that he must lead a revolution.

5. Legal Education

Professor SHARMA said that there was a consensus that legal education must be the same for practitioners, teachers and others. It must be broad-based. Every law student must be exposed to the problem of reconciling industrialized society with his own indigenous civilization. There was a need for a special course, which could be built around history, and for imaginative training to come to grips with the problems and values of society today. The law student must be trained as a good decision-maker, and this could only be done by teaching all subjects in the framework of the social and economic situation of the individual country. The comparative method, too, was essential, bringing in social and economic perspectives.

On the question of which techniques would best train the mind to appraise values and adjust to the pressures of society, he expressed the view that the emphasis should not be on the lecture method; the case method should be increased as should seminar discussions. The biggest problems were the apathy of the student and the huge numbers, many of whom were incompetent. There was a need to limit numbers.

Then there was the problem of how to find opportunities for a properly trained lawyer in society. He often needed further training before he could play a useful role, and post-degree courses were needed on special topics such as labour law and tax law, so that the lawyer could make a contribution to specialized fields.

Mr. VAKIL said that legal education must be effective to produce adequate lawyers. This meant first providing sufficient incentives and

opportunities for teachers of law to function effectively, and secondly that there was a need for better training for teachers of law. It was important to take other things into account.

Mr. CHANH drew attention to the problem of the shortage of law teachers, who were disproportionate to the number of students. Efforts should be made to broaden the educational staff of faculties of law, and practising lawyers should be prepared to teach part-time. There were material difficulties in the way of lecturers; they were very badly paid, while lawyers and judges were well paid. Many lecturers were in a very difficult position. If the countries of South-East Asia sought to encourage lawyers to devote themselves more disinterestedly to the good of their country, consideration must be given to the status and prospects of teachers of law. Dato YONG (Malaysia) said that in Malaysia the Bar Council supplied a panel of senior lawyers lecturing in the legal post-graduate courses of the university.

The part legal education had to play in producing lawyers who would earn the respect and confidence of the public was emphasised by Professor SHARMA and Mr. SANTOS. Mr. MUTOC said that it was through legal education that the principles in the Working Paper should be inculcated. Legal education should open up new horizons, teach new subjects, for example international finance and the promotion of international trade.

Mr. RAHMAN asked what concrete steps were needed in the law schools to produce lawyers aware of the Rule of Law problems. A special course could be set, or law teachers could be called upon to inculcate these principles in their courses generally. Mr. VAKIL suggested that in legal education the Rule of Law could be introduced as a new subject, and should be properly taught. The VICE-CHAIRMAN pointed out that there were practical difficulties in making the Rule of Law a special subject; it was better not to do so. It should be propagated by local bodies of lawyers in each area. Professor GREEN also opposed the teaching of the Rule of Law as a special subject. It was quite impracticable and unrealistic. The principles of the Rule of Law could only be communicated in the teaching of other subjects, all of which should be taught in the light and spirit of those principles. Mr. ASHKANASY said that legal education must have woven through it the principles of the Rule of Law, whether specifically or incidentally. The influence of lawyers could be extended to a much wider field. In the past, for example, all educated men joined the Inns of Court. The teaching of legal principles should be extended to the non-lawyer, and a subject should be introduced as part of a general liberal education, entitled "An outline of the general principles of the Rule of Law." This would help remove suspicion of the law. Every university should introduce such a course. A single textbook modified for each country might be sufficient for all South-East Asia.

Mr. HAHM, supported by Mrs. NGO BA THANH (Vietnam) proposed that the International Commission of Jurists should seek to establish

a South-East Asia Law Institute to which teachers of law could come for special training. On the proposal of the Chairman, a sub-committee was set up to consider this suggestion, and to prepare a draft conclusion relating to legal education. Professor Sharma was appointed Chairman, and the members were: Mr. Chanh, Mr. Hahm, Mr. Mutuc, Mrs. Thanh and Mr. Jayakumar (Secretary).

6. The Lawyer in International Relations

Mr. WHITE (New Zealand) said that it was the lawyer's responsibility to show how the Rule of Law could be applied to settle disputes between nations. There was a challenge to lawyers to spread the principles of the Rule of Law; it was a common denominator jumping national boundaries. However, direct action in this field would go somewhat beyond the work of the International Commission of Jurists. Because of the basic concern of the participants at the Conference with the law in their own countries, they need only give their support to the wider interest of lawyers in international relations, and note that other organizations were concerned with the field of international law.

Professor SHARMA said that it was a vital necessity in the field of international law to awaken lawyers to the part law could play in international relations. Mr. MUTUC said that while international relations were a matter of government policy, and primarily extra-legal, lawyers could write and mould public opinion to ensure that legal steps were taken where principles of law were involved. They could seek to influence those responsible for decisions in the political field.

7. Organized Bodies of Lawyers

Dato YONG introduced the subject by outlining the part that organized bodies of lawyers played in the life of Malaysia.

The VICE-CHAIRMAN said that legal education should be taken into the sphere of activity of organized bodies of lawyers, who had a responsibility in this field. Mr. NARAYANA RAO adverted to the function of the Bar Council to supervise legal education and prescribe courses for bar students. Mr. Justice BRIGHT said that legal education was indivisible. It goes on throughout life, and lawyers have to be reminded of the principles underlying the practice of their profession.

Mr. ZAIN AZHARI said that in some countries of South-East Asia certain repressive laws were inconsistent with the Rule of Law. Bar associations should try to have such laws repealed, or at least ensure that their application should be such that they are not too repressive on those affected.

