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## TABLE OF CONTENTS

<i>Editorial</i>	THE RULE OF LAW: FORM AND SUBSTANCE	153
<i>Durga Das Basu</i>	CONSTITUTIONAL PROTECTION OF CIVIL RIGHTS IN INDIA	157
<i>A. B. McNulty and Marc-Andre Eissen</i>	THE EUROPEAN COMMISSION OF HUMAN RIGHTS: PROCEDURE AND JURISPRUDENCE	198
<i>Stephan Hurwitz</i>	THE DANISH PARLIAMENTARY COMMISSIONER FOR CIVIL AND MILITARY GOVERNMENT ADMINISTRATION	224
<i>Pierre Siré</i>	THE LEGAL PROFESSION AND THE LAW: THE BAR IN FRANCE	244
<i>Vladimir Gsovski and Kazimierz Grzybowski, editors</i>	JUDICIAL PROCEDURE IN THE SOVIET UNION AND IN EASTERN EUROPE	269
<i>Notes:</i>		
<i>George Dobry</i>	Wire-tapping and Eavesdropping: A Comparative Survey	319
<i>Book Reviews:</i>		
<i>Norman S. Marsh</i>	Helmut Rumpf, <i>Regierungsakte im Rechtsstaat; rechtsvergleichende Beiträge zu einer Untersuchung des Verhältnisses von Politik und Recht</i>	336
<i>Norman S. Marsh and Sompong Sucharitkul</i>	Roger Pinto, <i>La Liberté d'Opinion et d'Information, contrôle juridictionnel et contrôle administratif</i> ; <i>Gabriél Arias-Salgado, Textos de Doctrina y Política de la Información</i>	338

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INTERNATIONAL COMMISSION OF JURISTS - GENEVA

## EDITORIAL

### THE RULE OF LAW: FORM AND SUBSTANCE

In a generous review of the first issue of this *Journal* Professor Olmstead of Columbia University School of Law, writing in the *New York University Law Review*,<sup>1</sup> says with reason that there must be "a clear and present danger" to justify the appearance of a new legal periodical in a world already overburdened with legal publications. The reviewer finds such a justification in the absence of an international legal concern for the administration of justice by a State with respect to its own nationals. The purpose of this *Journal* is, however, to reach many lawyers throughout the world (and indeed non-lawyers with an interest in and sense of responsibility for the administration of justice) who have neither the time nor the opportunity to add substantially to the already heavy list of their reading. It must therefore be a constant editorial preoccupation to ensure that the contents of the *Journal*, and the way in which they are presented, are directly and urgently related to problems wider and more fundamental than those with which the academic or professional legal journal normally deals. With this end in view it may be helpful to consider the principles upon which this issue has been compiled and briefly to summarize the significance of the individual contributions.

The general theme of this *Journal* is the Rule of Law. In the first issue the Rule of Law was defined as "adherence to those institutions and procedures, not always identical, but broadly similar which experience and tradition in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be essential to protect the individual from arbitrary government and to enable him to enjoy the dignity of man." Such a far-reaching conception as the Rule of Law cannot, however, be satisfactorily confined within the limits of a formula; and some elaboration may here be attempted of certain aspects of this definition which have particular relevance to this issue of the *Journal*.

In the first place, it is desirable to emphasize the final qualifying words of the definition. The Rule of Law in the sense here meant is not in its final analysis a purely formal and legalistic conception but presupposes (whether such presuppositions are incorporated in a constitution or not and whether or not that constitution is subject to judicial review) the acceptance of certain fundamental human values in the structure of government and the legal system. Secondly, it follows that however complete the legal system it will fail to conform to the Rule of Law unless those who at all levels are concerned with its working

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<sup>1</sup> Vol. 33, No. 2 (February 1958), p. 256.

themselves accept these values, not only under legal restraint but also by the force of public opinion, professional traditions and their own moral discipline. Yet, thirdly, it remains true that in legal procedure and institutions, and perhaps especially in those attaching to the criminal trial, where fundamental human values are in issue, the Rule of Law is most clearly seen in operation. Indeed, it is somewhat misleading to speak of "procedure" in this connection, as if all that was involved was the technical efficiency of a particular piece of governmental or legal machinery, without regard to the purpose for which it is employed. The rules of procedure which have come to be accepted by civilized nations as essential to ensure a "fair trial", for example, spring not from the brain of the legal technician but from two moral ideas, which lie at the basis of a particular conception of a "free society", namely, the absolute worth of the individual on the one hand and, on the other, the inevitability of human error. Finally, because the Rule of Law cannot be divorced from individual values, it is necessary to add that there will always be situations in which a critical balance has to be observed between the claims of a single person or group and those of the collectivity of individuals in organized society. Here generalization is of little value but much can be gained by factual comparative study of each area of conflict.

In the article by Mr. Basu, the distinguished author of the leading commentary on the Constitution of India,<sup>2</sup> an account is given of the human values established by that Constitution and of the far-reaching procedures which have been introduced, partly by statute and partly by the decisions of the Courts, to ensure that these values are respected. At an international level, Mr. McNulty and M. Eissen of the Directorate of Human Rights at the Council of Europe set out the main provisions of the European Convention on Human Rights, explain the procedure for bringing cases of alleged violation of such rights before the European Commission of Human Rights and summarize the hitherto little publicized but extremely interesting decisions of that body. In a recent valuable survey of *Human Rights and the United Nations* another Indian author<sup>3</sup> has described the European Convention on Human Rights as "the initiation, not the completion of a process. It is a regional attempt to restore the principles, which have an uncertain future in the United Nations. From that point of view this Convention will ever remain an important international agreement. Its drawbacks are indications of the general limitations of the growth of international law within the framework of the traditional concept of national sovereignty."

<sup>2</sup> D. D. Basu, *Commentary on the Constitution of India*, 3rd ed., Calcutta, June 1955 (Vol. I), March 1956 (Vol. II). The work is not confined to Indian law, but also gives a wide survey of comparable laws in other countries.

<sup>3</sup> R. Chakravarti, *Human Rights and the United Nations*, Calcutta, 1958.

Professor Hurwitz, the first holder of the important office of *Ombudsmand* in Denmark (a function which has parallels in Finland and Sweden and may shortly be introduced in Norway) shows how the spirit underlying the Rule of Law may be furthered by methods which strengthen and supplement but do not claim to supplant legal control by the Courts. An interesting comparison may be made between this Danish institution and the Procuracy of the Soviet Union as described in the first issue of this *Journal*. Another institution, which, in spite of the fact that it exists in some form in all mature legal systems, has often been left out of account in the traditional treatment of the Rule of Law, is the Bar. In the first number of the *Journal* the character and influence of the English Bar were described; M. Siré, formerly *Bâtonnier* of the Bar of Bordeaux, now gives an assessment of the position of the Bar in France and incidentally provides a most instructive introduction to the French legal system which should be of particular interest to those trained in the Common Law.

Reference was made above to the as yet unachieved aims of the United Nations in relation to Human Rights. It is, however, only right to draw attention to the increasing emphasis which the United Nations Commission on Human Rights has recently placed on what many lawyers would consider to be the more immediately practical spheres of criminal law and procedure. Thus a very successful regional seminar on "the protection of Human Rights in criminal law and procedure" was recently held at Baguio City in the Philippines<sup>4</sup> under the auspices of the United Nations and similar seminars are contemplated in other areas. It is in the context of this development that the chapters from a forthcoming comprehensive work on "Government, Law and Courts in the Soviet Union and Eastern Europe" should be read. Of particular interest is the account given of what is described as the *de facto* criminal procedure in the Soviet Union which can only be ascertained by careful study of recent speeches and articles in that country. It may be added that in a recent article sent to and published by the Harvard Law Record<sup>5</sup> Professor Karev, Dean of the Faculty of Law of Moscow University, expressed the opinion that

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<sup>4</sup> See United Nations, Economic and Social Council, Commission on Human Rights, Fourteenth Session, Item 9 of the Provisional Agenda, Paper E/CN.4/765 dated March 5, 1958. The Editor of this *Journal* took part in the Seminar on behalf of the International Commission of Jurists, having been invited to attend as an observer.

<sup>5</sup> Issue of May 1, 1958. Professor Harold J. Berman, the well-known American authority on Soviet law, adds a comment, which, while welcoming the acceptance of due process of law and elementary legal guarantees by Professor Karev, including, in the Soviet author's words, "the hearing of all criminal cases by the regular judicial authorities", draws attention to the omission of any reference to the abolition by a recent law of forced labour camps or to a law, newly introduced in some Republics, authorizing the exile of "anti-social, parasitic elements" by bodies of local citizens.

“criminal legislation now in effect in the USSR . . . on the whole to a considerable degree is out of date” and stated that “special bodies are working out the principles of Soviet criminal law common for all Union Republics, and each Republic is working out its own code of criminal law.”

The concluding note on wire-tapping (containing much hitherto not easily accessible material) and book reviews on freedom of speech and acts of State may serve to illustrate the *difficulties and dangers* which arise when the freedom of individuals within society clashes with the interpretation which its authorities put on the freedom of its members as a whole. These are problems which an authoritarian State attempts to solve by a simple denial of the reality of the conflict. In every State which claims to be under the Rule of Law, such problems are real, urgent and continuing; they can only be solved when they are faced and fully and frankly discussed in each situation where they may arise.

NORMAN S. MARSH

# CONSTITUTIONAL PROTECTION OF CIVIL RIGHTS IN INDIA

1. Introduction . . . . .	159
2. Right to Equality . . . . .	161
3. Freedom of Speech and Expression . . . . .	164
4. Freedom of Assembly . . . . .	173
5. Freedom of Association . . . . .	176
6. Freedom of Movement and Residence . . . . .	179
7. Freedom of Property . . . . .	181
8. Freedom of Profession . . . . .	185
9. Freedom of Person . . . . .	187
10. Freedom of Religion . . . . .	191
11. Safeguards in a Criminal Trial . . . . .	194
12. Immunity from Forced Labour . . . . .	196

## INTRODUCTION

The extent to which the Constitution of India has adopted the principles laid down by the Covenant on Human Rights<sup>1</sup> is in itself a remarkable indication of the wisdom and liberality of the framers of the Indian Constitution; more so, when it is remembered that the Constitution was drafted as early as 1948 and completed by the third quarter of 1949.

Ever since Dicey made his comparison between the English common law system of maintaining individual rights and the Continental system of a constitutional declaration of such rights,<sup>2</sup> the latter has become increasingly common, and modern constitutionalists outside England have few misgivings as to the utility of such declarations. This view has been recognized by the United Nations through its Commission on Human Rights, but the problem which struck Dicey in this connection is as relevant today as it was in 1885. He particularly emphasized the importance of *remedies* to enforce such rights in contrast to their mere assertion in the declaration itself. The need for this procedural safeguard is acknowledged in Article 8 of the Universal Declaration which says:

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

The Draft Covenant on Civil and Political Rights, prepared by the Commission on Human Rights in 1952 (Article 3), develops this safeguard by providing that:

“Each State party hereto undertakes -

- a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

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<sup>1</sup> In this article, it is proposed to compare the provisions of the Indian Constitution relating to civil rights with those contained in three international documents, namely, the Universal Declaration of Human Rights (1948); Covenant on Human Rights (1950); Draft Covenant on Civil and Political Rights (1952; *vide* Yearbook on Human Rights for 1952, pp. 424-427).

<sup>2</sup> Dicey, *Law of the Constitution*, 1st ed., 1885; see pp. 197-198 of the 9th ed., 1952. The Constitution of India guarantees a number of individual rights included in Part III of the Constitution under the head of ‘Fundamental Rights’. In this article, I shall deal with such of them as are supposed to fall under the category of ‘civil rights’, according to the Covenant on Human Rights and the Draft Covenant on Civil and Political Rights.

b) To develop possibilities of judicial remedy and to ensure that any person claiming such a remedy shall have his right thereto determined by competent authorities, political, administrative or judicial...<sup>3</sup>

That the framers of the Indian Constitution were fully alive to the supreme importance of the judicial remedies to enforce fundamental rights is evident from the fact that not only did they expressly lay down that any law which contravenes any of the fundamental rights shall be 'void' (Article 13) but they also incorporated in the Constitution itself certain extraordinary remedies for enforcing these rights against any State action, legislative or executive. Further, the right to make use of these constitutional remedies itself was also guaranteed by the Constitution, so that nothing short of an amendment of the Constitution can take away the power of the superior courts, that is, the Supreme Court and the High Courts (in which the power is vested by Articles 32 and 226) to apply these constitutional remedies for the protection of the individual rights guaranteed by the Constitution. The courts have made it clear that they cannot refuse to entertain an application for an appropriate constitutional remedy where a fundamental right has been infringed.<sup>4</sup>

Space does not permit any elaborate treatment of these constitutional remedies here, but it should be mentioned that these remedies consist of what are now called in England 'prerogative orders', namely, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, as well as the writ of *habeas corpus*. The jurisdiction of Indian courts in this connection has been made even more elastic and effective than in England by empowering them to issue not only the 'prerogative orders' but also any direction or order in the nature thereof as may be considered just and proper in the circumstances of each case, unfettered by the technicalities of the English orders.<sup>5</sup>

No less important than the provision for remedies is the formulation of *limitations*, subject to which, the rights declared may be enjoyed; for, since the disappearance of the fetish of *laissez faire* and the emergence of the Welfare State, it is generally acknowledged that the individual can have no absolute or unfettered right in any matter and that the welfare of the individual, as a member of a collective society, lies in a happy compromise between his atomistic rights as an individual and the interests of the society to which he belongs. There is no protection of the rights themselves, unless there is a measure of control and regulation of the rights of each individual in the interests of all. The framers of the Constitution of the United States contented themselves by declaring the rights alone. It was for the Judiciary to

<sup>3</sup> *Yearbook on Human Rights*, 1952, p. 425.

<sup>4</sup> *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566; *Himmatlal v. State of M.P.*, (1954) S.C.R. 1122.

<sup>5</sup> *Basappa v. Nagappa*, A.I.R. 1954 S.C. 440.



evolve various doctrines by which individual rights might be harmonized with collective interests. The Commission on Human Rights, after having drafted the Universal Declaration of Rights, realized the importance of defining the precise limitations which might legitimately be imposed by States, instead of leaving them to the uncontrolled will of the latter; and, for this purpose, the Covenant on Human Rights was drawn up.

The framers of our Constitution likewise realized the importance of formulating definite limitations instead of leaving the courts to devise vague doctrines, such as, that of 'Police Power' or that of 'Due Process' to combat the 'Police Power' itself. We have in Article 19 of the Indian Constitution, which guarantees as many as seven important civil rights, two parts - one declaring the rights themselves and another enumerating precisely the limitations which may be imposed by the State upon the exercise of each of these rights. It has been early laid down by our Supreme Court that the limitations enumerated in the Article are exhaustive and that the courts cannot uphold the validity of any restrictive State act on grounds other than those specified in the Article itself.<sup>6</sup>

Before taking up the specific civil rights guaranteed by Article 19, we may refer to the basic right of equality before the law.

### RIGHT TO EQUALITY AND EQUAL PROTECTION BEFORE THE LAW

The guarantee in Article 14 of the Indian Constitution corresponds to Article 20(1) of the Covenant on Human Rights:

Article 20(1) of the Covenant

Article 14 of the Indian Constitution

"All are equal before the law, and shall be accorded equal protection of the law."<sup>7</sup>

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Equality before the law is a reality in India inasmuch as the law recognizes no privileged class and every person regardless of his race, religion, wealth, social status or political influence, has a right to sue or to be sued, to prosecute and to be prosecuted for the same kind of action under the ordinary law of the land. The only immunity from legal action that exists is of the heads of State, namely, the President of the Republic or the Governor of a State, under Article 361 of the Constitution. Any possible injury to the individual as a result of this immunity is, however, avoided by declaring in the same Article that

<sup>6</sup> *Chiranjit Lal v. Union of India*, A.I.R. 1951 S.C. 41(56).

<sup>7</sup> Article 7 of the Universal Declaration includes this right.

the above personal immunity will not bar any action against the Government itself. As regards public officials, it is highly significant that the law does not exempt a public officer from the bounds of ordinary law and that, save for some procedural limitations provided by the law itself to protect the public servants in the *bona fide* discharge of their official duties from harassing litigation, public servants are liable to be tried for their illegal acts in the same courts as ordinary citizens. Instances of such procedural safeguards may be had in Section 80 of the Code of Civil Procedure, 1908, which requires a notice before institution of a civil action, and Section 197 of the Code of Criminal Procedure, 1898, which requires sanction of the Government for a criminal prosecution against a public servant.

The clause relating to equal protection before the laws has received, in a mass of cases, an interpretation similar to that given to the Fourteenth Amendment to the Constitution of the United States by the Supreme Court there. Thus, it has been held that as between persons similarly circumstanced, a law cannot provide for discriminatory privileges or liabilities.<sup>8</sup> In other words, the Legislature cannot discriminate between one person and another, if as regards the subject-matter of the legislation their position is the same.<sup>9</sup>

The above guarantee, however, does not take away from the State the power of classifying persons for legitimate purposes, if the classification is based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained. A Legislature which is to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate.<sup>10</sup> Such reasonable classification may be based on geographical differences,<sup>11</sup> or differences in time<sup>12</sup> or in the nature of the trade, calling, or occupation which it is sought to regulate by the legislation.<sup>13</sup>

The special treatment may even be founded upon differences in degree of public injury or harm, so that the Legislature is not precluded from introducing a reform gradually, i.e., applying the legislation, in the first instance, to some of the institutions or objects or particular areas only according to the exigencies of the situation.<sup>14</sup> The Legislature may even regulate only the aggravated forms of a mischief

<sup>8</sup> *State of W.B., v. Anwar Ali*, (1952) S.C.R. 284.

<sup>9</sup> *Chiranjit Lal v. Union of India*, (1950) S.C.R. 869.

<sup>10</sup> *Ameeroonissa v. Mahboob*, (1953) S.C.R. 404

<sup>11</sup> *State of Punjab v. Ajaib Singh*, (1953) S.C.R. 254.

<sup>12</sup> *Ranjilal v. Income-tax Officer*, (1951) S.C.R. 127.

<sup>13</sup> *State of Bombay v. Balsara*, (1951) S.C.R. 682.

<sup>14</sup> *Biswambhar v. State of Orissa*, (1954) S.C.R. 842.

and such a legislation cannot be challenged as unconstitutional on the ground that it is not all-embracing.<sup>15</sup>

Where, however, a statute, on the face of it, shows that the Legislature made no attempt at all to make a classification but singled out a particular individual or class without having any difference peculiar to such individual or class, either for the purpose of conferring a benefit or imposing a burden, the Courts will not hesitate to invalidate such law as offending the guarantee of equal protection.<sup>16</sup> The result will be similar where the Legislature authorizes the Executive to make such selection for special treatment, without providing any guide or standard for such selection or differentiation.<sup>17</sup> The discrimination may consist of an application of a special law of procedure which operates to the prejudice of an accused or other person who is to be affected by a liability. Thus, if a law empowers the Executive, at its option, to subject persons who are similarly situated, to a procedure (say, for the purpose of investigation or assessment of their income) which is substantially different from the ordinary procedure prescribed by the general law which would have been otherwise applicable, such law would be struck down by the Court.<sup>18</sup>

Perhaps the most remarkable application of the guarantee of equal protection in India was made by the Supreme Court in the case of *Ram Prasad v. State of Bihar*.<sup>19</sup> The framers of the Indian Constitution did not consider it necessary to incorporate in the Constitution a specific prohibition against the enactment of a 'Bill of Attainder', presumably because they supposed the evil to have disappeared from the democratic world long ago. But in *Ram Prasad's* case the Indian Supreme Court found the menace rising in a newer shape, and, thanks to the wisdom of the highest tribunal, it lost no time in quelling the judgment by the ingenious application of the Equality Clause, overruling a contrary view taken by the High Court. What happened in this case is that a State Legislature passed an Act declaring that the settlement of land belonging to a private landowner in favour of a lessee 'shall be null and void'. Whether a lease shall be valid or not is, obviously, a private dispute which is to be decided by the ordinary courts of law. Had not the impugned law been enacted, the dispute in the instant case would have been adjudicated in a court of law. The Supreme Court held that the Legislature could not single out the individual lessee in question and deprive him of such right to have his

<sup>15</sup> *Sakhwant v. State of Orissa*, (1955) 1 S.C.R. 1004.