Mr. ASHKANASY said that the functions of the organized bodies of lawyers were for the appropriate governing bodies of the legal profession to decide. There were dangers in trying to tell them how to conduct their affairs, and such a step should be avoided. It might bring the International Commission of Jurists into disfavour. Mr. WHITE suggested that the participants at the Conference should try to enlist the support of lawyers' organizations and encourage them to get in touch with the International Commission of Jurists and other international bodies. They should also be used by specialized bodies as a source of information about conditions in their respective countries.

On the basis of the Committee's discussions, draft Conclusions were prepared by a drafting sub-committee and the sub-committee on legal education, which were adopted, after further discussion and a number of modifications, by a final meeting of the Committee. (See page 185).

MEMBERS OF ADVISORY GROUP

Chairman : SHIGERU ODA, Japan
Rapporteur : F. A. TRINDADE, Malaysia
Secretary : KAREL VASAK, France

SIRIMEVAN AMERASINGHE, Ceylon
JOSÉ W. DIOKNO, Philippines
Miss M. R. SERMSRI KASEMSRI, Thailand
JOHN B. PIGGOTT, C.B.E., LL. B., Australia
M. P. CHANDRA KANTA RAJ URS, India

REPORT OF THE ADVISORY GROUP ON HUMAN RIGHTS REGIONAL CONVENTIONS AND COURTS FOR ASIA AND THE PACIFIC AREAS

The Advisory Group appointed at the First Meeting of the Plenary Session met for five sessions on February 15, 16, 17, and 18 1965.

At the first session on February 15 it was agreed that the four matters mentioned in paragraph 254 of the Working Paper should be examined in an attempt to give as far as possible direct answers to the questions posed. The four questions examined were as follows:

- (a) whether there should be one or more conventions for Asia;
- (b) which States in Asia—and the Pacific—would be likely to consider such a project favourably;
- (c) which State or States would be prepared to take a positive initiative in the matter;
- (d) what steps could be taken, as a follow-up of this Conference, to get the idea “ off the ground ”.

In relation to question (a), the general consensus of opinion was that there should only be one Convention for States in Asia. It was emphasised that other States in the Pacific area might reasonably

wish to accede to such a Convention. The Group were of the unanimous opinion that only political and civil rights should first be dealt with by such a Convention because there would be difficulties, on account of differences in existing economic, social and general conditions in the area, in concluding a Convention for the protection of economic, social and cultural rights at this stage.

In relation to questions (b) and (c), the Advisory Group was of the opinion that almost all the States in the region would be likely to consider such a Convention favourably, if limited to political and civil rights and with an acceptable method of enforcement. The Advisory Group was of the opinion that States having the greatest possibility of approach to all the States in the area would be in the best position to take an initiative in the matter. However, it was felt by the entire group that an authoritative answer to questions (b) and (c) could only be given after a further study and after approaches had been made to the Governments of the States in the area. In view of this, the Advisory Group recommends the creation of a Standing Committee to examine further the questions posed in Paragraph 254 of the Working Paper with particular reference to subparagraphs (b) and (c) thereof. This recommendation is embodied in the draft resolution appended to this report.

In relation to question (d) the unanimous opinion of the Group was that the creation of the Standing Committee would be a major step towards getting the idea " off the ground ". The Advisory Group would also recommend national sections of the International Commission of Jurists to take all steps to promote and encourage the adoption of the Convention as soon as it is drafted.

In accordance with its terms of reference, the Advisory Group considered the possibility of the establishment of a Court of Human Rights in the area. It was the view of the entire Group that there might be difficulties in getting States to accept the idea of a regional Court at this stage. It was emphasised that States in the area had a tradition of settling disputes through the good offices of intermediaries and the Group felt that the Standing Committee, when set up, should pay particular attention to methods of settling disputes by means of conciliation and arbitration, a method which it was felt was especially suitable to the region, and would serve as a valuable adjunct to a Court of Human Rights which should be established as soon as there are conditions conducive to its establishment in the area.

Having considered the question of regional conventions, the Advisory Group turned its attention to measures which might be taken now to strengthen the United Nations machinery for the protection of human rights. In particular the Advisory Group considered a proposal for the setting up of a United Nations High Commissioner for Human Rights with a status analogous to that of the United Nations High Commissioner for Refugees. The functions of a High Commissioner for Human Rights, in order not to offend

national sovereignty susceptibilities, would have to be limited to a critical examination of governmental, periodical, and other reports on Human Rights, and to reporting to the Economic and Social Council and to the General Assembly of the United Nations. The important aspect of this proposal is that the High Commissioner should be absolutely independent of all political pressures and should be free to report objectively on systematic violations of human rights wherever they occur. This proposal has been formulated by a group of experts from a number of international non-governmental organizations working in the human rights field. The Advisory Group considered that this proposal was one which would be of immediate value pending the adoption by the United Nations of the Covenants while, at the same time, such a proposal would serve as a useful adjunct for the supervision of the application of the Covenants, if and when adopted.

A draft resolution embodying the recommendations and suggestions of the Advisory Group is appended to this report*. In relation to the last paragraph of the Resolution, the Advisory Group suggests to the Commission to request the Standing Committee when constituted to examine the following matters related to the proposed regional Convention:

- (a) The political and civil rights to be protected by such a Convention;
- (b) Which economic, social and cultural rights could be included in this or a separate Convention;
- (c) The area or areas of the region in which such Convention could begin to function;
- (d) The method or methods of implementation to be provided by the proposed Convention and the examination *inter alia*, of the possibility of embodying in such Convention, in regard to inter-state disputes, provisions for the establishment of:
 - (i) Machinery for conciliation and/or arbitration, as a specially suitable method for settling such disputes in this region,
 - (ii) Machinery for independent on-the-spot investigation and fact finding,
 - (iii) Machinery for the setting up of a regional Commission or a regional Court of Human Rights or both;
- (e) The method or methods of implementing on a regional level the guarantees embodied in the Convention in regard to individual persons, including the methods suggested for the solution of inter-State disputes;

* see page 191. At the plenary session on February 18 the term "Study Group" was substituted for the originally proposed "Standing Committee".