<sup>16</sup> *Ram Prasad v. State of Bihar*, (1953) S.C.R. 1129.

<sup>17</sup> *Saghir Ahmad v. State of U.P.* (1955) 1 S.C.R. 707; *State of W.B. v. Anwar Ali*, (1952) S.C.R. 284.

<sup>18</sup> *Suraj Mall v. Visvanath*, (1955) 1 S.C.R. 448; *Muthisah v. Commr. of I.T.*, (1955) 2 S.C.R. 1247.

<sup>19</sup> *Ram Prasad v. State of Bihar*, (1953) S.C.R. 1129.

dispute adjudicated by a court as all other individuals of the land possessed. By doing so, the Legislature had enacted a law which was discriminatory on the face of it and the Court, accordingly, declared it to be void, and restored the parties to their position under the ordinary law. Equal protection is incompatible with *ad hoc* legislation against a particular individual.

### FREEDOM OF SPEECH AND EXPRESSION

It is interesting to compare the text of Article 19(1)(a) and (2) of the Indian Constitution with that of Article 16(2) and (3) of the Draft Covenant on Civil and Political Rights.<sup>20</sup>

#### Article 16(2) and (3) of the Draft Covenant

"(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."<sup>21</sup>

(3) The exercise of the rights provided in the foregoing paragraph carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such only as are provided by law and are necessary, (1) for respect of the rights or reputation of others, (2) for the protection of national security or of public order, or of public health or morals."

#### Article 19(1)(a) and (2) of our Constitution

"19(1)(a); All citizens shall have the right to freedom of speech and expression.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."<sup>22</sup>

The guarantee in clause (1)(a) above has been given the same amplitude as its universal counterpart by the judicial holding that freedom of expression includes the freedom of propagation of ideas, their publication and circulation,<sup>23</sup> and that the freedom extends to

<sup>20</sup> Yearbook on Human Rights for 1952, p. 427.

<sup>21</sup> Article 19 of the Universal Declaration is clothed in a slightly different language but the substantial contents are the same.

<sup>22</sup> The above is the text of sub-clause (2) of Article 19, as amended by the Constitution (1st Amendment) Act, 1951.

<sup>23</sup> *Ramesh Thappar v. State of Madras*, (1950) S.C.R. 594.

every medium of expression, such as word of mouth, writing, printing or other representation, addressed to the eyes or the ears.<sup>24</sup>

Any restriction imposed upon the above freedom is *prima facie* unconstitutional, unless it can be justified under the limitation clause, i.e., clause (2). This clause authorises the State to impose restrictions upon the freedom of speech only on certain specified grounds so that if, in any particular case, the restrictive law cannot rationally<sup>25</sup> be shown to relate to any of these specified grounds, the law must be held to be void.<sup>26</sup>

In the original Constitution, the grounds for restriction were: defamation; contempt of court; decency or morality; security of the State.<sup>27</sup> The amendment of the Constitution in 1951 has added certain more grounds, namely, friendly relations with foreign States, public order, incitement to an offence. But while the amendment has thus narrowed down the scope of the freedom in one respect, it has strengthened it in a most substantial sense by making it subject to judicial review. This has been done by inserting the word 'reasonable' to qualify the word 'restriction'. In the absence of the word 'reasonable' in the original article, courts were powerless to invalidate a law restricting freedom of expression on the ground that its provisions were procedurally unreasonable or that the restrictions imposed by it were excessive or arbitrary. The only ground on which the courts could interfere until 1951 was that a particular restriction did not relate to any of the grounds specified in the original clause (2).

Since it is not here possible to make an exhaustive treatment of all the grounds of restriction, we may take up some of them and explain the legitimate limits of State interference on that account. Thus, in the interests of *public order*, it is permissible for the State to restrict or penalize speeches inducing persons employed in the essential services<sup>28</sup> to withhold their services or to commit a breach of discipline;<sup>29</sup> or utterings calculated to outrage the religious feelings of any class of the people.<sup>30</sup> To prevent a breach of the peace during a period of emergency (such as communal agitation), temporary restrictions may also be imposed upon the publication of a specified class of matter in newspapers.<sup>31</sup> All such restrictions would, however, be subject to judicial review, the importance of which we may explain with reference to some interesting topics.

<sup>24</sup> *State v. Baboo Lal*, A.I.R. 1956 All. 571 (574).

<sup>25</sup> *Sodhi Shamser v. State of Pepsu*, A.I.R. 1954 S.C. 276.

<sup>26</sup> *Ramesh Thappar v. State of Madras*, (1950) S.C.R. 594.

<sup>27</sup> *Vide Basu's Commentary on the Constitution of India*, 3rd Edition Vol. I, p. 150

<sup>28</sup> Bihar Essential Services Maintenance Act, 1948.

<sup>29</sup> *State v. Ramanand*, A.I.R. 1956 Pat. 188.

<sup>30</sup> *Ramji Lal v. State of U.P.*, A.I.R. 1957 S.C. 620.

<sup>31</sup> *Virendra v. State of Punjab*, (1957) S.C. (Petns. 95 & 96/57).

### Inciting disaffection towards the Government

An intriguing question which has been agitated in the courts of India since the British days is whether the act of merely exciting disaffection or bad feeling towards the Government established for the time being can be punishable under the law. Since the coming into force of the Constitution the further question has arisen whether any law providing for such punishment would itself be constitutionally valid.

Section 124A of the Indian Penal Code provides for the offence of 'Sedition' thus:

"Whoever by words . . . or otherwise, brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished . . .

"Explanation 1. - The expression 'disaffection' includes disloyalty and all feelings of enmity."

In 1942 the Federal Court<sup>32</sup> took a bold step, on the footing of statutory construction, to hold that mere criticism or even ridicule of the Government was not an offence unless it was calculated "to undermine respect of the Government in such a way as to make people cease to obey it and obey the law, so that only anarchy can follow." In short, in the opinion of the Federal Court, the absence of a tendency to cause public disorder or violence was an essential ingredient of the offence under the said Section. But, on appeal, the Privy Council<sup>33</sup> overruled the decision of the Federal Court and held that the offence constituted by the Section had no necessary connection with violence or disorder.

After the coming into force of the Constitution, the Punjab High Court<sup>34</sup> held Section 124A of the Penal Code to be unconstitutional, inasmuch as it was not covered by any of the grounds for restriction which were then specified in clause (2) of Article 19 of the Constitution. That clause, before the amendment of 1951, did not include "public order". The relevant expression was "which undermines the security of the State". The Supreme Court had previously held<sup>35</sup> that mere excitement of disaffection or bad feelings against the Government may not necessarily undermine the security of the State; hence, the Punjab High Court<sup>36</sup> quite logically came to the conclusion that Section 124A of the Penal Code was not covered by the limitation clause (2) of Article 19.

The amendment of clause (2) in 1951 was progressive in one sense and retrograde in another. It was progressive in so far as it introduced

<sup>32</sup> *Niharendu v. Emp.*, (1942) 46 C.W.N. (F.R.) 9.

<sup>33</sup> *Sadashiv v. Emp.*, (1947) 74 I.A. 89.

<sup>34</sup> *Master Tara Singh v. State*, (1951)6 D.L.R. 82 (Simla).

<sup>35</sup> *Romesh Thappar v. State of Madras*, (1950) S.C.R. 594(602).

<sup>36</sup> *Master Tara Singh v. State*, (1951)6 D.L.R. 82 (Simla).

the words "reasonable restriction" and gave to the courts the right of review of laws restricting freedom of expression; but it was restrictive so far as it introduced new grounds of limitation, for instance, public order and incitement to an offence. The meaning of the expression "in the interests of public order" came up before the Supreme Court recently.<sup>37</sup> The question for decision was the constitutionality of the provision in Section 295A of the Indian Penal Code. This Section penalized the uttering of words "with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India." The Supreme Court said that the excitement of such religious disaffection has a proximate tendency to cause public disorder if perpetrated with a deliberate and malicious intention of outraging the religious feelings of a class of people. As regards the interpretation of the words "in the interests of public order", the Court agreed with the view taken by the Patna High Court in *Devi Soren v. State of Bihar*<sup>38</sup> that this expression is wider than words like "for the maintenance of" and that a law might, after the amendment, validly impose restrictions on utterances which have a tendency to cause public disorder but which may not actually lead to a breach of public order.

The *tendency test* introduced by the Supreme Court in the above decision would no doubt require a revision of some of the cases which had invalidated laws prior to the amendment of 1951. The question of validity of Section 124A of the Penal Code has not yet been brought to the Supreme Court. But the fact that the Court approves of the view taken in the Patna case suggests that the Supreme Court might uphold the validity of Section 124A, because the Patna High Court<sup>39</sup> had held that provision to be covered by the expression "in the interests of public order". Nevertheless, the Supreme Court's views on Section 124A would be of great interest to students of constitutional law, particularly in view of the fact that the framers of the original Constitution had refused to follow the decision of the Privy Council<sup>40</sup> and deleted the word 'sedition' from that provision of the Draft Constitution which ultimately became Article 19(2).<sup>41</sup>

Before leaving this topic, it should be pointed out that even under Section 124A of the Penal Code, "expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection" is not punishable.<sup>42</sup> *Disapprobation* becomes

<sup>37</sup> *Ramji Lal v. State of U.P.*, A.I.R. 1957 S.C. 620.

<sup>38</sup> A.I.R. 1954 Pat. 254.

<sup>39</sup> *Devi Soren v. State of Bihar*, A.I.R. 1954 Pat. 254.

<sup>40</sup> *Sadashiv v. Emp.*, (1947) 74 I.A. 89.

<sup>41</sup> *Vide Basu's Commentary on the Constitution of India*, Third Ed., Vol. I, pp. 200-201.

<sup>42</sup> Explanation II to Section 124A, Indian Penal Code.

*disaffection* when there is a tendency to undermine the authority of the Government.<sup>43</sup>

### Criticism of a Minister

A closely connected question is whether the criticism of, or abusive slogans used against, the Ministers individually can be penalised as an offence against the State without violating the permissible limits under Article 19(2) of the Constitution.

Prior to the adoption of the Constitution, the Judicial Committee of the Privy Council had held<sup>44</sup> that the criticism of an individual Minister was punishable under Section 124A of the Indian Penal Code and no question as to the constitutional validity of such law could arise at that time.

As to what would be the position under the Constitution, some light is thrown by the observations of the Supreme Court in a criminal appeal<sup>45</sup> from a conviction under the Punjab Security of the State Act, 1953. Following the language of clause (2) of Article 19 as it stands after the amendment of 1951, Section 9 of the Punjab Act made punishable with imprisonment any person who made or published any speech or statement which

“undermines the security of the State, . . . public order, decency or morality, or amounts to . . . defamation or incitement to an offence prejudicial to the security of the State or the maintenance of public order . . .”

The Appellants, who were members of a Motor Union, took out a procession against the policy of the Punjab Government to nationalise motor transport, uttering abusive slogans against the Minister of Transport and the Chief Minister, by name. The appellants were convicted on the ground that the utterances (a) undermined public order, (b) undermined decency or morality, and (c) amounted to defamation.

The Supreme Court, on appeal, negatived all the grounds levelled against the appellants. As to decency or morality, the Court found that the appellants belonged to a stratum of society where such vulgar abuses were so freely indulged in that they could hardly have any effect on the persons hearing the same. Hence, the abuses in question could not be held to have “*undermined* decency or morality”. More important was the question whether the utterances could be said to have ‘undermined public order’. The case of the prosecution was that some members of the public who had congregated to hear the slogans were ‘annoyed’ and that there might have been a breach of the

<sup>43</sup> *Devi Soren v. State*, A.I.R. 1954 Pat. 254.

<sup>44</sup> *Emp. v. Shibnath*, A.I.R. 1945 P.C. 156.

<sup>45</sup> *Kartar Singh v. State of Punjab*, A.I.R. 1956 S.C. 541.



peace, had there been no police arrangements. The Court found that the evidence fell short of establishing that there would have been a riot, but for the police arrangements, as a result of these utterances against the Ministers, and that, accordingly, it could not be held that the utterances had 'undermined public order'.

As to defamation the Court held that the utterances were defamatory, but that defamation could be punished under the Security Act only if such defamation was prejudicial to the security of the State or maintenance of the public order. This part of the judgment is worthy of particular notice. The question before the Court was not whether the appellants were punishable for the offence of defamation under the ordinary criminal law of the land<sup>46</sup> and, as the Court observed, the Ministers, personally, had taken no notice of the utterances. The appellants had been prosecuted under the Security Act, which had been made by the State Legislature under its legislative power relating to 'public order'.<sup>47</sup> Hence, defamation could be punished under the Act only where it was of such a character as to be prejudicial to the maintenance of public order. That it was not of such a character from the finding just referred to, namely, that there was no evidence of the utterances leading to any *reasonable* apprehension of breach of the peace.

The constitutionality of the Act under which the appellant had been convicted was not raised in the case, and the decision rested solely on the interpretation of the statutory provision. Nevertheless, the observations of the Supreme Court are clear enough to indicate the attitude of the Court towards the ambit of Article 19(2) also, since the very language thereof was reproduced in the Act.

It would be legitimate to infer from the above decision that mere 'annoyance' of the public or some Section thereof would not be tolerated as a ground of restriction of the freedom of expression 'in the interests of public order'. The connection must be proximate and not remote, as had been held even before the adoption of the Constitution.<sup>48</sup> An insulting statement about another's religion may have a proximate tendency to cause a public disorder but the criticism of a Minister, without more, may not.

In an earlier case,<sup>49</sup> the Supreme Court had held that scurrilous attacks upon a Chief Justice, however gross it might be, could not be restricted in the interests of 'public order'. If such attacks imputed gross partiality in the matter of recruiting judicial officers, the offenders might be dealt with under the ordinary law, but they could not be

<sup>46</sup> Section 499 of the Indian Penal Code, 1860.

<sup>47</sup> Item 1 of List II of the 7th Schedule of the Constitution; *vide Mani Ram v. State of Punjab*, A.I.R. 1956 Punj. 169 (170).

<sup>48</sup> *R. v. Basudev*, (1950) S.C.J. 47.

<sup>49</sup> *Sodhi Shamsar v. State of Pepsu*, A.I.R. 1954 S.C. 276.

detained under the Preventive Detention Act which was a special law made for the maintenance of security of the State and public order. The statements in question "could not have any *rational* connection" with the maintenance of public order.

It is difficult to resist the temptation of reproducing the concluding words of the late Mr. Justice Mukherjea in the above case: "The utmost that can be said is that the allegations in the pamphlets are calculated to undermine the confidence of the people in the proper administration of justice in the State. But it is too remote a thing to say therefore that the security of a State or the maintenance of law and order in it would be endangered thereby... After all, we must judge facts by the ordinary standards of common sense and probability, and it is no answer to say that strange and unexpected things do sometimes happen in this world."

### Freedom of the Press

If the reality of the freedom of the Press in a country is to be judged by the test whether the Press labours under any additional restraints besides those to which every individual is subject, the trend in India since the adoption of the Constitution must be labelled as strikingly progressive.

The only all-India enactment today which applies exclusively to the Press is the Press and Registration of Books Act, 1867, which requires the registration of the printing presses, newspapers, books and periodicals printed in India. But this enactment does not, in reality, impose any *restriction* upon the press any more than a law requiring registration of births and deaths does upon the individual. The object is merely to secure information relating to printing establishments and their publications. The Act does not impose any sort of censorship, previous restraint or the like. Even though no such law exists in England or the USA, it is significant to note that similar legislation has been advocated in the United States by the President's Committee on Civil Rights. Be that as it may, few people in India object to this measure and its constitutionality has also been judicially upheld.<sup>50</sup> Nor would anybody complain against the Newspaper (Price & Page) Act, 1956, which has been recently enacted to prevent unfair competition among newspapers by regulating the prices charged by newspapers. The latter measure, in fact, conduces to create a better atmosphere for the freedom of expression, in so far as it prevents this potent medium of expression from falling into the hands of monopolists and vested interests.

We cannot, however, overlook the fact that during British days we had special laws of all-India application, to deal with the Press and

<sup>50</sup> *In re Alavandar*, A.I.R. 1957 Mad. 427.

this heritage we maintained as late as the first of February 1956. Though it would be out of place here to trace the history of such press laws from early times, we should briefly refer to the development since the commencement of the Indian Constitution in order to demonstrate the progress made in this connection.

At the coming into force of the Constitution, there was the Indian Press (Emergency) Powers Act, 1931, which imposed on the Press an obligation to furnish security at the call of the Executive. The Act, in short, empowered a Provincial Government to direct a printing press to deposit a security which was liable to be forfeited if the press published any matter by which any of the mischievous acts enumerated in Section 4 of the Act were furthered, e.g., bringing the Government into hatred or contempt or inciting disaffection towards the Government; inciting feelings of hatred and enmity between different classes of subjects; inducing a public servant to resign or neglect his duty. This system of *executive* control and punishment of the Press is foreign to democratic England. The Indian Act was, in fact, an antiquated revival of the trial by Star Chamber of Press offences and the licensing system which English democracy had fought and conquered. The very Preamble of the Act "for the better control of the Press" was offensive.

While the Draft Constitution was under consideration in the Constituent Assembly, the Government of India appointed a Press Laws Enquiry Committee to "review the Press laws of India with a view to examine if they are in accordance with the fundamental rights formulated by the Constituent Assembly of India." This Committee recommended, *inter alia*, a repeal of the Press (Emergency Powers) Act, 1931, and the incorporation of some of its provisions in the general statutes laying down the law of crimes.

Meanwhile, some of the clauses of the Act were declared to be repugnant to the provisions of Article 19(2) of the Constitution, as it then stood.<sup>51</sup> This led Government to replace the Act of 1931 by a revised measure namely, the Press (Objectionable Matter) Act, 1951, which, however, retained some of the fundamental vices of the old law. The Preamble now looked innocuous as it was "to provide against the printing and publication of incitement to crime and other objectionable matter." The other improvements were as follows: while the Act of 1931 was a permanent statute, the Act of 1951 was a temporary one, to remain in force for a period of two years; the new Act provided for a *judicial inquiry* by a Sessions Judge before security could be demanded from a printing press or forfeited to Government and the person against whom a complaint had been made, could demand the matter to be determined with the aid of a Jury, and had a right of appeal from the order of the Sessions Judge to the High Court; a

<sup>51</sup> Cf. *Amar Nath v. State*, A.I.R. 1951 Punj. 18 (S.B.); *Srinivasa v. State of Madras* A.I.R. 1951 Mad. 70.

change was also made in the clause relating to inciting disaffection towards the Government.

Nevertheless, the very idea of a special law imposing restrictions upon the publication of certain matters instead of leaving them to be punished under the general law was not acceptable to many, and, before the duration of the temporary Act could be extended beyond 1953, the question of further extension of the Act was examined by a Press Commission which the Government had appointed in 1952. The minority of the Commission<sup>52</sup> recommended that the Act should lapse after its current term. The majority<sup>53</sup> sought to rely on internal control of the Press by a Press Council and expressed the desire that Government should drop the special Act after two years if the Press Council succeeded in checking those indulged in the publication of objectionable matter. The implementation of this recommendation by the Government forms a landmark in Indian democracy. The Act of 1951, which had been extended up to February 1956 was allowed to lapse thereafter and it was also formally included in a subsequent Repealing Act.

But though we have got rid of special Press laws demanding security from the Press as a particular medium of expression, it cannot be suggested that the Press in India is not subject to any restrictions at all, for there is no absolute freedom of the individual in any country with respect to any civil right. Article 2 of the Covenant on the Freedom of Information and the Press permits the States to impose restrictions upon the freedom of expression in the interests of national safety; public order; prevention of incitement to alter the system of government by violence or of commission of criminal acts or fraud, of obscene publication and the like. The States in India have enactments which impose restrictions upon the freedom of the Press in the interests primarily of public order or public safety, such as the West Bengal Security Act, 1950, Punjab Security of State Act, 1953, Madhya Bharat Public Security Act, 1953. Most of these Acts impose restrictions upon all media of expression in like manner, but there are some Acts, such as the Punjab Special Powers (Press) Act, 1956, which apply particularly to printed matter. A case under the latter Act, which came up before the Supreme Court<sup>54</sup> recently, will clearly demonstrate how the Courts would test the constitutionality of such restrictive laws on the touchstone of reasonableness.

In this case, the Supreme Court invalidated the following provision, namely:

“The State Government or any authority authorised by it in this behalf, if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of communal harmony

<sup>52</sup> Report of the Press Commission (D.I.B. 9), Part I, para. 1152.

<sup>53</sup> *Ibid.*, para. 1469.

<sup>54</sup> *Virendra v. State of Punjab*, (1957) S.C. (Petns. 95 & 96 of 1957).

affecting or likely to affect public order, may, by notification, prohibit the bringing into Punjab of any newspaper, periodical, leaflet or other publication."

The grounds were that the provision was unreasonable both from the substantive and procedural points of view. It was held that it was substantively objectionable because no limitation was imposed either as to the *duration* of the ban on importation authorised by the provision nor as to the *subject-matter* of the publication. It extended to any publication, and might be of an indefinite or unlimited duration. Procedurally, again, it placed the whole matter at the subjective determination of the State Government and there was no provision even for any representation of the party affected. It thus offended against the rules of natural justice.

At the same time, the Court upheld the validity of another section of the same Act which was *not* lacking in the above respects. This was Section 2(1)(a), which ran as follows:

"2(1) The State Government or any authority so authorised in this behalf if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the *maintenance of communal harmony affecting or likely to affect* public order, may, by order in writing address to a printer, publisher or editor,

"(a) prohibit the printing or publication in any document or any class of documents of any matter relating to a *particular* subject or class of subjects for a *specified period* or in a particular issue or issues of a newspaper or periodical;

"Provided that no such order shall remain in force for more than *two months* from the making thereof;

"Provided further that the person against whom the order has been made may within ten days of the passing of this order make a *representation* to the State Government which may on consideration thereof modify, confirm or rescind the order . . ."

### FREEDOM OF ASSEMBLY

The texts of Article 18 of the Covenant and Article 19(1)(b) and (3) of the Indian Constitution are as follows:

#### Article 18 of the Covenant

"Everyone has the right to freedom of peaceful assembly. No restrictions shall be placed on the exercise of this right other than those prescribed by law and which are necessary to ensure national security, public order, the protection of health or morals or the protection of the rights and freedoms of others."<sup>55</sup>

#### Article 19(1)(b) and (3) of the Indian Constitution

"(1)(b) - All citizens shall have the right to assemble peaceably and without arms.

"(3) - Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes or prevents the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause."

<sup>55</sup> Article 17 of the Draft Covenant on Civil and Political Rights (1952) is substantially the same as above.

It is evident that the limitation clause of *our* Constitution in regard to this right is much more guarded than that of the Covenant. It empowers the State to impose restrictions only on two grounds, namely: (a) that the assembly must be unarmed; and (b) that there should not be any breach of the peace caused by such assembly. A survey of the existing restrictive laws of India would illustrate how the restrictions imposed by the State relate to these two grounds.

In India, there is no common law right to bear arms and nobody can possess or carry arms without obtaining a licence under the Arms Act, 1878. But if a person possesses such a licence, his carrying the arms to a meeting or assembly is not *per se* punishable under the existing law. In other words, the mere carrying of arms to an assembly, which is lawful, by a person who is authorised to possess the arms is not unlawful; but, if the assembly *becomes* unlawful, the possession of a deadly weapon by a member of such an unlawful assembly, even though he possesses a licence for the arms, aggravates his offence, under Section 144 of the Indian Penal Code, 1860. In other words, when an assembly becomes unlawful, the carrying of arms imposes additional penalty on a member of such an assembly apart from the penalty prescribed for membership of an unlawful assembly.

For what constitutes an assembly unlawful, we have to refer to Section 141 of the same Code. A mere assemblage of men in any number cannot be illegal under the law, but an assembly of five or more persons becomes unlawful if the common object of the persons composing the assembly is to commit any of the criminal acts specified in the Section, for instance, to overawe the Government or any public servant in the exercise of his lawful powers or to resist the execution of any law or legal process by means of criminal force or show of criminal force. An assembly of less than five persons may also constitute an offence, if it actually disturbs public peace. Thus, Section 159 of the same Code penalises an 'affray' which is committed when two or more persons by assembling in a public place disturb the public peace.

As to restrictions in the interest of public order, it is evident that preventive measures must be taken by the authorities in charge of maintenance of the peace. Hence, regulative powers are conferred upon a police officer by the Police Act, 1861, to direct the conduct and prescribe the route and time for all assemblies and processions along the public routes and also to require the members to apply for a previous licence.

Section 107 of the Criminal Procedure Code, 1898, empowers a magistrate to obtain security for keeping the peace from any person who is likely to commit a breach of the peace, even though nothing has yet been actually committed in that direction.

In England, the question whether a meeting which is by itself lawful can be dispersed or prohibited has raised a nice controversy

since the days of *Beatty v. Gilbanks*,<sup>56</sup> and though the position is not quite certain, the latest view<sup>57</sup> is that even a lawful meeting may be dispersed on the ground that others are likely to cause a disturbance of the peace if it is impossible for the authorities to preserve the peace than by dispersing the meeting, and that a refusal to disperse after such an order constitutes an offence. The ultimate interest of maintaining the peace thus constitutes the *rationale* of curbing the individual's right of assembly. Section 127 of the Indian Criminal Procedure Code, similarly, authorises a magistrate to disperse not only an unlawful assembly but also a lawful assembly "if it is likely to cause disturbance of the peace," and Section 151 of the Penal Code makes it an offence not to disperse after a lawful command to disperse has been given.

Section 144 of the Criminal Procedure Code, on the other hand, empowers a magistrate to issue a temporary injunctive order to restrain any assembly, meeting or procession otherwise lawful, if there is a "risk of obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety or a disturbance of the public tranquillity or a riot or an affray." It is interesting to note that in the above provision danger to health is also a ground of restraining the assembly. That this is a legitimate ground for restriction few will question, and that is why it is mentioned in Article 18 of the Covenant. Of course, Article 19(3) of the Indian Constitution, as has been already noticed, uses the word "public order" only. But in an early decision,<sup>58</sup> the Supreme Court has observed that dangers to public health might come within the concept of public 'safety' (or freedom from danger) which is included within the wider expression 'public order'.

Preventive powers are conferred also by the State Public Safety Acts,<sup>59</sup> e.g., to impose conditions upon the holding of processions, meetings or assemblies, in the interests of public order or safety or to ban such assemblies within any specified area without the written permission of a prescribed authority;<sup>60</sup> or by the electoral law,<sup>61</sup> for the purpose of maintaining peace at the time of polling.<sup>62</sup>

The validity of all such restrictive provisions is, however, tested by the courts by the touchstone of 'reasonableness'. The courts have thus annulled such restrictive provisions where the law empowered the Government to delegate its power to impose restrictions on assemblies

<sup>56</sup> (1882) 9 Q.B.D. 308.

<sup>57</sup> *Duncan v. Jones* (1936) 1. K.B. 218.

<sup>58</sup> *Romesh Thappar v. State of Madras*, (1950) S.C.R. 594.

<sup>59</sup> Cf. Section 7(1) of the Madhya Bharat Maintenance of Public Order Act, 1949.

<sup>60</sup> *State v. Gangadhar*, A.I.R. 1957 M.P. 54.

<sup>61</sup> Section 126(1) of the Representation of the People Act, 1951.

<sup>62</sup> *Rameshwar v. State*, A.I.R. 1957 Pat. 252.

‘to any subordinate officer’, irrespective of his rank or status in office.<sup>63</sup>

An enactment of doubtful constitutional validity is the Prevention of Seditious Meetings Act, 1911. It empowers the State Government to declare any area as a “proclaimed area”. Upon such a declaration, the District Magistrate or Commissioner of Police is invested with the power to “prohibit any public meeting in such a proclaimed area, if in his opinion such a meeting is likely to promote sedition or disaffection or to cause a disturbance of the public tranquillity.”

Now apart from the question of constitutionality of the expressions ‘sedition’ and ‘disaffection’ which we have already noticed, this provision runs the risk of being challenged as unconstitutional on another ground: the Act provides that no public meeting “for the furtherance or discussion of any subject likely to cause disturbance or *public excitement*” shall be held in such an area without written notice to the district magistrate or commissioner of police. We have already referred to the view of the Supreme Court that mere public annoyance does not constitute a menace to ‘public order’. Judged in this light, “public excitement” is a vague expression which may not be favoured by the court as a ground of taking preventive action against a meeting.

### FREEDOM OF ASSOCIATION

The text of Article 11(1) and (2) of the Covenant on Human Rights, 1950, and Article 19(1)(c) and (4) of the Constitution of India are given below.

#### Article 11(1) and (2) of the Covenant

‘(1) Everyone has the right to freedom of association with others.

“(2) This freedom shall be subject only to such limitations as are pursuant to law and which are necessary for the protection of national security, public order, public safety, health or morals, or the fundamental rights and freedoms of others.”<sup>64</sup>

#### Article 19(1)(c) and (4) of the Indian Constitution

“(1)(c) All citizens have the right to form associations or unions.

“(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.”

It is evident at once that the guarantee of this freedom in our Constitution is in no way less liberal than that in the Covenant on Human Rights. It guarantees the right not only to form associations but also

<sup>63</sup> *State v. Gangadhar*, A.I.R. 1957 M.P. 54 (58).

<sup>64</sup> Article 18(1) and (2) of the Draft Covenant on Civil and Political Rights, 1952, is substantially the same but for the addition of the following further exception: “This article shall not prevent imposition of lawful restrictions on the exercise of this right by the members of the armed forces or of the police.”



to continue them,<sup>65</sup> so long as no law made in the interests of public order or morality is contravened. Hence, an association cannot be formed for the purpose of committing a criminal conspiracy. Section 120A of the Indian Penal Code, 1860, penalises a criminal conspiracy which means an agreement between two or more persons to do or cause to be done an illegal act, or an act which is not itself illegal, by illegal means, provided such agreement is followed by some overt act, done in pursuance of the agreement.

Similarly, while the Indian Trade Unions Act, 1926, recognises a trade union as a lawful association and even confers upon it a legal personality, Section 22 of the Industrial Disputes Act, 1947, prohibits certain strikes as well as lock-outs as illegal, for instance, in a public utility service; and Section 26 of that Act prescribes a penalty for participating in such illegal strikes or lock-outs. A provision such as this, which prohibits a strike or a lock-out without in the first instance resorting to the conciliatory machinery provided by the law, cannot be said to constitute an unreasonable restriction upon the freedom of association.<sup>66</sup> A law which provides that a union representing a certain percentage of the workers in an industry will have the right to represent that industry at an 'industrial dispute' to the exclusion of other unions has, similarly, been held as valid.<sup>67</sup>

The limits of State interference with this right have been clearly pronounced by the Supreme Court<sup>68</sup> in reviewing Section 15(2)(b) of the Indian Criminal Law (Amendment) Act, 1908, as amended by the Madras Act XI of 1950. This provision authorised the State Government to declare any association to be unlawful if the Government was of the opinion that it constituted a danger to the public peace. There was no provision for service of notice upon the members of the association, nor was any opportunity to be given to them for showing cause against the declaration. There was, of course, a provision for reference by the Government to an Advisory Board of any representation that might be made by any such association but no provision for the appearance of the aggrieved persons before that Board. The Supreme Court held this provision as an unreasonable restriction upon the right guaranteed by Article 19(1)(c) on two grounds:

1) The imposition of penal consequences after declaring an association as unlawful on the subjective satisfaction of the Government without providing for adequate communication of such declaration to the association and its members must be regarded as an unreasonable restriction in the absence of a condition of emergency justifying such a course.

<sup>65</sup> *Kulkarni v. State of Bombay*, A.I.R. 1951 Bom. 106.

<sup>66</sup> *Janardan v. Hukumchand Mills*, A.I.R. 1956 M.B. 199.

<sup>67</sup> *Kulkarni v. State of Bombay*, A.I.R. 1954 S.C. 73.

<sup>68</sup> *State of Madras v. Row*, (1952) S.C.R. 597.

2) The summary and one-sided review by an Advisory Board cannot be regarded as a reasonable substitute for a judicial enquiry to override the basic freedom of association in the absence of exceptional circumstances.

In short, the view of the Supreme Court was that in the absence of emergency conditions, an association could not be declared to be unlawful for want of judicial verdict. The observations of the Supreme Court in this connection are worthy of citation:

“The right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields, that the vesting of authority in the executive government to impose restrictions on such right, without allowing the grounds of such imposition both in their factual and legal aspects to be duly tested in a judicial enquiry, is a strong element which... must be taken into account in judging the reasonableness of the restrictions imposed by S. 15(2)(b) on the exercise of the fundamental right under Art. 19(1)(c).”<sup>69</sup>

The ambit of freedom of association which the employees of the Government can claim has been brought before the courts in several cases. While it is not disputed that a Government servant is also a citizen entitled to this fundamental right and that Government cannot, in the exercise of its power to impose restrictions upon the conduct of its employees, render the exercise of this right illusory,<sup>70</sup> at the same time it has been also laid down that in the interests of securing the integrity of, and discipline in, the services, Government can impose restrictions which may not be reasonable in the case of private individuals. This problem has come to the forefront even in the United States and cases like *United Public Workers v. Mitchell*<sup>71</sup> have been freely referred to in Indian decisions. Though the extent of reasonableness of such restrictions has not yet been decided by the Supreme Court, the High Court decisions may be referred to as illustrating the dividing line between legitimate and unconstitutional interference with the fundamental rights of Government employees.

Thus, while it has been held that a rule which imposes a kind of administrative censorship on the right of association by compelling employees to obtain the previous permission of the authorities before forming a union and prohibits them from becoming members of unions not constituted in accordance with the orders of Government is unconstitutional,<sup>72</sup> the validity of a similar rule which prohibits a Government servant from being a member of an association which consists of persons other than Government servants, has been upheld.<sup>73</sup>

<sup>69</sup> *State of Madras v. Row*, (1952) S.C.R. 597 (607).

<sup>70</sup> *Ramakrishnaiah v. Dist. Bd.*, A.I.R. 1952 Mad. 253; *Kulkarni v. State of Bombay*, A.I.R. 1951 Bom. 105 (114).

<sup>71</sup> 330 U.S. 75 (1946)

<sup>72</sup> *Ramakrishnaiah v. Dt. Bd.*, A.I.R. 1952 Mad. 253.

<sup>73</sup> *Chelappan v. State of T.C.*, A.I.R. 1957 Ker. 43.

Restrictions upheld in some other cases stand on a more solid ground, as for instance: (a) a rule which prohibits a Government servant to criticise in public any policy pursued or action taken by Government;<sup>74</sup> (b) a rule which prohibits a Government servant to ask for or accept or in any way participate in the raising of any subscription or other pecuniary assistance in pursuance of any object whatsoever, without the previous sanction of the Government.<sup>75</sup>

### FREEDOM OF MOVEMENT AND RESIDENCE

Article 19(1)(d)(e) and (5) of our Constitution guarantees freedom of movement and residence within the State in the same manner as Article 11(1)(a) of the Covenant on Human Rights, 1950, and Article 10(1)(a) of the Draft Covenant on Civil and Political Rights, 1952

#### Article 11(1)(a) of the Covenant

"Subject to any general law, adopted for specific reasons of national security, public safety or health, everyone has the right to liberty of movement and is free to choose his residence within the borders of each State."

#### Article 10(1)(a) of the Draft Covenant

"Subject to any general law of the State concerned which provides for such reasonable restrictions as may be necessary to protect national security, public safety, health or morals or the rights of freedoms of others, consistent with the other rights recognized in this Covenant; everyone legally within the territory of a State shall, within that territory, have the right to (I) liberty of movement and (II) freedom to choose his residence."

#### Article 19(1)(d)(e) and (5) of our Constitution

"(1) All citizens shall have the right . . .  
(d) to move freely throughout the territory of India;  
(e) to reside and settle in any part of the territory of India;  
(5) Nothing in sub-clause (d), (e) . . . of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clause either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

The object of the guarantee of freedom of movement and residence throughout the territory of India is to remove all discriminatory barriers between different parts of the country and to combat the growth of any provincial or parochial feelings. Not only should the individual be free from unlawful or arbitrary limitations at the spot where he for the time being resides, but he should have, in addition, the liberty of movement to, or settling in, any other part of the country to which he belongs. The question is of special importance in a federal country like India which has political subdivisions of territory.

<sup>74</sup> *Chacko v. State of T.C.*, A.I.R. 1957 Ker. 7.

<sup>75</sup> *Sethu Madhava v. Collector*, A.I.R. 1955 Mad. 469.

Like other freedoms, this must also be subject to legitimate restrictions in the public interest. Such restrictions, for instance, are: (a) those imposed to prevent the spreading of infectious diseases as, for example, by means of travelling by public conveyances (Section 71 of the Indian Railways Act, 1890); (b) those imposed for the safety of protected places, such as forts or other strategic areas where the public cannot be allowed to have access indiscriminately without jeopardising the interests of the security of the State (Official Secret Act, 1923); (c) provisions for the "externment" of persons whose presence in a particular locality endangers the peace and safety of the mass of peaceful citizens of that locality (Section 27 of the City of Bombay Police Act, 1902); or (d) restrictions imposed on habitual offenders<sup>76</sup> (Madras Restriction of Habitual Offenders Act, 1948).

The restrictions imposed must, however, be reasonable. From the substantive standpoint, the duration of the restrictions has been considered to be an important element. Thus, a law which provides for exclusion from an area for an *indefinite* period constitutes, *prima facie*, an unreasonable restriction.<sup>77</sup> As to the maximum period for which a person may be reasonably excluded, the test to be applied is the nature of the mischief which is sought to be remedied and the Supreme Court has made a distinction in this respect between persons participating in political agitations and persons offending against the ordinary criminal law of the land. As regards the former, the court has advocated a shorter period as a condition of reasonableness,<sup>78</sup> but in the case of dangerous characters and habitual offenders, the court would not interfere with such longer period (for instance, two years),<sup>79</sup> as the Legislature may deem necessary to combat the menace.

The Supreme Court has also applied the test as to whether the penalty awarded is in excess of the requirement, to invalidate a law which sought to penalise the influx of unauthorised persons from Pakistan. This Act not only provided for a judicial penalty for breach of the law, but also authorised the Government to remove from India *any person* who entered India from Pakistan, by committing a breach of Permit Regulations or who were reasonably suspected of having committed such a breach. The Court held that the statute could equally apply to an Indian citizen who had visited Pakistan on business and then returned to India without a proper permit; and that the expulsion of an Indian citizen for breach of Permit Regulations was in excess of the requirement, for it amounted to a virtual denial of citizenship; and that, further, the law was also procedurally unreasonable as it empowered the Executive to remove a person on its subjective

<sup>76</sup> *Armugham v. State of Madras*, A.I.R. 1953 Mad. 664.

<sup>77</sup> *Khare v. State of Delhi*, 1950 S.C.R. 519.

<sup>78</sup> *Khare v. State of Delhi*, 1950 S.C.R. 519.