- (f) The question of including optional clauses in relation to the implementation machinery and also the question of reservations;
- (g) The States in the area that are likely to favour the adoption of such a Convention as well as the States which would be prepared to take an initiative in the matter;
- (h) The establishment of a research centre in Asia to study all aspects related to the proposed Convention.

The Advisory Group recommends most strongly to the International Commission of Jurists that the establishment of such a Standing Committee, supported by appropriate research, is fundamental to further progress by the Commission in this field.

PLENARY SESSION

February 18, 1965

On the invitation of the Chairman of the Conference, the respective Chairmen of the Committees and of the Advisory Group presented their Draft Conclusions, which were then put to the Plenary Session for discussion and amendment.

A number of points, both of form and substance, were made. These were considered and, where accepted, given effect to by the Steering Committee of the Conference at a meeting held on the evening of February 18. The principal points considered, and the decisions taken on them, are summarized in the introductory speech at the Closing Plenary Session of the Conference, which is reproduced below.

CLOSING PLENARY SESSION

February 19, 1965

At the opening of the session, the Chairman recognised Mr. Edward St. John, Q.C. (Australia).

Mr. EDWARD ST. JOHN. "The Steering Committee met last night and I am very glad to announce that complete agreement was reached as to the form of the Conclusions and Recommendations, including the rather contentious Recommendation of the Advisory Group, which now reads in a slightly different form but very much with the same purpose. It now suggests that the International Commission of Jurists consider the establishment in the Region of a Study Group to advise the Commission on the implementation of these recommendations. That is a form which is acceptable to the Advisory Group, and indeed to the Commission, and I feel it will be acceptable to all the members of this Conference. It will be of course, for the Commission itself to determine how and when or whether it can give effect to that recommendation, and it will certainly receive its earnest consideration. Of that I am sure.

Now we heard the conclusions of the Committees read yesterday, and perhaps you might be prepared to take them as read to-day, if I just tell you in what small respects they differ from what you heard yesterday. First of all, to the regret perhaps of a few, the word "love" remains in the Preamble in the Conclusions of Committee III. That is the decision of the Steering Committee and I hope it will be accepted with good grace. For the rest there are some changes; roughly two-thirds of the suggestions made from the floor yesterday have been adopted and have resulted in the alteration of a few words here and there. Now I hope that the Conclusions which are now before you of the three Committees and the Advisory Group and the two resolutions put forward by two of those Committees relating to the setting up of a South-East Asian and Pacific Law Institute and of a Standing Committee which has now been re-named a Study Group will be passed by acclamation. Before I ask for your acclamation, could I just say this? I am quite sure that there are some people here who may find themselves in disagreement with particular words of particular clauses. But I hope that when it comes to moving the resolutions by acclamation, all of us who have come here with a very great respect for the Rule of Law, and in the hope that we can accomplish something, can accept the minor things which we perhaps disagree with, for the sake of the great, broad and general principles upon which we are all agreed. And if you feel it in your hearts to agree with the principles and the great part, if not all, of the actual words in which they are expressed, then I hope that you may join with me in heartily approving the Conclusions and the Resolutions by acclamation."

The Conclusions and Resolutions were then adopted by acclamation.

On the invitation of the CHAIRMAN, the SECRETARY-GENERAL, Mr. SEÁN MACBRIDE, then read the Declaration of Bangkok and thanked the participants for the contribution they had made to the success of the Conference. He went on: "It would, of course, be foolish for any of us to think that we, by a conference of this kind, can solve the millions of problems that surround us. All that we can do is to enthuse the lawyers of this Region for the work for the protection of human liberties under the Rule of Law. This, I think, we have successfully done in the course of this Conference, or we have at least successfully laid the foundation for it. Certainly, we have had the opportunity of gathering together the leading jurists from this part of the world to examine their problems here independently of Western influences, so that they could themselves point to the remedies that they think should be necessary. It has often been said in the past that there is a tendency for the West to try to impose its own institutions and ways of thinking on other regions of the world. That is why the International Commission of Jurists came here to get your advice, your views and your guidance. That you have given generously." The Declaration of Bangkok was then adopted by acclamation.

Mr. PHOUVONG PHIMMASONE (Laos) said that, aware of the importance of the Conference, his Government had entrusted him with the leadership of the Laotian delegation, and that in the name of that delegation and even, with certain reservations, of the Laotian Government, he supported the draft resolution of the Advisory Group, which corresponded exactly with the wishes of his Government and of the Laotian people. The lawyers of the Region were the defenders of justice, and had the moral duty to protect mankind against social injustice, without discrimination on grounds of race, colour, ideology or political persuasion.

After referring to violations of the Rule of Law and human rights in the Region, he continued: "It is for reasons of this sort that our Minister of Justice considers that an International Court of Justice with regional jurisdiction would be valuable where the domestic courts are incapable of fulfilling effectively their mission of protecting human rights. It is not a question of giving up national sovereignty; it will rather be a case of an act of international co-operation for the benefit of humanity with the object of achieving the ideal of human justice".

He went on to emphasize the duty of lawyers to study the problems involved in setting up the fundamental organizations needed to ensure the enforcement of the principles of the Rule of Law. He felt that a South-East Asia and Pacific Regional Convention for the Protection of Civil and Political Rights would be an excellent means of assuring the realization of those principles in the world. The creation of a United Nations High Commissioner for Human Rights and of a permanent secretariat of the International Commission of Jurists for the Region would lead sooner or later to the implementation of this proposal.

He concluded: "I would wish that this Conference would demonstrate its corporate spirit by adopting this proposal, the inspiration for which is not the desire to build castles in the air, or to construct an edifice on shifting sands, but to lay the foundation stone for a structure of the future. It is up to the interested nations to take a final decision on the recommendation of the International Commission of Jurists."

Mr. NAVROZ B. VAKIL (India) expressed deep satisfaction that the Conclusions and Resolutions of the Committees and the Advisory Group, as ultimately embodied in the Declaration of Bangkok, were cohesive and vital. In spite of the differences of view that had been expressed, he affirmed in all seriousness that neither love nor poetry nor anxious concern for the poor, the weary, the down-trodden or the oppressed, were academic or starchy-eyed. Surely, he said, poetry was the very soul of life, and philosophy and love the most powerful weapons man had: there was no need for them, as hardboiled, competent lawyers, to be either ashamed of this truth, or to hide it in the dark corners of their hearts.

He went on: " Never before have I seen a greater coming together of the minds and hearts of people who live in contiguous areas and in many cases under governments who disagree among themselves. Yet this is our basic achievement, that as men of good will we have worked towards co-operation and towards enunciating the role of the lawyer as something much more than that of a mere craftsman.

" I hope that this day will be a day to be remembered, not merely for the four days of hard striving, but so that we may follow it up and all of us, the Commission, and each one of us, may carry these ideas forward until in the best possible way we can give effective the implementation to the Rule of Law, however imperfect and however discouraging the conditions around us."

Mr. VIVIAN BOSE (India), President of the International Commission of Jurists, asked to speak in a personal capacity, as a member of the Conference. He said that, while the participants would undoubtedly feel that there was nothing in what they had done that could not have been done better, nevertheless, within the confines of what they had been asked to consider there could be no doubt that much had been accomplished. There had been sharp words exchanged, there had sometimes been a little acrimony, but that should be welcomed as a sign of a sound and healthy attitude, it should be looked upon as a practical application of the ideals for which they stood and which they preached to others: the right to freedom of speech and opinion, the right to express one's views in the form of public debate, openly, frankly, freely, courageously even, but with all courtesy and temperance of language.

The Hon. Justice R. CONCEPCION (Philippines), expressed satisfaction that it was now realized that eventually the problems of peace and happiness and the welfare of the peoples depended not upon force of arms but upon the establishment, maintenance and promotion of a solid social order, in the promotion of which the role of the lawyer could not be over-estimated. He expressed the hope that lawyers be given the further opportunities, which their performance at the Conference indicated they would welcome, to do what they could in the solution of the problems they had discussed.

The CHAIRMAN of the Conference then delivered his closing address:

" This brings to an end the first Conference appropriately held in this ancient city of Bangkok, a citadel of the free people of Thailand. My first duty on behalf of the Conference is to give expression to our gratitude to the authorities in this country who have made us welcome here, a welcome which has contributed greatly towards the success of our work. To Their Majesties the King and Queen of Thailand, who have been graciously pleased to extend an invitation to be presented to them, we, as in duty bound, offer our homage. To His

Excellency Prince Wan, who opened our Conference and who was gracious enough to come to us last evening, and to His Excellency the Foreign Minister, who made in well-chosen words a thoughtful contribution at the Opening of the Conference we express our gratitude. To the President of the Supreme Court of Thailand, who kindly bestowed on us the honour of accepting the office of Honorary President of this Conference, we are greatly beholden. Nor should I fail to mention the hospitality shown to us by His Excellency the Prime Minister, His Excellency the Ambassador of the Philippines, the Bar Association of Thailand and the Women Lawyers' Association; to all these we express our gratitude.

The Rule of Law which has now become a dynamic force has attracted votaries from all corners of the earth, from the old lands and the new, from the powerful states as well as the struggling states, from the well-developed countries through to the developing countries and to the under-developed countries.

In this particular region of the earth, the South-East Asian and Pacific Region, where a large section of the world's population lives and dies, the problems affecting the well-being and the dignity of the human beings are more pronounced than possibly in any other comparable region. It is the intensity of these problems that led to conceiving of the idea that a gathering of jurists, principally from this region, was opportune to consider the hurdles and obstacles besetting the progress of the Rule of Law for the maintenance and promotion of which the International Commission of Jurists stands.

That so many men and women of great ability and distinction in their own particular countries and in their own spheres of work saw to it that time was found for them to attend this Conference is indicative not only of the theme of this Conference but also of the interest everyone displays in the problems of this region and is an encouragement for the Commission.

As Chairman of this Conference, it is my very pleasant duty to give expression to our mutual indebtedness to the great contributions made to our discussions by the several participants.

Our experience is not uniform; the customs, the traditions and the laws of our respective countries do not follow one set pattern; our ways of life naturally differ; but the golden thread that runs through the web of our daily lives is the spirit of Justice that stirs within all human breasts, irrespective of the quarter of the world in which we live and have our being. The spirit of Justice has found its happiest expression hitherto in the Rule of Law as defined and refined through the discussions and deliberations sponsored by the International Commission of Jurists successively at Athens (in Europe), at New Delhi (in Asia), at Lagos (in Africa), at Rio de Janeiro (in South America) and now at Bangkok.

Ours is not a task that once accomplished is accomplished for ever. Rather is it a continuing task, the task of the watchman. Thinking,

well-meaning, responsible men and women all over the world must unite in common endeavours of keeping alight that flame which alone will make the difference between the worthwhile and the lasting on the one hand and the unjust and the transient on the other. In this great endeavour for which this Commission stands, the lawyers have voluntarily undertaken to give that lead for which their training and experience have fitted them. They more than all others are best equipped to keep tyranny from dominating over justice, and to keep alive democratic ideas, not forgetting all the while that justice and democracy can have but little meaning without an ensuring of the economic well-being and the social and cultural advancement of all peoples of the world.