<sup>79</sup> *Gurbachan v. State of Bombay*, (1952) S.C.R. 737.

satisfaction. The statute was thus held to constitute an unreasonable restriction of the right guaranteed by Article 19(1)(e). There was, it should be added, a very strong and well-reasoned dissent by Mr. Justice Das (the present Chief Justice of India) who pointed out that the law was enacted to meet an emergency situation resulting from the partition of India and the unhappy trend of events which followed in its train. The interpretation given to the clause however by the majority in this case enlarges the scope of clause (e) of Article 19(1) beyond the frontiers of India and secures not only freedom of movement unfettered by internal barriers within the territory of India but also freedom of a citizen to move into the territory of India, without any unreasonable restriction. From the international standpoint, thus, the liberality of the majority view is of supreme importance.

Furthermore, it has been held in a number of decisions that a law of "externment" is procedurally unreasonable when it offends the principles of natural justice, as for example, by condemning the person without giving him a right of hearing.<sup>80</sup>

In some cases it has also been held that a law would be invalidated as imposing an unreasonable restriction if it authorises or empowers the Executive to delegate its powers of "externment" to any officer irrespective of his rank, knowledge or responsibility, and enables such officer to act on his subjective satisfaction.<sup>81</sup>

The rules of natural justice, however, do not require anything like a judicial trial. It would be sufficient if the opportunity to be heard is offered. Thus, for the "externment" of habitual criminals or gangsters, it would not be unreasonable to provide for a procedure for hearing which does not allow the person affected the right to cross-examine the witnesses who give evidence against him. The reason is that in such cases no witnesses would be willing to depose publicly against such bad characters, for fear of violence to their person or property, and that the object of the legislation would be wholly defeated if a right to confront these witnesses were given to the suspect.<sup>82</sup>

### FREEDOM OF PROPERTY

The extent to which property rights of the individual are protected against the collective needs depends upon the sociological foundation of a country's political Constitution and is, accordingly, bound to vary from nation to nation. But, even though there has been a little

<sup>80</sup> *Jeshingbhai v. Emp.*, A.I.R. 1950 Bom. 363; *Tozammal v. State of West Bengal*, A.I.R. 1951 Cal. 322; *Khare v. State of Delhi*, 1950 S.C.R. 519; *State v. Motilal*, A.I.R. 1952 M.B. 114; *Khagendra v. Dt. Magistrate*, A.I.R. 1951 Cal. 3.

<sup>81</sup> *Khagendra v. Dt. Magistrate*, A.I.R. 1951 Cal. 3; *State v. Motilal*, A.I.R. 1952 M.B. 114; *State v. Gangadhar*, A.I.R. 1957 M.P. 54.

<sup>82</sup> *Gurbachan v. State of Bombay*, A.I.R. 1952 S.C. 221.

retrogression from the traditional Anglo-American concept as a result of the fourth amendment of the Indian Constitution<sup>83</sup> which has caused misgivings in certain quarters, it will be seen presently that even after this amendment the guarantee offered by that Constitution does not fall below the standard laid down by the Universal Declaration of Human Rights.

Article 17 of the Universal Declaration consists of two parts: clause (1) declares the right to own property and clause (2) declares the immunity from arbitrary deprivation of property. The former is dealt with in Article 19(1)(f) and (5), while the latter is dealt with in Article 31(1) of the Indian Constitution. It is convenient to examine them separately.

### A. Right to own and enjoy property

#### Article 17 of the Declaration

"Everyone has the right to own property alone as well as in association with others."

#### Article 19(1)(f) and 5 of the Indian Constitution

Clause (1)(f) - "All citizens have the right to acquire, hold and dispose of property."

Clause (5) - "Nothing in sub-clause (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

It is clear at once that the Indian provision is wider than its universal counterpart since it guarantees not only the right of private *ownership* but also the right to *enjoy* and *dispose* of property free from any restrictions other than reasonable restrictions imposed in the interests of the general public and of certain backward classes called 'Scheduled Tribes' who deserve protection from their own improvident acts as might take place if absolute freedom to deal with their properties were allowed.

It would not be practicable to exhaust an enumeration of all the laws which impose restrictions on the right to acquire, hold and dispose of property. But we may refer to some such laws the constitutionality of which has already been upheld by the courts. Thus, it has been held that in the interests of the general public, the State may:

<sup>83</sup> Constitution (Fourth Amendment) Act, 1955 (*vide* Basu's *Commentary on the Constitution of India*, Third Ed., Vol. I, pp. 827 *et seq.*).

control letting of houses<sup>84</sup> and of rent<sup>85</sup> in urban areas in view of shortage of accommodation; effect agrarian reform by providing for reduction of rents<sup>86</sup> or relief of agriculturists' indebtedness;<sup>87</sup> restrict the rights of management of the shareholders of a Company in order to ensure the supply of an essential commodity;<sup>88</sup> assume the management of the property of disqualified and extravagant proprietors;<sup>89</sup> control the management of natural resources, such as private forests;<sup>90</sup> regulate the construction of buildings in a municipal area, in the interests of the residents of the locality.<sup>91</sup>

On the other hand, it would not be in the public interests to take the property of one private person simply to give it to another.<sup>92</sup>

The *reasonableness* of the restrictions upon the freedom of property is reviewed by the courts from the substantive as well as procedural aspects.

From the procedural standpoint, the court would not, normally, uphold the validity of a law which authorises the administrative authorities to interfere with the proprietary rights of an individual in the exercise of their unfettered discretion. Thus, even the cancellation of a gun licence cannot be provided for unless the Law requires a communication of the grounds for cancellation to the licensee and an opportunity being given to him to be heard in the matter.<sup>93</sup>

A tenancy law provided that if a landlord habitually infringed the rights of a tenant as specified in that law, he would be deemed to be disqualified to manage his own property and the property would thereupon be taken over by the Court of Wards. The determination of the question whether a landlord had habitually infringed the rights of his tenants was left to the Court of Wards, and there was no procedural safeguard against the discretionary act of that authority. The Supreme Court annulled this provision on the ground that it made the infringement of the right of property to depend entirely on the mere discretion of the Executive and could not, accordingly, be held to be reasonable particularly inasmuch as the measure was a permanent one and did not put a limit to the period of time for which the landlord could be

<sup>84</sup> *Venkatachellum v. Kabalamurthy*, A.I.R. 1955 Mad. 350.

<sup>85</sup> *Iswari Prasad v. N. R. Sen*, A.I.R. 1952 Cal. 273.

<sup>86</sup> *Raja of Bobbili v. State of Madras*, A.I.R. 1952 Mad. 203; *Nabin v. State of Orissa*, A.I.R. 1957 Orissa 56.

<sup>87</sup> *Jammalal v. Kishendas*, A.I.R. 1955 Hyd. 194.

<sup>88</sup> *Chiranjit Lal v. Union of India*, A.I.R. 1951 S.C. 41(57).

<sup>89</sup> *Harmahendra v. State of Punjab*, A.I.R. 1953 Punj. 30.

<sup>90</sup> *Durgaji v. State of Bihar*, A.I.R. 1953 Pat. 65.

<sup>91</sup> *Mulaimchand v. Katni Municipality*, A.I.R. 1957 M.P. 50.

<sup>92</sup> *State of Bihar v. Kameshwar*, (1952) S.C.R. 889.

<sup>93</sup> *In re The State of Madras*, A.I.R. 1957 Mad. 692; *Narasimha v. Dt. Magistrate*, A.I.R. 1953 Mad. 476.

deprived of the enjoyment of his own property as a result of the subjective determination of the administrative authority.<sup>94</sup>

A State Act for the maintenance of public safety<sup>95</sup> provided for the imposition of a collective fine on the inhabitants of any area in the following terms: "If it appears to the State Government that the inhabitants of any area are concerned in or are abetting the commission of offences prejudicially affecting the maintenance of public order... the State Government may by notification impose a collective fine on the inhabitants of that area." The High Court of Patna<sup>96</sup> held this provision to constitute an unreasonable restriction upon the freedom of property both from the subjective as well as the procedural standpoint. From the subjective standpoint, the Court held it to be unreasonable because it sought to impose vicarious liability and also because it imposed the penalty in indefinite and vague language and gave no notice to the parties affected as to what conduct it was necessary to follow if the penalty was to be avoided. The decision on this point recalls American decisions like *Screws v. U.S.*<sup>97</sup> and *Burstyn v. Wilson*.<sup>98</sup> Procedurally also, the Court held it to be unreasonable because the Act ousted the jurisdiction of the courts of law and authorised the Executive to impose a penalty on its subjective satisfaction, even without giving a notice to the inhabitants of the area who were going to be affected.

## B. Immunity from arbitrary deprivation of property

Article 17(2) of the Declaration

Article 31(1) of the Indian Constitution

"No one shall be arbitrarily deprived of his property."

"No person shall be deprived of his property save by authority of law."

While Article 19(1)(f) of *our* Constitution (already noticed) protects the individual against arbitrary *restrictions* upon the enjoyment of private property, Article 31(1) seeks to protect the individual from *deprivation* of his property by the Executive, without the sanction of the Legislature. In this respect, too, the protection afforded by *our* Constitution is co-extensive with that under the Universal Declaration and the Supreme Court has already nullified a seizure of a person's

<sup>94</sup> *Raghubir v. Court of Wards*, A.I.R. 1953 S.C. 373.

<sup>95</sup> Bihar Maintenance of Public Order Act, 1949.

<sup>96</sup> *Ajablal v. State of Bihar*, A.I.R. 1956 Pat. 137.

<sup>97</sup> 325 U.S. 91 (1944).

<sup>98</sup> 343 U.S. 495 (1952).



goods by the Police<sup>99</sup> or a revocation by the Government of a proprietary grant made by an Indian Ruler,<sup>100</sup> without the authority of law.

### FREEDOM OF PROFESSION

The Constitution of India guarantees another civil right, namely, the right to practise any profession, or to carry on any occupation, trade or business – subject to specified limitations – which is not so much emphasised in the International Charters except in so far as it is included in the right ‘to work and to free choice of employment’.<sup>101</sup>

Article 19(1)(g) and (6) of the Indian Constitution provides:

“(1)(g) All citizens shall have the right to practice any profession, or to carry on any occupation, trade or business.

“(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to

1. the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
2. the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service whether to the exclusion, complete or partial, of citizens or otherwise.”

It has been held in India that the freedom guaranteed by the above provision includes only the natural right to enter into any trade, calling or profession which every person possesses as a member of a civilised society. It does not extend to rights *created* by statute, which can be enjoyed only subject to the conditions and limitations imposed by the relevant statute.<sup>102</sup> Thus, a lawyer cannot claim a “fundamental” right to appear before any court or authority. For the same reason, none can claim a constitutionally guaranteed right to carry on callings which are so inherently pernicious that civilised society regards it as *res extra commercium*, e.g., gambling.<sup>103</sup>

Among the restrictions which the State may constitutionally impose on the freedom of profession or business “in the interests of the general public” may be mentioned restrictions imposed: on imports and exports for maintaining the economic stability of the

<sup>99</sup> *Wazir Chand v. State of H.P.*, A.I.R. 1954 S.C. 415.

<sup>100</sup> *Virendra v. Union of India*, (1955) S.C.R. 415.

<sup>101</sup> Article 23 of the Universal Declaration; Article 6(1) of the Draft Covenant on Economic, Social and Cultural Rights (*Yearbook on Human Rights*, 1952, p. 428).

<sup>102</sup> *Mulchand v. Mukund*, A.I.R. 1952 Bom. 296; *Rangaswami v. Industrial Tribunal*, A.I.R. 1954 Mad. 553; *Ananthakrishnan v. State of Madras*, A.I.R. 1952 Mad. 395 (402).

<sup>103</sup> *State of Bombay v. Chamarbaugwala*, A.I.R. 1957 699 (718).

country;<sup>104</sup> to protect national industries;<sup>105</sup> on the sale of essential commodities to ensure their equitable distribution and availability at fair prices;<sup>106</sup> on the right to carry on a profession, such as that of a lawyer, to maintain the standards of public life;<sup>107</sup> on the conditions of work and hours of employment in shops and commercial establishments.<sup>108</sup>

As to the restrictions which the State may *reasonably* impose on this freedom, it has been established that no uniform or rigid standard can be formulated. The reasonableness of the restriction will depend upon the *nature* of the business and the conditions prevailing in that trade.<sup>109</sup>

A primary distinction has been drawn by the Supreme Court as between trades which are *inherently* dangerous or injurious to the society, and others.

A. As to trades callings and inherently dangerous or immoral, such as noxious or dangerous goods or trafficking in women<sup>110</sup> or the manufacture or sale of intoxicating liquors,<sup>111</sup> the State can go to the length of totally prohibiting them; and a person will not be heard to say that total prohibition, in such cases, is not a "reasonable" restriction.

B. Even though a business or profession is not inherently dangerous, it may affect a social interest in particular aspects or under particular circumstances. In such cases, therefore, the State has the right to impose restrictions or regulations commensurate with the social interest which has to be protected and relevant to the mischief which has to be averted, e.g., injury to public health, morals, supply of essential services. Some occupations by the noise made in their pursuit, some by the odours they engender, and some by the dangers accompanying them, require regulations as to the locality in which they may be conducted. Some by the dangerous character of the articles used, manufactured or sold, require also special qualifications of the parties permitted to use, manufacture or sell them.<sup>112</sup>

In respect of commodities essential to the community, it is reasonable to have restrictions which may, in certain circumstances, extend to total prohibition for a time, of all normal trading in that

<sup>104</sup> *Khader v. Subramania*, A.I.R. 1952 Mad. 840.

<sup>105</sup> *Bhatnagars & Co. v. Union of India*, A.I.R. 1957 S.C. 478 (482).

<sup>106</sup> *Ibid.*; *M.B. Cotton Association v. Union of India*, A.I.R. 1954 S.C. 634.

<sup>107</sup> *Sakhwant v. State of Orissa*, A.I.R. 1955 S.C. 166.

<sup>108</sup> *Matrumal v. Chief Inspector*, A.I.R. 1952 All. 773.

<sup>109</sup> *Cooverjee v. Excise Commissioner*, (1954) S.C.R. 873.

<sup>110</sup> *C.S.S. Motor Services v. State of Madras*, (1950) 2 M.L.J. 894 (910). Traffic in human beings of any kind is expressly prohibited by Article 23 of the Constitution.

<sup>111</sup> *Cooverjee v. Excise Commissioner*, (1954) S.C.R. 873.

<sup>112</sup> *Ibid.*

commodity.<sup>113</sup> On the other hand, the absolute denial of the right to carry on a normal business to particular persons or to all persons is unreasonable (e.g., the right to carry on wholesale business in vegetables<sup>114</sup> or to establish or maintain a cattle market).<sup>115</sup> Again, a law cannot empower the Government to compel the traders to sell their stock to the Government at *any* rate which may be fixed by the Government at its discretion.<sup>116</sup>

For ensuring equitable distribution of commodities considered essential to the community and their availability at fair prices, it is quite reasonable to regulate the sale of such commodities through licensed vendors to whom quotas are allotted in specified quantities and who are not permitted to sell them beyond the prices that are fixed by the controlling authorities.<sup>117</sup> But if the power of licensing, in respect of a normally available commodity, is left to the absolute discretion of an executive authority without any standard or check to guide or control that discretion, the law would be unreasonable because it subjects the freedom of trade or business to the unfettered discretion of an executive officer and fails to strike a proper balance between the freedom guaranteed by Article 19(1)(g) and the social control permitted by clause (6) of that Article.

For the purpose of preventing agricultural labour available in an area being diverted to non-agricultural pursuits, the State may prohibit employment or engagement in a non-agricultural pursuit, provided the ban is limited to adult persons capable of being engaged in agricultural operations and the ban is confined to the actual agricultural season. If the restriction be in excess of the requirement, it would be struck down by the Court as unreasonable.<sup>118</sup>

Regulations may be made for securing proper conservancy and sanitation at fairs, but a person cannot be denied the right to hold a fair on his own land merely on the ground that permits for holding fairs would not be issued to private individuals.<sup>119</sup>

### FREEDOM OF THE PERSON

This topic may be discussed under two heads

- A. protection of personal liberty;
- B. safeguards against arbitrary arrest or detention, as provided for in Articles 21 and 22, respectively, of the Indian Constitution.

<sup>113</sup> *Madhya Bharat Cotton Association v. Union of India*, A.I.R. 1954 S.C. 634; *Harishankar v. State of M.P.*, (1955) 1 S.C.R. 380.

<sup>114</sup> *Rashid Ahmed v. Municipal Board*, (1950) S.C.R. 566.

<sup>115</sup> *Tahir Hussain v. Dt. Board*, A.I.R. 1954 S.C. 630.

<sup>116</sup> *State of Rajasthan v. Nathmal*, (1954) S.C.R. 982.

<sup>117</sup> *Dwarka Prasad v. State of Uttar Pradesh*, (1954) S.C.A. 204 (211).

<sup>118</sup> *Chintamanrao v. State of M.P.*, (1950) S.C.R. 759.

<sup>119</sup> *Ganapati v. State of Ajmer*, A.I.R. 1955 S.C. 188.

A. Article 21 corresponds to Article 9(1) and (2) of the Covenant.

Article 9(1) and (2) of the Covenant

Article 21 of the Indian Constitution

“(1) No one shall be subjected to arbitrary arrest or detention.

“(2) No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law.”<sup>120</sup>

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

The above provision of the Indian Constitution protects a person, whether a citizen or an alien, from arbitrary arrest or detention by the Executive. Before a person is deprived of his life or personal liberty the procedure established by law must be strictly followed and if there is any breach of the procedure or conditions laid down by the law the courts will interfere and set the individual free.<sup>121</sup> The Supreme Court has more than once observed that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law.<sup>122</sup>

As in England or in the United States, the writ of *habeas corpus* is a potent weapon in the hands of the superior courts to secure the release of a prisoner who has been deprived of his liberty in contravention of the legal requirements, and in a number of cases the Supreme Court has already interfered with cases of such arrest and detention. Even the omission of a court to make an order of remand to custody when adjourning a trial, as required by Section 344 of the Criminal Procedure Code has been used as a good ground for releasing a prisoner under trial.<sup>123</sup>

B. Procedural safeguard against arbitrary arrest and detention is provided for in Article 22(1) to (3) of the Indian Constitution, corresponding to Article 9(3) and (4) of the Covenant.

Article 9(3) and (4) of the Covenant

Article 22(1) to (3) of the Indian Constitution

“(3) Any one who is arrested shall be informed promptly of the reasons for his arrest and of any charges against him.

“(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be

<sup>120</sup> Article 8(1) of the draft Covenant on Civil and Political Rights, 1952, is to the same effect.

<sup>121</sup> *Makhan Singh v. State of Punjab*, (1952) S.C.R. 368.

<sup>122</sup> *Ram Narain v. State of Bombay*, (1953) S.C.R. 652.

<sup>123</sup> *Ram Narain v. State of Delhi*, (1953) S.C.R. 652.

"(4) Any one arrested or detained on the charge of having committed a crime or of preparing to commit a crime shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. Pending trial, release may be conditioned by guarantees to appear for trial."

denied the right to consult, and to be defended by, a legal practitioner of his choice.

"(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

"(3) Nothing in clauses (1) and (2) shall apply

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention."

It is evident that clause (1) of the above Article of our Constitution improves upon clause (3) of Article 9 of the Covenant by guaranteeing a right to be defended by a counsel. The object of the right to be informed of the grounds is that on learning the grounds of arrest, the person arrested is in a position to make an application to the appropriate court for bail, or to move the High Court or the Supreme Court for a writ of *habeas corpus*. The intimation also enables the arrested person to prepare his defence in time for purposes of his trial<sup>124</sup> and when the matter comes before the court in a proceeding for *habeas corpus* it is open to the court to pronounce whether the arresting authority has communicated the grounds as soon as reasonable in the circumstances, and, if it finds that a reasonable time has already passed and the arrested person has not yet been informed of the grounds of his arrest, the court can order his immediate release.<sup>125</sup> The right to consult a legal adviser of his choice from the moment of arrest provides an additional safeguard that the arrested person will be properly represented in the court before which he is required to be produced under clause (2). Even during trial the guarantee in clause (1) is applicable and it has been held that where a trial is held without informing the accused of the date fixed for trial and without giving him an opportunity of getting into communication with his legal adviser, the conviction is liable to be set aside.<sup>126</sup>

Clause (2) of Article 22 of our Constitution makes a specific guarantee on a matter which is left somewhat elastic in clause (4) of Article 9 of the Covenant. Instead of using the word "promptly", it

<sup>124</sup> *Vimal Kishore v. State of U.P.*, A.I.R. 1956 All. 56.

<sup>125</sup> *State of Bombay v. Atma Ram*, 1951 S.C.R. 167.

<sup>126</sup> *Hans Ram v. State*, A.I.R. 1956 All. 641.

fixes a definite period of twenty-four hours (excluding the period required for journey from the place of arrest to the court), within which the person arrested must be produced before the nearest magistrate – i.e., a court having criminal powers and acting in a judicial capacity.<sup>127</sup> Once the period of twenty-four hours has passed without compliance with the requirement of this clause, the arrested person is entitled to be released forthwith and the Supreme Court has ordered accordingly in a conspicuous case of arrest under orders of the Speaker of a Legislature.<sup>128</sup> The above provisions of the Constitution thus offer protection against any arbitrary arrest effected by any authority otherwise than under a warrant issued by a court. In any case the arrested person is ensured of a judicial verdict as to the validity of his arrest as early as possible. The procedure to be followed by the court when the arrested person is thus brought before it is laid down in the ordinary law of criminal procedure (cf. Section 167 of the Criminal Procedure Code, 1898).

Clause (3) of the above Article of the Indian Constitution contains something which is not to be found in the Covenant on Human Rights but which appears to have been provided for by Article 3 of the Draft Covenant on Civil and Political Rights. It contains an exception from the foregoing guarantees as regards enemy aliens, and persons detained under the law of preventive detention. However, so far as “enemy aliens” are concerned, few will plead for such rights in their favour and the position of an enemy alien in a country such as the United Kingdom is no better.<sup>129</sup>

Preventive detention on the other hand is something not known in the United States of America or the United Kingdom in times of peace. Much has been made of the adoption of this provision in the Indian Constitution, as a permanent measure, authorising preventive detention whether in time of war or of peace. But apart from the special circumstances which necessitated the adoption of this extraordinary measure in the Constitution several facts relating to its working should be considered before adjudging the merits of this provision which is apparently retrograde. Firstly, the Constitution itself, in clauses (4) to (7) of Article 22, provides definite safeguards against any abuse of this power and, secondly, the right of *habeas corpus* has been held available even to persons detained under a law of preventive detention enacted in pursuance of the above constitutional provision. Moreover, as will be seen, there have been a number of cases in which the Supreme Court and the High Court have nullified orders of preventive detention, in proceedings for *habeas corpus*. Thirdly, the above provisions of the Constitution are not self-exe-

<sup>127</sup> *Hariharanand v. Jailor*, A.I.R. 1954 All. 355.

<sup>128</sup> *Gunupati v. Naziful*, A.I.R. 1954 S.C. 636.

<sup>129</sup> *R. v. Knockaloe Camp Commandant*, (1917) 87 L.J. (K.B.) 43.

cuting but require a law to be made by the Legislature, confirming to the conditions laid down in the Article. The Preventive Detention Act, 1950, has accordingly been passed by the Indian Parliament and, as amended, constitutes at present the law of preventive detention in India. The provisions of this law as they now stand have further safeguarded the rights of the detenu. It should also be borne in mind that if any provision of such a law contravenes the requirements of the Article of the Constitution, it is liable to be challenged in the courts as unconstitutional as happened in the celebrated case of *Gopalan v. State of Madras*.<sup>130</sup> Lastly, if the propriety of a measure is to be judged by the use made of it, it should also be noted that there are today in fact very few persons held in detention under this Act. At the end of 1957 the total was roughly two hundred,<sup>131</sup> and in all probability at the present time it has come down to a handful of men, against whom a judicial trial, with the convincing proof as is required in a criminal proceeding, could not be resorted to in the interests of the security of the State. Space does not permit further elaboration of this topic, but we may conclude it with a reference to the powerful control exercised by the Indian judiciary over any possible abuse by the State of this powerful element of administrative machinery. Thus, the courts have invalidated an order of detention not only where it has violated the requirements of the Act itself, for instance, for failure to communicate the grounds to the detenu within a reasonable time, as required by Section 7 of the Act,<sup>132</sup> but also on the ground that the requirements of Article 22 of the Constitution have been violated. Thus, the court may examine the grounds communicated to the detenu to see if they have a relevant connection with the security of the State or the maintenance of public order, to preserve which preventive detention is sanctioned by the Constitution,<sup>133</sup> or whether the grounds furnished are sufficient to enable the detenu to make an effective representation;<sup>134</sup> or whether the order of detention has been made *mala fide*, i.e., for a purpose other than what the Legislature had in view in passing the law of preventive detention.<sup>135</sup>

### FREEDOM OF RELIGION

The freedom of religion guaranteed by Article 25 of our Constitution is comparable to Article 16 of the Covenant on Human Rights,

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<sup>130</sup> (1950) S.C.R. 88.

<sup>131</sup> *Vide* Lok Sabha Debates, dated 9.12.57.

<sup>132</sup> *State of Bombay v. Atma Ram*, (1951) S.C.R. 167.

<sup>133</sup> *Gopalan v. State of Madras*, (1950) S.C.R. 88.

<sup>134</sup> *Tarapada v. State of West Bengal*, (1951) S.C.R. 212.

<sup>135</sup> *De Souza v. State of Bombay*, (1956) S.C.R. 382.

1950, to which corresponds Article 15(1) and (3) of the Draft Covenant on Civil and Political Rights, 1952.

#### Article 16 of the Covenant

"1. Everyone has the right of freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.<sup>136</sup>

"2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are pursuant to law and are reasonable and necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others."

#### Article 25 of the Indian Constitution

"(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

"(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law;

"(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

"(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus..."

Subject to the restrictions which the above Article imposes, every person has a fundamental right under the Indian Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such other acts as are enjoined by his religion and, further, to propagate his religious views for the edification of others. It is also immaterial whether its propagation is made by a person in his individual capacity or on behalf of any church or institution.<sup>137</sup> Freedom of conscience would be meaningless unless it were supplemented by the unhampered freedom of spiritual conviction in word and action. While freedom of "profession" means right of the believer to state his creed in public, freedom of "practice" means his right to give it expression in forms of private and public worship.<sup>138</sup> The only grounds of restriction to the above freedom, which are mentioned in the Article are: public order, morality and health; regulation of non-religious activity associated with religious practice; social welfare and reform; throwing open of Hindu religious institutions of a public character to all classes of Hindus; other provisions of the Constitution.

To those who have any idea as to what part religion plays in the entire being of the common man in India, the bold pronouncements in the above Article must appear to be astoundingly progressive. It

<sup>136</sup> Article 18 of the Universal Declaration is to the same effect.

<sup>137</sup> *Ratilal v. State of Bombay*, (1954) S.C.R. 1055.

<sup>138</sup> *Hindu Religious Endowments v. Lakshmindra*, (1954) S.C.R. 1005.



is to be noted that this guarantee is available not only to the citizens of India but to all persons, including aliens. The scope of the above guarantee illustrates the ideal of a secular State envisaged by the framers of the Indian Constitution. We have no established church in India and, notwithstanding the political exploitation of religious faiths in the past, the Constitution of free India places every person within its boundaries on the same footing of equality and freedom not only in the matter of faith but also in the matter of observance. No better implementation of the International Covenant could be expected.

The Indian Constitution even improves on the Covenant by supplementing and reinforcing the above guarantee by other provisions. Thus, freedom of practice is supplemented by the guarantee provided in Article 26 under which every religious denomination is entitled to own, acquire and administer property in accordance with the law and subject to regulation in the interests of public order, morality and health. The regulation of the right to administer property which is guaranteed by Article 26, does not justify interference with religious practices or performances of acts in pursuance of religious belief, such practices and acts being as much a part of religion as faith or belief in particular doctrines. In the name of controlling the administration of a religious endowment, therefore, neither the State nor any of its agencies has any right to say that particular rights and ceremonies, unless they are unlawful, do not form an essential part of a religion.<sup>139</sup>

There are two other express provisions in the Constitution itself which embody principles laid down in the United States by judicial decisions. Thus, Article 27 expresses the principle in *Everson v. Board of Education*,<sup>140</sup> namely, that no person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The State being secular, it would be against the policy of the Constitution to allow it to pay out of its public funds any money for the promotion or maintenance of any particular religion.

Again, Section 28 guarantees what has been enunciated in the United States in the case of *McCullum v. Board of Education*.<sup>141</sup> It provides that no religious instruction shall be provided in any educational institution wholly maintained out of State funds and that no person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution.

<sup>139</sup> *Ratilal v. State of Bombay*, (1954) S.C.R. 1055.

<sup>140</sup> 330 U.S. 11(16) (1946).

<sup>141</sup> 333 U.S. 203 (1948).

## SAFEGUARDS IN A CRIMINAL TRIAL

**Immunity from conviction under an ex post facto law**

The safeguard in this respect is provided in clause (1) of Article 20 of the Indian Constitution which is comparable to Article 14 of the Covenant of Human Rights, 1950 and paragraph 1 of Article 13 of the draft Covenant of Civil and Political Rights, 1952:

## Article 14 of the Covenant

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed."<sup>142</sup>

## Article 20(1) of the Indian Constitution

"No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

It is evident that the above provision of the Indian Constitution safeguards the individual against any retroactive criminal legislation in the same way as does the International Covenant. It has been held by the Supreme Court that retrospective operation cannot be given to a law which comes within the purview of the above clause by the use of words such as "shall be deemed to be in force".<sup>143</sup> As has been held by the Supreme Court, however, the prohibition against such retrospective legislation is confined only to the substantive provisions relating to the creation of an offence and the penalty prescribed therefor and does not extend to the procedure<sup>144</sup> for a trial, nor does it extend to punishments other than a criminal conviction.<sup>145</sup> The substance of the guarantee is that a person cannot be convicted for an act which was not an offence under the law which was in force when that act was committed and that upon conviction he may be subjected to those penalties only which were prescribed by the law in force at the time when the offence was committed. If an additional or higher penalty is prescribed by any change in the law made subsequent to the commission of the offence such change will not operate against him as far as the offence in question is concerned.<sup>146</sup>

<sup>142</sup> Article 13(1) of the Draft Covenant of 1952 is identical except that it defines the scope of the guarantee more precisely by substituting the word "criminal" for the word "penal".

<sup>143</sup> *Shiv Bahadur v. State of V.P.* (1953) S.C.R. 1188.

<sup>144</sup> *Prahlad v. State of Bombay*, A.I.R. 1952 Bom. 1.

<sup>145</sup> *Shiv Bahadur v. State of Vindhya Pradesh*, (1953) S.C.R. 1188.

<sup>146</sup> *Kedar Nath v. State of West Bengal*, A.I.R. 1953 S.C. 404.

### Immunity from self-incrimination

The guarantee is clause (3) of Article 20 of the Indian Constitution in this connection is comparable to Article 12(2)(f) of the Draft Covenant on Civil and Political Rights, 1952:

#### Article 12(2)(f) of the Draft Covenant

"For the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees...not to be compelled to testify against himself..."

#### Article 20(3) of the Indian Constitution

"No person accused of any offence shall be compelled to be a witness against himself."

This clause of the Indian Constitution gives protection to a person who is accused of an offence, against compulsion to be a witness against himself, but the Supreme Court has *prima facie* enlarged the protection offered by this provision by putting a liberal interpretation on the language so that the guarantee does not in practice, fall below what is offered by the Draft Covenant. Thus, the Supreme Court has observed<sup>147</sup> that the word "witness" is not to be taken in the sense of appearing as a witness but to include any kind of evidence which is reasonably likely to support a prosecution against an accused. Hence, the Court cannot issue a notice or summons to an accused to produce a document which was alleged to be forged.<sup>148</sup> But the power to recover a document by issuing a search-warrant through the court has been upheld on the ground that that process does not compel the accused to produce the document himself.<sup>149</sup>

Further, it has been held that the word, "witness" includes not only the accused at a trial but also any person against whom a formal accusation has been made which, in the normal course, may result in prosecution. The protection thus extends to any evidence obtained under compulsion prior to the trial which may in the normal course result in the prosecution of the person from whom such evidence has been obtained. The ambit of the protection has thus been very much widened in the same way as in the United States.<sup>150</sup>

The Article, however, does not apply where there is no likelihood of an *accusation* of a *criminal* offence.<sup>151</sup>

<sup>147</sup> *Sharma v. Satish*, (1954) S.C.R. 1077.

<sup>148</sup> *Krishnan v. State of Kerala*, A.I.R. 1957 Ker. 78; *Ramalinga v. Commr. of I.T.*, A.I.R. 1956 Mad. 145.

<sup>149</sup> *Sharma v. Satish*, (1954) S.C.R. 1077.

<sup>150</sup> *Cf. Betts v. Brady*, 316 U.S. 456 (1942); *Boyd v. U.S.*, 1816 U.S. 616 (1886).

<sup>151</sup> *Maqbool v. State of Bombay*, A.I.R. 1953 S.C. 325; *Calcutta Motor Cycle Co. v. Collector*, A.I.R. 1956 Cal. 253.

### IMMUNITY FROM FORCED LABOUR

The provisions of Article 23 of the Indian Constitution are comparable to Article 8 of the Covenant on Human Rights, 1950, and the corresponding Article 7 of the draft Covenant on Civil and Political Rights, 1952.

#### Article 8 of the Covenant

"1. No one shall be held in slavery; slavery and the slave trade shall be prohibited in all their forms.<sup>152</sup>

"2. No one shall be held in servitude.

"3. No one shall be required to perform forced or compulsory labour except pursuant to a sentence to such punishment for a crime by a competent court.

"4. For the purposes of this Article, the term "forced or compulsory labour" shall not include:

(a) any work, not amounting to hard labour, required to be done in the ordinary course of prison routine by a person undergoing detention imposed by the lawful order of a court;

(b) any service of a military character or, in the case of conscientious objectors, in countries where they are recognised, exacted in virtue of laws requiring compulsory national service;

(c) any service exacted in cases of emergencies or calamities threatening the life or well-being of the community;

(d) any work or service which forms part of the normal civic obligations."

#### Article 23 of the Indian Constitution

"(1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

"(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them."

Slavery in its ancient form may not be a problem in most States today, but its newer forms which are labelled in the Indian Constitution under the general term "exploitation" are no less serious a challenge to human freedom and civilization. It is with this consideration in view that the Indian Constitution, instead of using the word "slavery", uses the more comprehensive expression "traffic in human beings" which includes a prohibition not only of slavery but also of traffic in women or children or the crippled, for immoral or other purposes.<sup>153</sup> The Indian Constitution also prohibits any form of

<sup>152</sup> Article 4 of the Universal Declaration is identical.

<sup>153</sup> Cf. *Raj Bahadur v. Legal Remembrancer*, A.I.R. 1953 Cal. 523.

forced labour similar to "begar", an indigenous system under which landlords sometimes used to compel their tenants to render free service. What is prohibited by the clause is therefore compelling a person to render free service where he was lawfully entitled either not to work or to receive remuneration for it. The clause does not, however, prohibit forced labour as a punishment for a criminal offence which is expressly mentioned as an exception in the international Covenant. Further, instead of enumerating particular public purposes such as military or other social or civic purposes, as has been done in the Covenant, the Indian Constitution has adopted the wider expression "public purposes". This expression would cover compulsory recruitment or conscription for social services, as, for example, part of a campaign to reduce mass illiteracy.<sup>154</sup>

DURGA DAS BASU \*

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<sup>154</sup> Cf. *State v. Jorawar*, A.I.R. 1953 H.P. 18.

## THE EUROPEAN COMMISSION OF HUMAN RIGHTS: PROCEDURE AND JURISPRUDENCE

The European Commission of Human Rights provided for in the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 19) was established in May 1954.

In accordance with Articles 24 and 25 of the Convention respectively, it has an obligatory competence to hear applications referred to it by one High Contracting Party against another and an optional competence to hear applications referred to it by individuals against a High Contracting Party in respect of an alleged violation of the Convention.

As to the competence to hear inter-Party applications, two such applications have been lodged under Article 24. Both are brought by the Greek Government against the United Kingdom Government and contain allegations of violations of certain provisions of the Convention in Cyprus. It is further alleged that the Government in Cyprus is responsible for these violations.

In the first of these applications which was declared admissible by the Commission in June 1956 the Sub-Commission set up to ascertain the facts and attempt to secure a friendly settlement of the matter (Articles 28 and 29) is now about to submit its report to the Plenary Commission which in its turn will submit a report to the Committee of Ministers (Article 31). It is of interest to note that the Sub-Commission decided, in order to complete the material for its report, to conduct an enquiry on the spot (Article 28, para. a) as to certain aspects of this matter and for this purpose were in Cyprus for about two weeks in January 1958 where they interviewed representatives of the various elements of the community in the island.

In the second case, the Commission decided at its tenth Session in October 1957 that this application was admissible in respect of 29 of the 49 incidents of alleged ill-treatment. This application will now similarly be examined by a new Sub-Commission.

Both applications are accordingly *sub judice* the Commission and therefore no further information concerning them can be given at this stage.

As to the optional competence of the Commission in regard to individual applications, Article 25 of the Convention states as follows:

“(1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the

High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

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

(3) ...

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

On July 5, 1955 this competence was achieved as the minimum of 6 acceptances had by that date been received. There are at present 7 Contracting Parties who have accepted this competence of the Commission.<sup>1</sup>

The main part of this article, after the following short note on procedure, is to show the amount and types of individual applications which have been so far examined by the Commission and also to summarise the jurisprudence which has now emerged.

### PROCEDURE OF THE COMMISSION

As soon as it was constituted, the Commission established a procedure for examining the admissibility of applications. They had particularly in mind the fears that had been expressed at the time of the drafting of the Convention that recognition of the right of individual recourse to an international tribunal might lead to abuse and to consequent embarrassment to Contracting Parties. They decided that the Commission should have the power to declare an application inadmissible without any reference to the Contracting Party complained against.

The Rules of Procedure are, in general, designed to expedite the examination of applications in regard to the question of their admissibility and at the same time to provide governments with substantial safeguards.

As early as 1950, the Committee of Experts responsible for drafting the Convention expressed the following opinion:

"With regard to the fear expressed by the Assembly concerning the large number of petitions which would be referred to the Commission, the Committee was of the opinion that the majority of these petitions would be irregular or manifestly ill-founded and that the Commission might easily make provi-

<sup>1</sup> *Belgium*: 2 years as from June 29, 1955, renewed for further period of 2 years as from June 30, 1957. *Denmark*: 2 years as from April 7, 1953, renewed for further period of 2 years as from April 7, 1955, and for 5 years as from April 7, 1957. *Federal Republic of Germany*: 3 years as from July 5, 1955. *Iceland*: 5 years as from March 25, 1955. *Ireland*: accepted February 25, 1953 without limit. *Norway*: 2 years as from December 10, 1955, renewed for further period of 2 years as from December 9, 1957. *Sweden*: accepted February 4, 1952 without limit.

sion in its own Rules of Procedure to settle such affairs without needless loss of time."

In view of the conclusions reached during the preparatory work and having regard to the terms of Articles 26 and 27 of the Convention, the Commission considered itself empowered to adopt a form of summary procedure for examining the admissibility of individual applications.