It would not be fitting if in the course of these remarks of mine I failed to make some mention of the efforts of those who have worked behind the scenes and given much of their wealth, their wisdom, their labour and their experience to the production of the tools which were necessary for the success of this Conference. To those bodies and individuals who supply the funds that keep the work of the Commission alive the participants no doubt must offer their thanks. To the Secretariat that has made the arrangements and spared no pains to see to the hundreds of matters of detail that made for the smooth working of this Conference I must on behalf of you all express our sincere thanks. In this connection, at the wish of many participants, a special word of praise must be reserved for the official or officials principally responsible for the production of the Working Paper. This Working Paper is a remarkable document and, as you all know, has evoked unstinted praise during the deliberations in Committees. Those responsible for bringing it before us must surely feel proud that the labour bestowed on it has been amply justified. That capable, experienced men found it an excellent basis for discussion must surely be ample reward for those who brought it forth. To the Secretary-General, who has had an anxious time seeing to the success of the work of this Conference, we must record our gratitude. To the Executive Secretary, the Legal Officers of the Commission, and their Staff who have remained in the background in the impartial tradition of the silent service we have seen fit to advocate for the developing Countries, we cannot be too thankful. Finally, on behalf of the Commission (and if I may include, of myself) I wish to say that it has been a rewarding week—a week of stimulation. That irrespective of differences of race, colour, creed, religion, language, clime or country, we speak by and large only one language—the language of the Rule of Law, is the best augury for the future of a just world.

The way we have to tread may be long and weary. It may be stony, thorny and beset with pitfalls. But it is the only way if we wish to make this world of ours one where we and those who have to come after us can live without fear and, as we all hope, without want.

That we were able to iron out common principles in the three Committees is an encouraging sign. In regard to the work of the Advisory Group on Human Rights, you must all be glad to learn that it was plain in the deliberations in the Steering Committee last night that it was never in the contemplation of the International Commission of Jurists to adopt Procrustean methods in dealing with a problem so dear to the hearts of the great majority of us here.

I therefore bid you farewell and I terminate our proceedings at Bangkok in the confident belief that you will all carry back to your respective countries the resolution to work to make the Rule of Law as we all understand it not an academic concept but a live, vital, throbbing and inspiring reality.

I wish you a safe journey to your homes, ladies and gentlemen. Mesdames, Messieurs, bon voyage.»

DECLARATION OF BANGKOK

This Conference of 105 jurists from 16 countries of the South-East Asian and Pacific Region, assembled in Bangkok from February 15th to 19th, 1965, under the auspices of the International Commission of Jurists has reached these conclusions:

It considers that, given peace and stability, there are no intrinsic factors in the Region which make the ultimate establishment, maintenance and promotion of the Rule of Law incapable of attainment; that the Rule of Law can only reach its highest expression and fullest realization under a representative government freely chosen by universal adult suffrage; and that the Rule of Law requires effective machinery for the protection of fundamental rights and freedoms;

It recognizes that the Rule of Law and representative government are endangered by hunger, poverty and unemployment; that, in order to achieve social, economic and cultural development, sound economic planning is essential; that, in particular, measures of land reform to assure fairer distribution and its most economic utilization may be necessary; that successful planning depends on the maintenance of administrative efficiency and the elimination of corruption at political and administrative levels; that proper means of redress should be available where administrative wrongs are committed; and that, in the light of the experience gained in Scandinavia and New Zealand, consideration should be given to the Ombudsman concept as a means of individual redress and the improvement of administration;

It affirms that lawyers should be a vital and courageous element in a developing community; and that they should always be conscious of the social, economic and cultural aspirations of the people to the realization of which they should commit their skills and techniques;

It believes that the conclusion of a Regional Convention on Human Rights among States in the Region should be considered as a means of making an important contribution to individual human rights and to the solution of national, racial, religious and other minority issues; and that the establishment of the office of United Nations High Commissioner for Human Rights would be a valuable immediate measure to safeguard effectively human rights in accordance with the Universal Declaration of Human Rights;

It reaffirms the *Act of Athens*, the *Declaration of Delhi*, the *Law of Lagos* and the *Resolution of Rio*;

AND NOW SOLEMNLY

Adopts the Conclusions and Resolutions annexed to this Declaration. This Declaration shall be known as the Declaration of Bangkok.

Done at Bangkok, this 19th day of February, 1965.

CONCLUSIONS AND RESOLUTIONS

CONCLUSIONS OF COMMITTEE I

Basic Requirements of Representative Government under the Rule of Law

PREAMBLE

Recalling and reaffirming the definition of the Rule of Law adopted by the International Commission of Jurists at the New Delhi Congress in 1959, which reads:

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 having themselves 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;

Believing that the protection of the individual from arbitrary government and his enjoyment of the dignity of man are best assured by a representative government under the Rule of Law;

And with the object of setting out and defining the basic requirements of, and considerations affecting, representative government under the Rule of Law;

This Committee has reached the following Conclusions in relation to such requirements:

- CLAUSE I The Rule of Law can only reach its highest expression and fullest realization under representative government.
- CLAUSE II By representative government is meant a government deriving its power and authority from the people, which power and authority are exercised through representatives freely chosen and responsible to them.
- CLAUSE III Free periodic elections are therefore important to representative government. Such elections should be based on universal and equal adult suffrage and should be held by secret ballot and under such

conditions that the right to vote is exercised without hindrance or pressure. Where a legislature is elected by districts, there should be a periodic re-distribution of seats or districts so as to ensure as far as practicable that each individual vote has the same value. It is also necessary to ensure that election expenses of candidates are regulated in such a manner and to such an extent as may be necessary to ensure that elections are both free and fair.