It accordingly decided that a preliminary examination should be carried out by groups of three appointed from among its members. These groups would then report to the Plenary Commission, which would alone have power to take a final decision. (See Rules 34 and 35, para. 1, of the Rules of Procedure).

Experience has shown this system to be effective. During the Third Plenary Session of the Commission, held in Strasbourg from September 19 to 24, 1955, three of these groups examined the admissibility of 63 individual applications in two days. The nine groups which examined the applications on the list for the 4th, 5th, 6th, 7th, 8th, 9th and 11th Sessions took only 29 days altogether to deal with some 290 individual applications.

The groups of three members examine the files on the basis of a statement of the facts prepared in each case by the Secretariat of the Commission. They can thus quickly form at least a provisional opinion as to the admissibility of the applications. Having received their Report, the Plenary Commission can reach a rapid decision in the majority of cases. These arrangements prevent the list from becoming over-loaded.

Secondly, being concerned to avoid disturbing Governments needlessly, the Commission has also deemed it necessary to make a clear distinction between applications from Contracting Parties (Article 24 of the Convention) and those from private persons (Article 25 of the Convention).

In the case of applications from Contracting Parties, the Commission has provided in Rule 44 of its Rules of Procedure that they shall immediately be brought to the notice of the Contracting Party against which the claim is made before being examined as to admissibility.

On the other hand, individual applications are not notified to the Contracting Party concerned immediately upon receipt. Under Rule 45, para. 2, notice of the application is given only if the group of three members unanimously reports that it appears to be admissible. In this case, before any examination is made by the Plenary Commission, the President of the Commission gives notice of the application through the Secretary-General of the Council of Europe to the High Contracting Party against which the claim is made and invites it to submit to the Commission its observations in writing on the admissibility of the application.

If, on the other hand, the group of three members is not unani-



mous as to the appearance of admissibility,<sup>2</sup> the Plenary Commission considers the application and may:

- declare at once that the application is inadmissible, without inviting the Contracting Party against which the claim is made to submit comments in writing on the admissibility of the application and even without giving it prior notice of such application [Rule 45, para. 3 (a)];

- or, give such notice of the application and invite comments [Rule 45, para. 3 (b)].

Although an individual application may be declared inadmissible without prior notice to the Contracting Party against which the claim is made, it cannot be admitted until that Party has been informed of it and has had an opportunity of stating its views. In the latter case, the Plenary Commission does not decide the question of admissibility until it has obtained adequate information from the comments of the Contracting Party and, if need be, from the further comments in writing or oral explanations which it may invite the Parties to provide.<sup>3</sup>

The Commission clarified these various points at its third Session by amending the text of Rules 44, 45 and 46, which it had adopted at its second Session.

It should be added that in the case of the rejection forthwith of an individual application, the Commission informs only the applicant of its decision.<sup>4</sup>

In practice, the application of Rules 45 and 46 of the Rules of Procedure has given the results shown in the table at Appendix I.

Of the 302 individual applications which the Commission has examined so far, only 10 have been transmitted through the Secretary-General of the Council of Europe to the Contracting Party against which the claim was made.<sup>5</sup> It should be added that the Commission subsequently rejected three of them, the first on the ground that domestic remedies had not been exhausted, the second as incompatible with the provisions of the Convention and the third on a combination of various grounds. The Commission has not yet taken a final decision as to the admissibility of the other seven, the exchange of written or oral comments between the parties not having been completed.

Of the other 292 applications, 274 were at once rejected, 15 were removed from the list and 3 are held over pending further information.

<sup>2</sup> If the three members unanimously agree that the application appears inadmissible, or if opinions are divided, or if they reserve their opinion.

<sup>3</sup> See Rule 46, para. 1. It should be noted that Rules 45 and 46 prescribe an essentially written procedure for the examination as to admissibility. Oral explanations are purely secondary (Rule 46, end of para. 1).

<sup>4</sup> According to Rule 46, para. 2, "The Commission shall inform the parties concerned as to its decision on the admissibility of an application." The full text of each decision has, in fact, for some months past been communicated to the parties. It should be added that reasons are always given for the decisions.

<sup>5</sup> In two cases under Rule 45, para. 2, and in 8 cases under Rule 45, para. 3 (b).

## **JURISPRUDENCE OF THE COMMISSION IN RESPECT OF THE ADMISSIBILITY OF INDIVIDUAL APPLICATIONS**

The decisions of the Commission, both by reason of their number and importance, now constitute a significant body of precedent.

The broad outlines of this jurisprudence, which is in continuous development, seem at present to be as follows:

- 1) before referring to the Commission, applicants must exhaust domestic remedies;
- 2) applications must relate to a period after the entry into force of the Convention;
- 3) applications may only be made against a High Contracting Party which has recognized the right of individual recourse to the Commission;
- 4) individual applications must normally be made by the persons who themselves claim to be the victims of alleged violations;
- 5) in submitting an application, the applicant must not show such a persistent disregard of the formal requirements as might amount to an abuse of the right of recourse;
- 6) an application must not be substantially the same as a matter already examined by the Commission;
- 7) applications must relate to an alleged violation of one of the rights or freedoms recognized in the Convention or Protocol;
- 8) the Convention does not recognize the right of any person to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms safeguarded;
- 9) examination of the file must disclose the appearance of a violation of one of the rights or freedoms as defined in the Convention and Protocol;
- 10) the European Commission of Human Rights is not a higher tribunal called upon to correct errors of law or fact alleged to have been made by domestic courts.<sup>6</sup>

### **I. Before referring to the Commission applicants must exhaust domestic remedies**

The Commission has strictly adhered to the principle laid down in Article 26 and confirmed by Article 27 (3) of the Convention, namely, that it:

“may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law . . .”

Up to the present, 75 individual applications have been declared wholly or partly inadmissible on the ground of non-exhaustion of

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<sup>6</sup> See Table at Appendix II for the number of applications declared inadmissible under various heads.

domestic remedies. This occurs when examination of the files shows

- a) that the applicant has not made use of a remedy which Article 26 requires should normally be exhausted; and
- b) that further there were no special circumstances which would release the applicant, "according to the generally recognized rules of international law", from the obligation to use that remedy.

*A. Non-exhaustion of a remedy which Article 26 requires should normally be exhausted*

Applicants very often fail, before referring to the Commission, to appeal to a higher court or to the Court of highest instance against the decision of a lower court, when it is nevertheless open to them to do so. Sometimes, indeed, they do not employ any of the legal remedies available to them. This total or partial failure to exhaust domestic remedies may either be final if the time-limit laid down by domestic law has expired, or capable of being remedied if such time-limit has not yet lapsed.

In some cases an applicant goes to a particular domestic court, including the Supreme Court, but submits his complaint to the Commission without waiting for that Court to pronounce judgment.

In all these cases the Commission declares the application inadmissible on the ground of non-exhaustion of domestic remedies.<sup>7</sup>

When examining the admissibility of a certain application the Commission had to decide whether a constitutional complaint (*Verfassungsbeschwerde*) to the Federal Constitutional Court (*Bundesverfassungsgericht*) of the Federal Republic of Germany was among the remedies which Article 26 of the Convention requires should normally be exhausted. After the parties had submitted observations in writing, it decided on May 31, 1956, that

"recourse to the Federal Constitutional Court (*Bundesverfassungsgericht*), for matters within the competence of that Court, is a domestic remedy which in principle falls within the scope of the provision contained in Article 26 of the Convention."

In another case the applicant, being certified a lunatic, had asked the German courts – in the last instance the Federal Constitutional Court – to terminate his guardianship. The Constitutional Court provisionally rejected the application on the ground that it had not been submitted by his guardian. The Commission held that domestic remedies had not been exhausted and considered

"that the Federal Constitutional Court declared the application inadmissible on the sole ground that the applicant could only take legal proceedings if represented by his guardian, that it follows that the said Court has not yet pronounced judgment on the substance of the case..."

<sup>7</sup> Subject to the presence of "special circumstances" (see section B below).

More recently, the Commission dealt with an application alleging that a German court of first instance (*Landgericht*) had prejudiced the rights of the defence. The applicant had unsuccessfully appealed to the Federal Supreme Court (*Bundesgerichtshof*), but only on the merits of the case. The alleged prejudice to the applicant's rights of defence had been referred by him direct to the Federal Constitutional Court (*Bundesverfassungsgericht*) which rejected this constitutional complaint (*Verfassungsbeschwerde*) on the ground of non-exhaustion of remedies.<sup>8</sup>

Without going into the facts of the case, the European Commission of Human Rights decided:

"that, in order to conform with the provision (of Article 26 of the Convention), it is not enough for the applicant simply to have resorted to all the competent domestic courts pursuant to the said Article 26; that unless it was impossible or he was prevented from doing so, the applicant should, to the extent that it reasonably depended on him, also have made appropriate submissions to the higher instance concerning those rights which he now alleges to have been violated by the decision of the court of lower instance; that the file shows that he did not submit his complaints against the Court (*Landgericht*) of . . . as to procedure to the Federal Supreme Court (*Bundesgerichtshof*); that he has not convinced the Commission that there was any valid reason for that omission . . ."

*B. Absence, in a particular case, of special circumstances which would release the applicant from the obligation to exhaust a specific remedy*

When the Commission finds that an applicant has not employed a remedy which Article 26 requires should normally be exhausted, it does not reject the application for that reason until it is satisfied that there was no special circumstance, in this particular case, which would release the applicant, "according to the generally recognized rules of international law", from the obligation to use that remedy. With increasing frequency, in its decisions, the Commission makes a point of making express mention of the absence of such circumstances.

Thus, when pronouncing on the admissibility of one of these applications, the Commission found that there were no such circumstances as "undue delay in proceedings"<sup>9</sup> or a "well established jurisprudence" inconsistent with the applicant's case.

Another applicant complained that the appeal which he had

<sup>8</sup> See Article 90 (2) of the Federal Law of March 12, 1951 on the Federal Constitutional Court.

<sup>9</sup> In another case, the applicant had appealed to the German Federal Constitutional Court but asked the Commission to take a decision without awaiting the judgment of that Court, alleging that a case similar to his own had remained before the same Court without settlement for more than three years. The Commission found that an examination of the file did not reveal the appearance of a violation of one of the rights or freedoms recognized in the Convention and consequently declared the application inadmissible as manifestly ill-founded. It considered it superfluous to enquire in this particular case whether internal remedies had been exhausted.

lodged with a German court had remained pending and had not been heard within a reasonable time. The Commission held that the file did not in fact show "that the applicant had been treated in a manner inconsistent with the generally recognized rules of international law".

In a third case, the applicant had not employed a remedy available to him at law. He tried to justify this by pleading inadequate financial means. The Commission noted that he had apparently not even applied for legal aid and held that the inadequacy of the applicant's resources could not "of itself and in the particular case" be regarded as a special circumstance which would release the applicant, according to the generally recognized rules of international law, from the obligation to use that remedy.

A fourth applicant, of Polish nationality, wished to obtain damages in respect of his internment in a number of Nazi concentration camps. He had, however, only taken administrative action, without instituting any legal proceedings.

He explained this by referring to a letter from the competent authorities informing him that German legislation provided for compensation to non-Germans only under certain conditions which were not satisfied by the applicant. The Commission ruled that "the above-mentioned letter from the *Öffentlicher Anwalt für die Wiedergutmachung* of the... Court cannot be considered a "special circumstance which would release the applicant..."

Lastly, the Commission was recently called upon to give a decision in the following case: the applicant, whose claim was rejected by a court of first instance, had failed to appeal because, as he alleged, his poor state of health prevented him from using that remedy which he believed would in any event be found to fail. The Commission decided, *inter alia*, that "the applicant's poor state of health cannot *per se* set aside (the) obligation (to exhaust the domestic remedies available to him); that, furthermore, the applicant's own opinion concerning the prospects of success of an appeal to the... *Oberverwaltungsgericht* cannot be taken into consideration, as it is not supported by any factors tending to show that such an appeal would probably have been ineffective or inadequate".

## II. Applications must relate to a period after the entry into force of the Convention

As regards the date of the effect of the Convention and Protocol, the Commission has strictly observed the principle of non-retroactivity.

At its 3rd session (September 19 to 24, 1955), the Commission was in general agreement:

- a) that it is competent to hear any application presented by one Contracting Party against another Contracting Party under

Article 24 of the Convention if such application relates to facts occurring after the entry into force, in respect of the defendant Party, of the Convention or Protocol, within the meaning of Article 66, paras. 2 and 3 of the Convention and of Article 6 of the Protocol. In regard to facts previous to the entry into force capable of constituting a continuous breach of the Convention or Protocol which persists after such entry into force, the Commission shall make a decision according to the particular circumstances;

b) that it is competent to hear any application submitted by any person, non-governmental organisation or group of individuals in accordance with Article 25 of the Convention when such application

i) refers to facts occurring during the period mentioned in the preceding paragraph,  
and

ii) was submitted after July 5, 1955 (in the case of Sweden, Ireland, Denmark, Iceland, the Federal Republic of Germany and Belgium)<sup>10</sup> or maintained by the applicant after that date.

As to the question whether applications made against the above countries and addressed to the Secretary-General before July 5, 1955, have legal effect, the Commission approved the practice followed by the Secretariat of asking applicants if they intended to maintain such applications. As this question affects the operation of the time-limit of six months laid down by Article 26 of the Convention, the Commission decided to state its opinion in the light of the concrete cases brought before it in the course of its duties.

In general, however, the Commission reserved the right to reconsider the whole matter according to the particular circumstances of each case submitted to it.

The practical application of these principles has led the Commission to declare partly or wholly inadmissible *ratione temporis* 113 individual applications referring to facts which occurred prior to the entry into force of the Convention or Protocol in respect of the Contracting Party against which the claim was made. The Commission considered that,

“according to the generally recognized rules of international law, the European Convention on Human Rights applies, for each Contracting Party only to facts which occurred subsequent to its entry into force in respect of that Party.”<sup>11</sup>

<sup>10</sup> For the other countries which have recognized (Norway) or may in the future recognize the right of individual recourse, the date will be that on which their declaration is deposited.

### III. Applications may only be made against a High Contracting Party which has recognised the right of individual recourse to the Commission

In a number of decisions, the Commission considered

“that it is apparent from Article 25 (1) of the European Convention on Human Rights that an application may only be admissible if made against a Contracting Party to the said Convention; that it is, moreover, implied by Article 66 of the Convention that only countries which have duly signed and ratified the Convention are to be regarded as Contracting Parties.”<sup>11</sup>

It follows, in particular, that:

#### A. Applications may not be made against non-Members of the Council of Europe<sup>12</sup>

In three cases where examination of the files showed that the State against which the claim was made was not a Member of the Council, the Commission declared the applications inadmissible on that ground, by virtue of Article 27 (2) of the Convention.<sup>13</sup>

#### B. Applications may not be made against a member country of the Council of Europe which has signed but not yet ratified, the Convention or Protocol<sup>14</sup>

The Commission found that some of the allegations in fourteen Applications submitted against the Federal Republic of Germany in reality related to France or Austria, countries which although Members of the Council and signatories of the Convention, had not yet ratified the latter. To that extent, the applications were judged incompatible with the provisions of the Convention.

Until February 13, 1957 the Federal Republic of Germany was in a similar position with regard to the Protocol which it had signed but not ratified. Up to that date, the Commission has declared inadmissible<sup>15</sup> fourteen applications alleging violation by that State of the

<sup>11</sup> The Convention:

– September 3, 1953 for Denmark, Federal Republic of Germany, Iceland, Ireland, Norway and Sweden and June 14, 1955 for Belgium.

– The Protocol: May 18, 1954 for Denmark, Iceland, Ireland, Norway and Sweden, June 14, 1955 for Belgium and February 13, 1957 for the Federal Republic of Germany.

<sup>12</sup> It follows from Article 66 of the Convention that only Members of the Council of Europe may sign and ratify it. On receiving a petition which refers to a non-Member State or a Party which has not recognized the right of individual recourse, the Secretariat does not normally transmit it to the Commission. It does so only if the application is in fact partly directed against one of the seven member countries which have recognized that right. Such was the position in the three cases mentioned here.

<sup>13</sup> Without giving other reasons in one application; as being incompatible with the provisions of the Convention in two applications.

<sup>14</sup> The remarks in footnote (12) also apply, *mutatis mutandis*, to the applications referred to under this head.

<sup>15</sup> “As being incompatible with the provisions of the Convention as ratified by the Federal Republic of Germany”, or “as being made against a country not bound by the Protocol” or “in the absence of legal means of enforcement”, etc.

right to property guaranteed by Article 1 of the Protocol. It held, in fact, that

“under the terms of Article 6, the Protocol is binding only on those signatories which have ratified it.”

The Federal Republic of Germany having deposited its instrument of ratification of the Protocol on February 13, 1957 this problem no longer arises.

### *C. Applications may not be made against persons*

Up to the present, the Commission has rejected, as being incompatible with the provisions of the Convention, 6 applications that were in fact directed against individuals, considering

“that under the terms of Article 19 of the Convention, the sole task of the European Commission of Human Rights is to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention; that it is, moreover, apparent from Article 25 (1) of the Convention that the Commission can properly receive an application from a person, non-governmental organisation or group of individuals only if that person, non-governmental organisation or group of individuals claims to be the victim of a violation by one of the High Contracting Parties – not by a person – of the rights set forth in the Convention.”

## **IV. Individual applications must normally be made by the persons who themselves claim to be the victims of alleged violations**

Several decisions of the Commission contain a statement of grounds worded as follows:

“Whereas, under the terms of Article 25 (1) of the European Convention on Human Rights, the Commission may receive an individual application only if the applicant claims to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention; whereas, although the applicant has not shown that he is duly empowered (by the principal victim of the alleged violation) to act on his behalf<sup>16</sup> it is nevertheless permissible, where a violation of the Convention is alleged, for a near relative of the victim or even a third party to submit an application to the Commission on his own initiative, in so far as the said violation is prejudicial to him or he has a genuine personal interest in the termination of the violation or, again, where the victim himself is unable to act in defence of his rights.”<sup>17</sup>

The Commission has so far declared inadmissible, as being incompatible with the provisions of Article 25 (1) of the Convention three applications of which the author satisfied none of these conditions.

<sup>16</sup> See Rule 37, para. 1, and Rule 40 of the Commission's Rules of Procedure. Article 28 of the Convention itself provides for representation of the parties.

<sup>17</sup> This ground, or one similar, appears in the decisions on the admissibility of three applications.



**V. In submitting an application, the applicant must not show such a persistent disregard of the formal requirements as might amount to an abuse of the right of recourse**

In three recent cases, the application consisted merely of one short letter from the applicant drafted in the vaguest terms. The Secretariat of the Commission wrote to each applicant twice asking him to supplement his communication. The applicant signed receipts for the two letters and returned them to the Secretariat, but made no other reply. As several months had passed since the application had been submitted, the Commission rejected it for the following reasons:

"...Whereas, under Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Commission may, subject to certain conditions, receive applications from any person, non-governmental organisation or group of individuals; whereas neither this nor any other article of the Convention lays down specific rules for the form and method of presentation of individual applications, apart from requiring that they be addressed to the Secretary-General of the Council of Europe (Article 25) and that they shall not be anonymous [Article 27 (1) (a)] but whereas Rules 40, 41 and 42 of the Commission's Rules of Procedure<sup>18</sup> contain a number of additional provisions on this point; whereas in order to assist applicants in complying with those provisions, the Commission at its third session approved the despatch of an application form to applicants; whereas it also considered it necessary, in order to ensure the satisfactory carrying out of its work, to impose upon the applicants a time-limit of two months from receipt of the form to return it duly completed or, failing that, to forward to the Secretariat another document which fulfilled the same conditions; whereas the non-observance of these rules, which are liberal and are applied with flexibility, may sometimes show disregard of one of the rules of admissibility laid down by the Convention; whereas such non-observance may, in particular, show persistent negligence amounting to abuse of the right of recourse within the meaning of Article 27(2) of the Convention on the part of the applicant; whereas it appears clearly from the facts of the case that the applicant, having set in motion the safeguarding machinery provided by the Convention, neglected to furnish the Commission with the essential particulars indispensable for the examination of his case, although the Secretariat had twice requested him to do so; whereas, further, he has not invoked any circumstance which might justify or excuse his silence and the Commission, in this case, has no reason to presume the existence of any such circumstance; whereas, therefore, he has manifestly abused his right of recourse; whereas his application should consequently be rejected in accordance with Article 27(2) of the Convention"

**VI. An application must not be substantially the same as a matter already examined by the Commission**

Under the terms of Article 27 (1) (b) of the Convention,

"the Commission shall not deal with any application submitted under Article 25 which

(a) ...