CLAUSE IV No adult citizen should by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, wealth, education, status or birth be deprived of the right to be a candidate at any election, to seek votes, or to cast this vote for any candidate.

CLAUSE V Freedom of expression through the press and other media of communication is an essential element of free elections and is also necessary to ensure the development of an informed and responsible electorate.

CLAUSE VI Representative government implies the right within the law and as a matter of accepted practice to form an opposition party or parties able and free to pronounce on the policies of the government, provided their policies and actions are not directed towards the destruction of representative government and the Rule of Law.

CLAUSE VII Illiteracy is an impediment to representative government reaching its highest expression and fullest realization. It is therefore the duty of the State to provide compulsory free education for all children and free education for all illiterate adults up to such standard as is necessary ultimately to remove such impediment.

CLAUSE VIII To enable representative government to yield the best results, the people should not only be literate, but should have a proper understanding and appreciation of the principles of democracy, the functions of the different branches of the government and the rights and duties of the citizen vis-à-vis the State. Civic education through schools and through all mass media of communication is therefore a vital factor for ensuring the existence of an informed and responsible electorate.

CLAUSE IX It is essential for the effective operation of the Rule of Law that there should be an efficient, honest and impartial civil service.

CLAUSE X This Committee has reached the following further Conclusions relating to the guarantee of individual freedom and dignity within the framework of a representative government:

- (1) In a State in which the Rule of Law prevails there should be effective machinery for the protection of fundamental rights and freedoms, whether or not these rights and freedoms are guaranteed by a written constitution.
- (2) In countries where the safeguards afforded by well-established constitutional conventions and traditions are inadequate, it is desirable that the rights guaranteed and the judicial procedures to enforce them should be incorporated in a written constitution.
- (3) While governments should of their own volition refrain from action infringing fundamental rights and freedoms, the ultimate determination as to whether the law or an executive or administrative act infringes those rights and freedoms should be vested in the Courts.
- (4) The ultimate protection of the individual in a society governed by the Rule of Law depends upon the existence of an enlightened, independent and courageous Judiciary, and upon adequate provision for the speedy and effective administration of justice.

CLAUSE XI In view of the fact that some governments in the Region often have recourse to preventive detention, this Committee has found it necessary to reaffirm, reiterate and extend the Conclusions of Lagos relating to preventive detention in the following terms:

- (1) Save during a period of public emergency threatening the life of the nation, no person of sound mind shall be deprived of his liberty except upon a charge of a specific criminal offence, and preventive detention without trial shall be contrary to the Rule of Law.
- (2) During such period of public emergency, legislation often authorizes preventive detention of an individual if the Executive finds that

public security so requires. Such legislation should provide the individual with safeguards against continuing arbitrary confinement by requiring a prompt administrative hearing and decision upon the need and justification for detention, with a right to judicial review as to the need and justification for such detention and with the right to representation by counsel at all stages. It should be required that any declaration of public emergency by the Executive be forthwith reported to, and be subject to ratification by, the Legislature. Moreover, both the declaration of public emergency and any consequent detention of individuals should, except in time of war, be effective only for a specified and limited period of time (not exceeding six months).

- (3) Extension of the period of public emergency should be effected by the Legislature only after careful and deliberate consideration of the necessity therefor. Finally, during any period of public emergency the Executive should only take such measures as are reasonably justifiable for the purpose of dealing with the situation which exists during that period.
- (4) Even where the preventive detention of an individual is permitted by law by reason of a public emergency threatening the life of the nation, it is essential that the Executive should not act arbitrarily and that it should forthwith supply the person detained with the grounds for his detention and particulars thereof.
- (5) Where it is necessary in order to prevent hardship, the State should support the dependents of a person placed under preventive detention.

CLAUSE XII Finally, this Committee, having anxiously considered the various factors which challenge the Rule of Law in the Region, wishes to add that in its view there are no intrinsic factors in the area which make the ultimate establishment, maintenance and promotion of representative government under the Rule of Law incapable of attainment.

CONCLUSIONS OF COMMITTEE II

Economic and Social Development within the Rule of Law

PREAMBLE

Considering that the Rule of Law requires the establishment and observance of certain standards that recognize and foster not only the political rights of the individual but also his economic, social and cultural security;

Realizing that the Rule of Law is endangered by the continued existence of hunger, poverty and unemployment, which tend to make a truly representative form of government impossible and promote the emergence of systems of government opposed to the principles of the Rule of Law;

Believing that the lasting and effective way of reaching the social and economic goals necessary to the smooth operation of the Rule of Law is by methods and procedures that conform to its principles; and

Bearing in mind, in consonance with the Universal Declaration of Human Rights, that the economic, social and cultural rights of the individual include the right to work, to free choice of employment, to protection against unemployment, to just and favourable conditions of work and remuneration which will ensure to the worker and his family an existence worthy of human dignity, to security and social protection, and to the satisfaction and enrichment of his intellectual and cultural faculties;

The Committee has arrived at the following conclusions regarding social, economic and cultural development in the Region:

CLAUSE I Some of the economic, social and cultural standards set forth above have already been given legal force and sanction by constitutional and statutory provisions; however, there is a need progressively to enact the appropriate legislation and to develop the legal institutions and procedures whereby these standards may be maintained and enforced within the Rule of Law.

Economic, social and cultural rights should also be safeguarded on the international level by relevant conventions of the United Nations and its

specialized agencies. Governments are urged to co-operate in the framing of such conventions and to ratify them.

CLAUSE II It is essential to economic and social development under the Rule of Law that inequality of opportunity arising from birth or wealth, and discrimination arising from ethnic, religious, linguistic, regional or communal factors be overcome.

Political, racial, social, religious and other types of intolerance impede the unified effort required for economic progress. Governments should therefore promote and encourage a spirit of tolerance among all sections of the community.

CLAUSE III It is recognized in general, and more particularly in the case of the developing countries of the Region, that in order to achieve greater economic and social benefits for the individual some measure of intervention in property rights may become necessary, but such intervention should never be greater than is absolutely necessary in the public interest and should be subject to safeguards afforded by the Rule of Law.

CLAUSE IV The land problem is one of the most fundamental and complicated problems in the Region. Consideration to appropriate land reform programmes must therefore be given high priority.

CLAUSE V While no specific methods of land reform can be suggested by the Committee which are uniformly appropriate for all communities, it is recognized that such methods may properly include qualification of the right to own or to succeed to land, provision for the maximum utilization of land, facilities for the granting of credit on advantageous terms, the issuance of land titles, the strengthening of the right of association of rural people for their political, economic, social and cultural advancement, and support for rural development in general. These and other measures of land reform must, however, conform to the principles and procedures of the Rule of Law.

CLAUSE VI Sound economic planning is essential to the social and economic development of the countries in the Region, but the Rule of Law requires that both the

ends and the means embodied in such planning derive from and reflect the ideas, the needs and the aspirations of the people themselves.

CLAUSE VII To inspire confidence and to reduce the possibility of maladministration, especially in regard to capital investment in public economic development projects, it is recommended that full accounts on such projects be the subject of independent and expert examination, and that reports thereon be regularly submitted to the Legislature.

CLAUSE VIII Nationalization of private enterprises by a democratically elected government when necessary in the public interest is not contrary to the Rule of Law. However, such nationalization should be carried out in accordance with principles laid down by the Legislature and in a manner consistent with the Rule of Law, including the payment of fair and reasonable compensation as determined by an independent tribunal. The same considerations should apply to other governmental action taken with similar purpose and effect.

CLAUSE IX It is in accord with the Rule of Law to adopt, when necessary in the interest of public welfare, fair and reasonable measures with respect to price control, state trading, control of private trade and anti-trust legislation.

CLAUSE X In every developing country it is desirable in the interest of social and economic peace that there be legal machinery for the peaceful settlement of labour disputes. It is recommended that, where necessary, States which have ratified the relevant conventions of the International Labour Organization implement the same by appropriate legislation.

CLAUSE XI The effective operation of the Rule of Law in developing countries requires an efficient administration, adequately equipped to cope with vast and complex social and economic problems.

Corruption among public officials not only undermines confidence in the public service, but it is a positive hindrance to economic and social progress. It also leads to miscarriage of justice, thereby affecting the operation of the Rule of Law. These considerations apply with at least equal force to Ministers and members of the Government.

It is essential, particularly in multi-racial or multi-religious developing societies of the Region, that the appointment, promotion, dismissal and disciplinary control of public servants be determined without discrimination on religious, racial, linguistic or other grounds which may be extraneous to the proper functioning of the public service.

CLAUSE XII In order to minimize infringements of the rights and freedoms of the individual, particularly in developing countries where far-reaching administrative decisions are necessary, such decisions affecting these rights and freedoms should be supported by stated reasons and be subject to review. The Conclusions of Committee II of the New Delhi Congress (Clauses IV and V), and of Committee II (A and B) of the Rio Congress of the International Commission of Jurists are reaffirmed.

CLAUSE XIII Full observance of the Rule of Law requires that the Government be liable for wrongs committed by it or its servants in the execution or the purported execution of public duties. The relevant conclusion of the of New Delhi Congress (Committee I, Clause VI) is reaffirmed.

CLAUSE XIV In the light of the experience gained in Scandinavia and New Zealand, it is recommended that nations of the Region should examine the possibility of adopting the "Ombudsman" concept as a means of facilitating the correction of administrative errors and minimizing the possibility of maladministration.

While adaptation to local circumstances will be necessary, it is understood that the basic principles underlying such a concept are: the complete independence of the office from the Executive; its full and untrammelled power, including access to files and the hearing of witnesses, to investigate complaints against administrative actions of the Executive; and the limitation of its power to recommendations addressed to competent legislative and executive organs.

CONCLUSIONS OF COMMITTEE III

The Role of the Lawyer in a Developing Country

PREAMBLE

Law and lawyers are instruments of social order. Without law, the evolution of mankind to its present stage of development would not have been possible. Through the law, society is preserved and man is enabled to live and love and labour in peace from generation to generation.

The law is not negative and unchanging. It should be not a yoke, but a light harness holding society loosely but firmly together, so that it may move freely forward. Order is important, but it must be an evolving order; the law must be firm yet flexible, and capable of adapting itself to a changing world. This is especially so in a developing country.

Poverty, lack of opportunity and gross inequality in the Region require leaders who understand the need for evolutionary change, so that every citizen may look to a future in which each may realise his full potential as an individual in a free society. The great need of the peoples of the Region requires action, lest freedom be utterly forfeited. Beseated by threats from the right or left, the statesman must find means to advance the economic and social development of his country and countrymen, whilst preserving or establishing the institutions and the freedoms which are the cornerstones of a free society under the Rule of Law.

These problems require the lawyer to play a vital role in their solution. They cannot be solved by lawyers alone. But the life of man in society and his relationships with others are the subjects of the lawyer's special knowledge and study; in many parts of the Region lawyers are particularly well equipped to see these problems in perspective, and to devise solutions.