<sup>18</sup> See Appendix III.

(b) is substantially the same as a matter which has already been examined by the Commission...and if it contains no relevant new information."<sup>19</sup>

With increasing frequency, however, private persons whose initial applications have been declared inadmissible re-apply to the Commission complaining of the same facts. The Commission rejects the second application if it finds it to be "substantially the same" as the first. But it shows some flexibility in that respect:

"considering the scope of its functions and powers, the Commission believes that, in the matter of the protection of Human Rights, it ought not to follow strict rules which would lead to its decisions being invested with the authority of *res judicata*, as is the case in ordinary courts of law when there are *eadem personae, eadem res, eadem causa petendi*."

The Commission infers

"that only examination of the application will disclose whether it is inadmissible under sub-paragraph (1) (b) of Article 27."<sup>20</sup>

In two cases recently dealt with by the Commission, the applicants repeated their former complaints, but one advanced fresh legal arguments and the other applicant produced fresh information. The Commission held that, in these particular cases, the legal arguments and information in question "(could) not alter the legal facts which (constituted) the foundation of the right" previously invoked by the applicant. With regard to one of these applications it also pointed out that it had already made an *ex officio* examination<sup>21</sup> of the said legal arguments and had dismissed them, some expressly and the others by implication, in its first decision. It accordingly found that both applications were "substantially the same" as the preceding cases and rejected them on that ground.

Up to the present, the Commission has declared 6 individual applications inadmissible under Article 27 (1) (b) of the Convention.

## VII. Applications must relate to an alleged violation of one of the rights or freedoms recognised in the Convention or Protocol

This does not mean that the applicant must necessarily invoke a specific Article,<sup>22</sup> or even a specific right<sup>23</sup> in the Convention. It is sufficient if, in the opinion of the Commission, the subject of the

<sup>19</sup> In the French text, the words "relevant new information" are rendered as "faits nouveaux".

<sup>20</sup> These two grounds appear in the Commission's decisions on the admissibility of two applications.

<sup>21</sup> See below, p. 211.

<sup>22</sup> Although the Secretariat sends them the full text of the Convention, applicants often refer not to the Convention at all but to a domestic Constitution or law, to

complaint is such as to bring it within the scope of the Convention. If need be, the Commission makes an *ex officio* examination<sup>24</sup> to determine whether that is the case:

"whereas, under the terms of Article 19 of the Convention, the Commission was set up to ensure observance of the engagements undertaken by the Contracting Parties; whereas it is therefore the duty of the Commission, when an application is submitted to it by a private person, to determine whether or not the case involves the appearance of the violation of the Convention; whereas the Commission carries out this enquiry *ex officio* in order to determine whether the subject of the complaint falls by its nature within the scope of the Convention even if the applicant does not rely on a specific article of the Convention."<sup>25</sup>

At the same time:

"under the terms of Article 1,<sup>26</sup> the Convention guarantees only those rights and freedoms set forth in Section I; and in accordance with Article 25 (1)<sup>27</sup> only the alleged violation of one of these rights or freedoms by a Contracting Party can be the subject of an application admissible by the Commission."<sup>28</sup>

an international treaty other than the Convention, or to the Universal Declaration of Human Rights, etc. The Commission does not reject an application on this ground alone. Moreover, Rule 41, para. 1 (d) of the Rules of Procedure stipulates that the application shall include only "as far as possible" the provision relied upon in the Convention.

<sup>23</sup> Even where an applicant refers solely to a right not covered by the Convention (e.g., the right to practise a profession), the Commission, before rejecting the application, makes an *ex officio* examination to determine whether it is not admissible under some other head (e.g., the right to a proper administration of justice as defined in Article 6 of the Convention).

<sup>24</sup> The examination is of the file as a whole. In the Commission's latest decisions, the expression "examination of the file" constantly recurs. Earlier decisions usually contained such phrases as "examination of the application", "examination of the alleged facts" or "examination of the applicant's allegations". Although particularly prominent in the kind of case treated in this Section VII, the concept of *ex officio* examination dominates the whole of the Commission's jurisprudence and practice. On judging the admissibility of an application, the Commission does not, therefore, confine itself to the allegations, arguments and evidence submitted by the party or parties. Where appropriate, it instructs its secretariat to invite the party or parties to furnish information, explanations or further evidence, without which it could not decide as to admissibility in full knowledge of the facts of the case. It has even conceded that its Secretariat is entitled in each case to arrange on its own initiative for the production of any exhibits and documents likely to facilitate the proper conduct of the proceedings.

<sup>25</sup> This argument, or one similar, occurs in the decisions on two applications. The Commission, nevertheless, rejected both applications, the first by virtue of Article 27(1)(b) of the Convention (see above, pp. 209-210) and the second as being manifestly illfounded, examination of the file having disclosed no appearance of a violation of any of the rights set forth in the Convention.

<sup>26</sup> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

<sup>27</sup> "... of a violation by one of the High Contracting Parties of the rights set forth in this Convention..."

<sup>28</sup> This statement of grounds, or one similar, occurs in the decisions in 13 applications.

The Commission has applied this rule to reject, as incompatible with the provisions of the Convention (Article 27, para. 2 of the Convention), 21 applications which invoked a right not included among those enumerated in Section I of the Convention or the first three articles of the Protocol.<sup>29</sup>

The Commission has decided, *inter alia*, that:

*“the right to nationality is not included among (the rights and freedoms set forth in the Convention)”*; *“the right to exercise a profession is not included, in principle, among those rights and freedoms”*; *“the right to an adequate standard of living and the right to decent housing are not included, in principle, among those rights and freedoms”*; *“the right to take up residence within the territory of a State other than the State of which one is a national . . . is not included, in principle, among those rights and freedoms”*; *“the right to a pension is not included, in principle, among those guaranteed by the Convention”*; *“the subject of public service (in particular the right of access to the public services) . . . lies, in principle, outside the scope of Section I of the Convention.”*<sup>30</sup>

### VIII. The Convention does not recognise the right of any person to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms safeguarded

A recent important case gave the Commission the opportunity of pointing out that the exercise of the rights and freedoms set forth in the Convention does not imply the right “to engage in any activity or perform any act aimed at the destruction (of those rights and freedoms) or at their limitation to a greater extent than is provided for in the Convention” (Article 17).

This was an application lodged by the German Communist Party against the Federal Republic of Germany on February 11, 1957. The applications requested the Commission to find that the Government of that State, by bringing about the dissolution and prohibition of the party mentioned, had violated its obligations under the Convention. The dissolution and prohibition of the party had been ordered on August 17, 1956 by the Federal Constitutional Court under Article 21, para. 2, of the Basic Law of the Federal Republic,<sup>31</sup> after

<sup>29</sup> Certain other applications of the same kind have been rejected as manifestly ill-founded. These are as a rule comparatively early decisions.

<sup>30</sup> In a number of the decisions referred to here, the Commission held that the Convention contained no provision corresponding to Articles 15, 21 (2), 23 (1) or 25 (1), as the case may be, on the Universal Declaration of Human Rights.

<sup>31</sup> “Parties, which, according to their aims and the behaviour of their members, seek to impair or abolish the free and democratic basic order or to jeopardise the existence of the Federal Republic of Germany, shall be anti-constitutional. The Federal Constitutional Court shall decide on the question of anti-constitutionality.”

the Court had been moved to proceed by the said Government. In support of their application, the applicants invoked Articles 9, 10 and 11 of the Convention.<sup>32</sup>

After the parties had exchanged observations in writing, the Commission pronounced a decision on July 20, 1957 with the following reasoning:

"Whereas the rights and freedoms set forth in Articles 9, 10 and 11 of the Convention may, under the terms of the second paragraphs of those Articles, be subject to such limitations as are prescribed by law, under the conditions laid down by the Convention;

Whereas in the present instance there is no need to consider the application of the second paragraphs of Articles 9, 10 and 11, since Article 17 of the Convention contains the following more general provision:

'Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'; Whereas this fundamental provision of the Convention is designed to safeguard the rights listed therein by protecting the free operation of democratic institutions (see Preparatory Work, Official Records of the Consultative Assembly, 1949, First Session, pages 1235, 1237 and 1239: 'It is necessary to prevent totalitarian currents from exploiting, in their own interests, the principles enunciated by the Convention; that is, from invoking the rights of freedom in order to suppress Human Rights.');

Whereas a similar motive appears to have guided the German legislator when drafting Article 21 of the Basic Law;

Whereas the question at issue is to determine whether the application of the last-mentioned provision to the present case is in conformity with the said Article 17, and whether, therefore, within the meaning of that Article, the applicants have committed acts or engaged in any activity aimed at destroying the rights or freedoms set forth in the Convention or at securing more comprehensive limitations of those rights or freedom than are provided for in the said Convention;

Whereas it is patent:

1) that the 'aim of the Communist Party is to establish a socialist-communist system by means of a proletarian revolution and the dictatorship of the proletariat' [statements of the German Communist Party reproduced in the Decision by the Federal Constitutional Court and in '*Entscheidungen des Bundesverfassungsgerichts*' (cf. vol. 5, 1956, page 163)]; and

2) that the German Communist Party continues to vaunt these principles (*loc. cit.*, pages 191 and 193-195); Whereas even if it could be proved that the Party's present activity is directed towards the seizure of power solely through the constitutional means afforded to it in the Basic Law of the Federal Republic of Germany, this would in no sense imply that the Party had renounced its traditional objectives; on the contrary, the aforesaid statements reaffirm the continued adherence of the German Communist Party to those objectives;

<sup>32</sup> Freedom of thought, conscience and religion; freedom of expression; freedom of assembly and of association with others.

Whereas the pursuit of such ultimate objectives, on the applicants' own admission, implies transition through the stages advocated by fundamental Communist doctrine, the essential stage being dictatorship of the proletariat; Whereas recourse to a dictatorship for the establishment of a regime is incompatible with the Convention, inasmuch as it includes the destruction of many of the rights or freedoms enshrined therein; Whereas the organisation and operation of the German Communist Party, in the circumstances of the case, constitute an activity within the meaning of Article 17; Whereas it is clear from the foregoing that the application by the German Communist Party cannot rest upon any provision of the Convention, least of all on Articles 9, 10 and 11."

The Commission accordingly declared the application inadmissible by virtue of Article 27, para. 2, of the Convention, as being incompatible with the provisions of the Convention.

#### **IX. Examination of the file must disclose the appearance of a violation of one of the rights or freedoms as defined in the Convention and Protocol**

Where a right, as such, comes within the scope of the Convention, but is subject to restrictions or limitations, the Commission proceeds to determine its scope. If examination of the file discloses no appearance of a violation of the right<sup>33</sup> as defined by the Convention, the Commission rejects the application under Article 27(2) of the Convention.<sup>34</sup>

The following decisions may now be quoted as examples of this work of interpretation:

##### *A. Article 5 of the Convention (right to physical liberty and security of person)*

A number of applicants, *detained* as dangerous habitual criminals for an indefinite period, under Articles 20(a) and 42(e) of the Penal Code of the Federal Republic of Germany, challenged the compatibility of these articles with Article 5 of the Convention.

The Commission rejected their applications on the grounds:

"that under the terms of Article 5 of the Convention, no one shall be deprived of his liberty save in the cases enumerated there and in accordance with a

<sup>33</sup> During its examination of admissibility, the Commission is clearly called upon to pronounce only on the existence of the appearance of a violation of the rights and freedoms guaranteed, and not on that of a violation in fact which can only be established after the attempt at conciliation has failed (Article 31 of the Convention). It follows that a misconception by the applicant of the scope of those rights and freedoms might result in the inadmissibility of the application only if it were manifest.

<sup>34</sup> Sometimes as manifestly ill-founded, sometimes (particularly in the latest decisions) as incompatible with the provisions of the Convention.

procedure prescribed by law, for example, the lawful detention of a person after conviction by a competent court; that it appears that those rules have been respected in the present case."<sup>55</sup>

*B. Article 6 of the Convention (right to the proper administration of justice)*

Owing to its obvious practical importance, this Article has given rise to a particularly large number of decisions which now enable us to define its effect in several respects.

i) Right of everyone to a hearing within a reasonable time [Article 6 (1)]

One applicant complained that a divorce suit instituted by her had been pending for more than seven years. The Commission enquired as to whether the delay could be attributed to the courts dealing with the case. Having reached the conclusion that this was not so, it gave the following decision:

"Whereas Article 6 of the Convention provides that everyone is entitled to a fair and public hearing within a reasonable time; whereas the exercise of this right depends, however, on the necessary diligence being shown by the interested party; whereas, in this case, examination of the file does not show that the courts, in the exercise of their judicial powers, refused to hear the applicant's case within a reasonable time; whereas it appears, on the contrary that the applicant reproaches her lawyer for this delay and that this is simply an allegation which, even if correct, could in no way be considered as a violation by the Contracting Party of the said right mentioned in Article 6 of the Convention; . . . whereas the application should therefore be declared inadmissible by virtue of Article 27(2) of the Convention as manifestly ill-founded."

ii) Right to free legal assistance [Article 6(3) (c)]

Under the terms of Article 6(3)(c) of the Convention, anyone charged with an offence has the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

The decisions of the Commission show that the right of such legal assistance is accorded only to accused persons. In a number of decisions, the Commission has held that this right,

"is only accorded to a person charged with a criminal offence, where he has not sufficient means to pay for legal assistance of his own choosing and when the interests of justice so require; except in the case provided for in Article 6 of the Convention, the benefit of legal assistance is not recognized in the Convention as a right which may be claimed by everyone and the refusal of which by a competent authority would in itself be a violation of the Convention."

<sup>55</sup> This argument, or one similar, occurs in the decisions in 7 applications.

Consequently, when an applicant complains that he has met with such a refusal in connection with a civil action which he wishes to bring, the Commission declares the application inadmissible on that ground.<sup>36</sup> Secondly, the right "*does not guarantee the right to free judicial proceedings*, but only the right to free legal assistance when the interests of justice so require." Thirdly, it does not entail the right to a free choice of legal assistance, because:

"...it follows from Article 6(3)(c) that the Convention guarantees the right to free choice of legal assistance only where the accused has sufficient means to pay for legal assistance; if he has not such means, his right is restricted to free legal assistance by counsel appointed by the Court, when the interests of justice so require."

*C. Article 7 of the Convention (legal basis of offences and Penalties)*

In a number of recent decisions the Commission has held that this article confirms the "principle that offences and penalties must be covered by the law" (*nullum crimen, nulla poena sine praevia lege*) which has among other corollaries, the "rule of the restrictive interpretation of repressive legislation" and the "rule of the non-retroactivity of criminal law."<sup>37</sup>

On the first point (restrictive interpretation), the Commission has sometimes had occasion to enquire whether a judicial decision seemed inconsistent with the provisions of Article 7. When it has been able to answer that question in the negative, it has rejected the application on that ground as being manifestly ill-founded.

On the second point (non-retroactivity), the Commission has found it necessary to make a statement as to the scope of para. 2 of Article 7, the text of which is as follows:

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

The Commission has recognized

"that it is clear from the preparatory work on the Convention that paragraph 2 of Article 7 is intended to explain that this article does not affect laws which, in the very exceptional circumstances at the end of the second world war were passed in order to suppress war crimes, treason and collaboration with the enemy, and does not aim at any legal or moral condemnation of those laws."

<sup>36</sup> Sometimes as manifestly ill-founded, sometimes (in the latest decisions) as incompatible with the provisions of the Convention.

<sup>37</sup> In 4 applications. In the first case, the applicant also apparently complained that he had been convicted of an offence committed by somebody else. The Commission found in fact that he had been convicted in respect of his own act and decided therefore that it would be "superfluous, in the present instance, to examine whether the Convention sanctions the rule of non-vicarious liability which the applicant appears to invoke."



The Commission therefore declared inadmissible as being manifestly ill-founded, two applications the authors of which complained of having been sentenced for collaboration to the loss of certain rights under retroactive legislation.<sup>38</sup>

*D. Article 8 of the Convention (right to respect for private and family life, home and correspondence)*

Certain applicants have maintained that, in making homosexuality a punishable offence, Articles 175 and 175(a) of the Penal Code of the Federal Republic of Germany infringe Article 8 of the Convention.

The Commission considered that:

“the Convention permits a State by its legislation to declare homosexuality to be a punishable offence under its laws, having regard to the fact that the right to respect for private and family life as protected by Article 8, para. 1, is subject, in a democratic society, under paragraph 2 of the same Article, to interference by the State in accordance with the law for the protection of health or morals.”<sup>39</sup>

The applications were consequently rejected as manifestly ill-founded.

In another case the applicant, of Danish origin but married to a German, complained that she had been unable to obtain residence and labour permits in Denmark for her husband and had therefore been obliged to settle in Germany with him. She alleged, *inter alia*, violation of Article 8(1) of the Convention. The Commission noted “that the applicant and her husband have... their home in Germany, where they may continue to live together” and therefore decided that an examination of the file did not “disclose any appearance of a violation either of the right to respect for her private and family life, or of the right to respect for her home, as defined in Article 8(1) of the Convention”. It accordingly declared the application inadmissible, as being manifestly ill-founded, especially as “the right to take up residence within the territory of a State other than the State of which one is a national”, which the applicant apparently claimed for her husband, “is not, in principle, one of (the) rights and freedoms” guaranteed by the Convention.

*E. Article 10 of the Convention (freedom of expression)*

An applicant convicted of illegally practising as a solicitor argued that his conviction was in violation of Article 10 of the Convention. The Commission held that:

<sup>38</sup> The measures in question were Article 123(6) of the Belgian Penal Code and Article 9 of the Belgian law of August 10, 1948 respectively.

<sup>39</sup> See Article 8(2).

“Article 10, invoked by the applicant, guarantees to everyone the right to freedom of expression, including freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers; it cannot be inferred from this Article or from any other provision in the Convention that everyone is free to practise the profession of solicitor or that that profession may not be made subject to restrictions in the public interest.”

*F. Article 14 of the Convention (non-discrimination in the enjoyment of the rights and freedoms set forth in the Convention)*

A number of applicants claimed to have been subjected to discriminatory treatment, but only in respect of the enjoyment of a right *not* covered by the Convention.<sup>40</sup> The Commission decided that:

“Article 14 of the European Convention on Human Rights guarantees the principle of non-discrimination only as to the enjoyment of the rights and freedoms set forth in the Convention.”

In three other cases, the alleged discrimination was in respect of a right covered by the Convention, namely, the right to respect for private and family life (Article 8). Two applicants maintained that, in limiting the punishment of homosexuality to homosexuality between men, Articles 175 and 175(a) of the Penal Code of the Federal Republic of Germany violated not only Article 8,<sup>41</sup> but also the principle of non-discrimination on the ground of sex, mentioned in Article 14 of the Convention. The third applicant made a similar complaint concerning Article 181, para. 1, sub-para. 2, of the same Penal Code, relating to serious cases of procuring.

The Commission replied that:

“The provision of Article 14 of the Convention concerning *discrimination* between the sexes does not exclude the possibility of the State *differentiating* between the sexes in the measures which it takes in regard to homosexuality for the protection of health and morals under Article 8, paragraph 2.”