The lawyer must look beyond the narrower confines of the law, and gain understanding of the society in which he lives, so that he may play his part in its advancement. The inspiration of the lawyers of the world, particularly those of the Region, with the ideals proclaimed at the Rio Congress in the Conclusions of Committee III, "The Role of Lawyers in a Changing World", could play a large part in moulding free societies of the future,

able to promote the full dignity of man, and to withstand the perils and dangers of the changing times.

This Committee therefore reaffirms and reiterates the Conclusions of the Rio Congress, and adopts the following further Conclusions with particular reference to developing societies:

CLAUSE I The lawyer has a deep moral obligation to uphold and advance the Rule of Law in whatever sphere he may be engaged or in which he has influence, and he should fulfill that obligation even if it brings him into disfavour with authority or is contrary to current political pressures. He can give effect to many of the principles underlying the Rule of Law in his daily work; for the rest, it is his responsibility as a citizen in a developing community to apply them for the benefit of society and his fellow-men.

CLAUSE II An indispensable aspect of the maintenance of the Rule of Law is the availability of lawyers to defend the civil, personal and public rights of all individuals and the readiness to act for those purposes resolutely and courageously. Such a readiness involves the obligation to take an active part in implementing and making effective schemes of legal aid for the poor and destitute.

CLAUSE III The lawyer should endeavour:—

1. to secure the repeal or amendment of laws which have become inappropriate or unjust or out of harmony with the needs and aspirations of the people;
2. to review proposed legislation and delegated legislative enactments, and to ensure that they are in accord with the Rule of Law;
3. to ensure that the law is clear and readily accessible;
4. to promote legislation establishing the legal framework which will enable a developing society to advance, and its members to attain their full dignity as human beings.

CLAUSE IV The lawyer should assist in the work of administration; he should insist, nonetheless, that it be executed with respect for the rights of the individual and otherwise according to law, and strive to assure judicial review of all administrative acts which affect human rights.

- CLAUSE V Lawyers must bring to bear in the field of international relations the underlying principles of the Resolution of Rio, and the Conclusions of this Conference: respect for law, coupled with a concern for all mankind, particularly the poor, the weak, the illiterate, and the oppressed.
- CLAUSE VI This Committee endorses the Conclusions of Rio regarding the Role of Legal Education in a Changing Society as being particularly relevant in the context of the Rule of Law in developing societies. It urges lawyers to be actively concerned with legal education and the provision of adequate incentives for teachers of law, and to do their utmost to implement the principles enunciated in those Conclusions. The Rule of Law, as a dynamic concept, requires that legal education should bear a realistic relation to the social and economic conditions obtaining in developing societies, so that future lawyers in the Region may be better equipped to perform their role in a constructive manner.
- CLAUSE VII This Committee recommends the adoption by the Commission of a resolution, in the form attached, relating to the consideration of the feasibility of promoting a South-East Asian and Pacific Law Institute.
- CLAUSE VIII Lawyers should endeavour to enlist the aid of their professional associations to secure the acceptance by their members of the ideals set forth above.

RESOLUTION OF COMMITTEE III

on the Role of the Lawyer in a Developing Country

WHEREAS the countries in the Region vary in standards of legal education; and

WHEREAS co-operation on a regional basis is an effective means of enhancing the role of legal education in advancing the Rule of Law in the Region;

AND WITH A VIEW TO :

1. Providing a centre where training programmes may be conducted for teachers of law in the Region;
2. Examining existing methods of legal education and teaching techniques;
3. Providing a clearing house for information as to common problems and experiences in the Region and initiating a comparative study of the problems confronting the various legal systems;
4. Encouraging and facilitating research into the vital problems of social and legal adjustment posed by the impact of Western legal institutions and concepts;

This Conference requests the International Commission of Jurists to consider the feasibility of the establishment of a South-East Asian and Pacific Law Institute to realize the foregoing objectives.

RESOLUTION OF ADVISORY GROUP

on Human Rights Regional Conventions for South-East Asia and the Pacific

- WHEREAS the Rule of Law requires that fundamental rights and freedoms of every individual shall receive protection without discrimination not only under his national system of law, but also as a member of the international community;
- WHEREAS the protection and the promotion of human rights are now matters of international concern;
- WHEREAS the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948, is a common standard for achievement by all peoples;
- WHEREAS the necessary Covenants for its effective implementation have not yet been adopted and all means for such implementation should be pursued;
- WHEREAS international action to protect human rights on a regional basis should be also pursued;
- WHEREAS the conclusion of a regional convention among some or all States in the South-East Asian and Pacific Region would make an important contribution, not only to the further protection of individual human rights, but also to the solution of problems arising from national, racial religious, linguistic or other minority issues and lead to the maintenance of good relations in the area;
- WHEREAS such a Convention would give concrete expression to the adherence of the peoples of this Region to the Rule of Law;

Now, THEREFORE, this Conference

URGES this lawyers of the Region :

1. To press upon their governments the importance of the adoption of the necessary conventions for the protection of human rights in the Region, and, within the framework of the United Nations, the necessary general conventions for the protection of human rights, in each case with the appropriate implementing machinery; and
2. To request their governments to support the establishment of the office of United Nations High Commissioner for Human Rights, with status analogous to the United Nations High Commissioner for Refugees, as an immediate measure to safeguard effectively human rights throughout the world and ultimately as an adjunct to the Covenants;

RECOMMENDS

1. That the International Commission of Jurists encourage the adoption of a regional South-East Asian and Pacific Convention for the Protection of Political and Civil Rights;
2. That such a Convention be adopted by such States as are willing to do so and that due provision be made for later accession by other States in the Region;

SUGGESTS

That the International Commission of Jurists consider the establishment in the Region of a Study Group to advise the Commission on the implementation of these recommendations.

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