**X. The European Commission of Human Rights is not a higher tribunal called upon to correct errors of law or fact imputed to domestic courts**

An absolutely consistent jurisprudence shows that the Commission does not consider itself called upon to act as an appeal court or “cour de cassation” for domestic courts or, in particular, to consider how they have interpreted or applied domestic law. The Commission’s function is confined to determining, in each case submitted to it, whether such courts have observed the provisions of the Convention

<sup>40</sup> Right to exercise a profession in two cases, right of access to public service in one case, right to proper housing in one case and right to take up residence within the territory of a State other than the State of which one is a national in one case.

<sup>41</sup> See p. 217 above.

and Protocol which are binding on them as on the other authorities of the Contracting Parties.

Where the examination of the file discloses no appearance of a violation of one of the rights recognized in the Convention and Protocol, the numerous applications based on an alleged violation of domestic law and, more generally, on an alleged error of the courts, are rejected under Article 27 (2) of the Convention.<sup>42</sup>

It is the Commission's view that:

"Whereas the European Commission of Human Rights was not set up as a higher court to hear cases of alleged errors of law or fact committed by the domestic courts of the Contracting Parties acting wholly within their jurisdiction but, in accordance with Article 19 of the Convention, to ensure observance of the obligations undertaken by the Parties in the Convention; whereas errors of law or fact committed by domestic courts concern the Commission, during its examination of the admissibility of applications, only insofar as they appear to have resulted in the violation of one of the rights and freedoms limitatively listed in the Convention; whereas, more generally, the Commission is only competent to pronounce on the judgments of domestic courts if there is a presumption that such judgments were given in disregard of the rights and freedoms guaranteed by the Convention..."<sup>43</sup>

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MARC-ANDRÉ EISSEN\*\*

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<sup>42</sup> Usually as being manifestly ill-founded.

<sup>43</sup> This argument, or one similar, occurs in the decisions in 34 applications. It is plainly based on a form of words adopted during the preparatory work on the Convention. Moreover, the Commission does not hesitate to declare inadmissible under Article 27 (2) of the Convention, as being manifestly ill-founded or constituting an abuse, the very numerous applications received (over 170 so far) which are trivial, illusory or made by persons of unsound mind. In such cases, it usually finds "that examination of the files does not disclose the appearance of a violation of one of the rights and freedoms set forth in the Convention." Finally it is important to emphasise that, contrary to what had been feared, the Commission cannot be said to have served as a platform for subversive propaganda.

## Appendix I

	Total	11th Session <sup>1</sup> (16-20.12. 1957)	9th Session (28.8-5.9. 1957)	8th Session (15-20.7. 1957)	7th Session (4-8.3. 1957)	6th Session (27.9-1.10. 1956)	5th Session (28.5-2.6. 1956)	4th Session (15-17.12. 1955)	3rd Session (19-24.9. 1955)
I	353 <sup>a</sup>	39	9	49	31	50	61	51	63
II	274	29	8	35	24	43	51	41	43
III	15	—	—	6 <sup>b</sup>	—	—	4 <sup>d</sup>	5 <sup>c</sup>	—
IV	48 <sup>e</sup>	4 <sup>5</sup>	1	4	5	6	4	5	19
V	2	—	—	—	—	—	1	—	1
VI	8	4	—	2	2	—	—	—	—
VII	3	1 <sup>9</sup>	—	1 <sup>8</sup>	—	—	1 <sup>7</sup>	—	—
	2	—	—	1 <sup>11</sup>	—	1 <sup>10</sup>	—	—	—
	1	1 <sup>12</sup>	—	—	—	—	—	—	—
	353	39	9	49	31	50	61	51	63

<sup>1</sup> The Commission examined no individual applications during its 10th Session (9-12.10.57)

<sup>2</sup> The Commission has in fact only examined 302 individual applications of which some were examined more than once.

<sup>3</sup> The applicants having withdrawn them.

<sup>4</sup> The applicants having withdrawn them (3 cases) or died (1 case).

<sup>5</sup> 2 of them were the applications already communicated to the Parties complained against at the 5th and 8th Session respectively.

<sup>6</sup> 5 of these applications are still pending and include 2 applications communicated to the Parties complained against. The 43 others have either been rejected or struck out of the list.

<sup>7</sup> Application transmitted at the 3rd Session to the Party complained against.

<sup>8</sup> One of the applications transmitted at the 7th Session to the Party complained against.

<sup>9</sup> One of the applications transmitted at the 8th Session to the Party complained against.

<sup>10</sup> Application transmitted at the 5th Session to the Party complained against. This application is still pending.

<sup>11</sup> One of the applications transmitted at the 7th Session to the Party complained against. This application is still pending.

## Appendix II

TABLE

Showing grounds of rejection of the 277 individual applications on the admissibility of which the Commission ruled at its 3rd, 4th, 5th, 7th, 8th, 9th and 11th Sessions.<sup>1</sup>

	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII	total
I	25	40	15	—	2	1	1	—	—	—	1	28	113
II	40	85	18	—	5	1	1	1	—	—	—	33	184
III	15	18	17	—	—	—	2	—	—	—	—	23	75
IV	—	—	—	—	—	—	—	—	—	—	—	2	2
V	2	5	—	—	6	1	—	—	—	—	—	6	20
VI	1	1	—	—	1	—	—	—	—	—	—	3	6
VII	1	1	2	—	—	—	3	—	—	—	—	13	20
VIII	—	1	—	—	—	—	—	2	—	—	—	—	3
IX	—	—	—	—	—	—	—	—	6	—	—	—	6
X	—	—	—	—	—	—	—	—	—	2	—	—	6
XI	1	—	—	—	—	—	—	—	—	—	6	2	9
XII	28	33	23	2	6	3	13	—	—	4	2	—	114
Total	113	184	75	2	20	6	20	3	6	6	9	114	

- Key:
- I *Ratione temporis*.
  - II Manifestly ill-founded.
  - III Non-exhaustion of domestic remedies.
  - IV Non-observance of the six-month rule (Art. 26).
  - V Applications made against a country not bound by the Convention (or Protocol).
  - VI Applications made against private individuals.
  - VII Applications referring to a right not covered by the Convention.
  - VIII Applications submitted by someone other than the victim or his representative.
  - IX Abuse of the right of recourse.
  - X Applications already examined by the Commission [Article 27 (1) (b) of Convention].
  - XI Miscellaneous.
  - XII Applications found inadmissible by the Commission under more than two heads.

<sup>1</sup> Of these 277 applications:

152 were rejected as inadmissible on one ground only

89 were rejected as inadmissible on two grounds

31 were rejected as inadmissible on three grounds

4 were rejected as inadmissible on four grounds

1 was rejected as inadmissible on five grounds

**Appendix III****Extracts from the rules of procedure of the European  
Commission of Human Rights***Rule 34*

1. The Commission shall, as circumstances require, appoint one or more groups, each consisting of three of its members, to carry out the duties laid down in Rule 45. Two substitute members shall also be appointed for each group.
2. Such members and substitute members shall be appointed by the Commission in plenary session.
3. The work of a group shall be presided over by the senior member of such group according to the order of precedence laid down in Rule 3.

*Rule 37*

1. The persons, non-governmental organisations or groups of individuals referred to in Article 25 of the Convention may represent their case in person before the Commission. They may be assisted or represented by a member of the Bar, of a High Contracting Party to the Convention, by a solicitor authorised to appear before the court under the laws of such State or by a professor of law at one of the institutions of higher education of such Party.
2. The Commission or a Sub-Commission may, at the request of a Party or his representative, permit the use by such party or his representative of a language other than French or English.

*Rule 40*

1. Any claims submitted under Article 24 or 25 of the Convention shall be submitted in the form of an application in writing and shall be signed by the applicant or his representative.
2. Where an application is submitted by a non-governmental organisation or by a group of individuals, it shall be signed by those persons competent to represent such organisation or group, if such organisation or group is properly constituted according to the laws of the State to which it is subject. The application shall in all other cases be signed by the persons composing the group submitting the application.

*Rule 41*

1. The application shall include:
  - a) the name of the applicant;
  - b) the name of the High Contracting Party against which the claim is made;
  - c) the object of the claim;
  - d) as far as possible the provision relied upon in the Convention;
  - e) a statement of the facts and of the means of proof,
  - f) any attached documents.
2. In pursuance of Article 26 of the Convention, a party shall provide evidence to show that all domestic remedies have been exhausted.

*Rule 42*

Where a party intends to claim damages for an alleged injury, the amount of damages claimed may be stated in its application.

*Rule 43*

The Secretary-General of the Council of Europe shall transmit the application and any relevant documents to the President of the Commission.

*Rule 44*<sup>1</sup>

Where, pursuant to Article 24 of the Convention, an application is brought before the Commission by a High Contracting Party, the President of the Commission shall through the Secretary-General of the Council of Europe give notice of such application to the High Contracting Party against which the claim is made and shall invite it to submit to the Commission its observations in writing on the admissibility of such application.

*Rule 45*<sup>2</sup>

1. Any application submitted according to Article 25 of the Convention shall be referred by the President of the Commission to the three members mentioned in Rule 34 who shall make a preliminary examination as to its admissibility. The three members shall then submit to the Commission a report on such preliminary examination.

2. If the three members unanimously report that the application appears to be admissible, the President of the Commission shall through the Secretary-General of the Council of Europe give notice of such application to the High Contracting Party against which the claim is made and shall invite it to submit to the Commission its observations in writing on the admissibility of such application.

3. If the three members do not unanimously report that the application appears to be admissible, the Commission shall consider the application and may

a) either, declare at once that the application is inadmissible;

b) or, through the Secretary-General of the Council of Europe give notice of such application to the High Contracting Party against which the claim is made and invite it to submit to the Commission its observations in writing on the admissibility of such application.

*Rule 46*<sup>3</sup>

1. Except for the case provided for in Rule 45, paragraph 3 (a), the Commission, before it decides as to the admissibility of an application, may, if it thinks fit, invite the parties to submit to it their further comments in writing. It may also invite the parties to make oral explanations.

2. The Commission shall inform the parties concerned as to its decision on the admissibility of an application.

<sup>1</sup> Amended on September 20, 1955.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

# CONTROL OF THE ADMINISTRATION IN DENMARK

## THE DANISH PARLIAMENTARY COMMISSIONER FOR CIVIL AND MILITARY GOVERNMENT ADMINISTRATION

### I. Introduction

Since the First World War, and especially during and after the Second World War, the work of the Government in Denmark has increased considerably. The legislature has taken up a great variety of subjects and, on the basis of far-reaching enabling acts, the administration has laid down detailed rules and regulations which are often of vital importance to the citizens.

This development has brought to the fore the question of protecting citizens against the mistakes or abuse of power of public authorities. The safeguards consisting in the criminal and disciplinary liability of civil servants and in the citizens' access to the Courts or right of administrative appeal were not considered sufficient by public opinion.

This view was upheld by the committee established in 1946 to consider amendments to the Constitution and the committee proposed the appointment of a "Folketingets Ombudsmand" (Parliamentary Commissioner) to supervise the civil and military administration of the State. This proposal was passed as a part of the new Constitution of June 5, 1953, Section 55, which provides:

"By Statute shall be provided for the appointment by the Folketing (i.e., Parliament) of one or two persons, who shall not be members of the Folketing, to control the civil and military administration of the State."

A precedent existed in Sweden, where a *Justitieombudsman* and a *Militieombudsman*, appointed by Parliament, were introduced in 1809 and in 1915 respectively.<sup>1</sup>

The Danish constitutional Bill was brought into Parliament in February 1953 together with a Bill concerning the Commissioner. Although Section 55 of the Constitution opened the possibility of two commissioners, the Bill only provided for one. For various reasons

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<sup>1</sup> In Finland a parliamentary *Justitieombudsman* was introduced in 1918, presumably to follow the Swedish precedent. The Danish committee, however, did not mention this Finnish office.



the Bill was not passed at the same time as the Constitution but a year after as Act No. 203 of June 11, 1954,<sup>2</sup> and on March 29, 1955, the present writer was elected to be the first Commissioner and took up office on April 1, 1955.

In pursuance of Section 3 of the Act, Parliament on March 22, 1956 adopted detailed Directives for the Commissioner's activities.<sup>3</sup>

## II. The Commissioner's jurisdiction and powers

The Commissioner's task is first of all to supervise all State administration. The Commissioner's jurisdiction comprises the ministers, the civil servants and all other persons acting in the service of the States. In the interests of the independence of the courts, judges however are kept outside the Commissioner's jurisdiction, and the same applies to the deputy judges in so far as complaints against their conduct of office can be brought before a special Court of Complaints.

Nor is the municipal administration within the jurisdiction of the Commissioner, but a plan to extend his jurisdiction to municipal affairs is at present under consideration.<sup>4</sup>

According to Section 3 of the Directives the Commissioner "shall keep himself informed as to whether any person, within his jurisdiction, pursues unlawful ends, makes arbitrary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his duty."

To perform his task the Commissioner has very wide powers. He is entitled on receipt of a complaint or on his own initiative to examine any civil or military activity which is performed in the service of the State and comes within his jurisdiction. Furthermore he may inspect any office under the State, and every person in Government service is obliged to supply him with such information and to produce such documents and records which he may require for the performance of his duties.

If the Commissioner after an investigation finds that a minister or former minister should be called on to account, under civil or criminal law, for his conduct of office, he shall submit a recommendation to that effect to Parliament. If the Commissioner considers that other persons within his jurisdiction have committed criminal offenses in public service or office he may instruct the prosecuting authorities to institute preliminary investigation and to bring a charge before the ordinary courts.

If, furthermore, the Commissioner finds that the misconduct of a

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<sup>2</sup> The text of the Act is printed below as Annex I.

<sup>3</sup> Printed below as Annex II.

<sup>4</sup> P. 232 *infra*.

civil servant renders necessary a disciplinary prosecution he may direct the administrative authority concerned to institute disciplinary investigation.

It should be said, however, that these last-mentioned powers are not likely to be of great practical importance. The high standard of the Danish civil servant has made the institution of criminal action for crimes in public service very seldom, and although every year disciplinary investigations are made the number of such investigations is very small compared with the total number of civil servants. Thus it has never been necessary so far to use the powers to institute criminal or disciplinary prosecution.

In practice it has appeared that the authority which has had the greatest importance to the Commissioner is the one which is granted to him by Section 9 of the Act and reinforced by Section 10 of the Directives. According to these provisions the Commissioner may always give his opinion on a complaint to the person complained of.

By calling attention to errors committed the Commissioner is enabled to exercise a guiding influence on the administration. Furthermore in case the Commissioner considers a particular decision to be erroneous the provisions give him the legal basis for initiating negotiations with the authority concerned regarding a correction of the decision. If, however, on account of the character of the case or the decision a correction is not possible, the case will often give the Commissioner an occasion to discuss with the authorities a revision of the general procedure.

In this connection it may be mentioned that according to Section 7, Sub-Section 3 of the Directives the Commissioner may recommend that a complainant be granted free legal aid in the event of his intention to bring an action against a State authority or person acting or having acted in the service of the State in respect of alleged errors or negligence in such service. Naturally this authority is used with great care.

It must, however, be emphasized that the Commissioner never has authority to change an administrative decision. The function of the Commissioner is to supervise and not to act as a court of appeal or of cassation. The administration is not bound to follow the Commissioner's recommendations, and in case of a refusal the only thing left for him is to report the matter to Parliament, which may take up the question with the responsible minister. Until now the administration in the vast majority of cases has been ready to comply with the Commissioner's requests whether they have concerned special cases or general questions regarding administrative practice or procedure.

Besides the control of the administration the Commissioner has the authority to notify Parliament and the minister concerned of cases where, in his opinion, defects are revealed in existing laws or administrative regulations, and in the same way he may propose such measures as he deems useful to promote law and order or to improve

Government administration. This, however, does not mean that it is the function of the Commissioner to introduce regular Bills in Parliament. Nor should he in any way state his opinion about political questions, but he may draw the attention of Parliament to such errors or imperfections in an Act which it may be assumed have escaped the notice of Parliament.

### III. Relation to Parliament

As already mentioned the Commissioner is elected by Parliament. To secure his independence it is provided that he shall not hold any office in public service or in private firms, enterprises or institutions or institutions except with the consent of the parliamentary committee mentioned below.

Usually the Commissioner is appointed after every general election, but Parliament may at any time dismiss a Commissioner who no longer has its confidence and appoint a new Commissioner.

This, however, does not mean that Parliament may interfere with the Commissioner's handling of individual cases. As expressly stated in Section 3 of the Act the Commissioner is – apart from the general Directives – independent of Parliament in the performance of his duties.

The Commissioner's independence in relation to Parliament has also found expression in Section 13 of the Act, according to which the Commissioner engages and dismisses his own staff. The number, salaries and pensions of the staff are, however, fixed by Parliament. At present the staff consists of 10 persons, 5 of whom have legal education.

The Commissioner's supervision of the administration is made on behalf of Parliament, and accordingly he is obliged to inform Parliament and the appropriate minister of cases in which his investigations have revealed that any person coming within his jurisdiction has committed mistakes or acts of negligence of major importance.

Furthermore the Commissioner has each year to submit a report to Parliament on his activities in the preceding calendar year. In this report, which is printed and published, it is for the Commissioner to mention his decisions in individual cases which may be of general interest.

To protect the civil servants it is prescribed that if the Commissioner's report or information submitted to Parliament or a minister contains criticism of any person or administrative agency the report or information shall state what the person or agency concerned have pleaded by way of defence. If further in his report the Commissioner mentions cases where he has found the complaint groundless the name and address of the person complained of must not be mentioned, unless he has expressed a desire to that effect.

To facilitate contact with the Commissioner Parliament has

appointed a special committee through which the reports and information regarding special cases are submitted to Parliament. As a rule the committee invites the Commissioner to attend the meetings.

#### IV. The handling of complaints

According to Section 6 of the Act the Commissioner may take up a matter for investigation on his own initiative. Until now this authority has only been used in few cases, for instance when the press has brought a matter concerning the administration before the public. Usually, however, investigations are initiated upon receipt of a complaint.

Any person may lodge a complaint without having to show any special interest in the matter concerned, but naturally the Commissioner will be rather reluctant in taking up a complaint for examination if it is evident that the complainant has no legal or reasonable interest in the matter.

Civil servants and soldiers are not debarred from complaining, nor are they obliged to forward the complaint through the official channels but may send it direct to the Commissioner. In fact a rather large part of the cases comes from civil servants, usually of the lower grades, who are dissatisfied with the conditions of their service.

Further, according to Section 6 of the Act any person, deprived of his personal liberty, is entitled to address written communications in sealed envelopes to the Commissioner.

In this connection it should also be mentioned that during the last two years I have inspected several prisons and penal institutions. Usually these inspections are announced in advance, and the prisoners are informed that they will have an opportunity of talking to the Commissioner without the presence of any officials from the prison. Although the complaints of the prisoners usually do not prove justified I attach importance to such talks, as they give the prisoners an opportunity of discussing questions which have troubled them with a person whom they do not consider as a representative of those who have imprisoned them, or of the prison authorities.

In pursuance of Section 71, Sub-Section 7 of the Constitution Parliament has appointed a Supervisory Board regarding the treatment of persons who are deprived of their liberty other than by a Court (e.g., persons detained in mental hospitals or in homes for the mentally deficient). It is provided in Section 4 of the Directives that the Commissioner shall refer complaints about the treatment of such persons to the Board, which on the other hand may call upon the Commissioner to consider complaints directed against any person or institution acting in the service of the State. Collaboration with the Board has been completely satisfactory.

Regarding the form of the complaints it is prescribed that it

should, as far as possible, be submitted in writing and be accompanied by the complainant's evidence. Further the name and address of the complainant must be stated. It has happened that a complainant who has stated his name to the Commissioner for special reasons has asked to have his name kept secret from the authorities. In such cases the Commissioner decides whether he finds it reasonable to comply with the wish.

According to Section 6 of the Act the complaint must be lodged not more than one year after the date on which the subject matter of the complaint was committed. This time limit, however, is not absolute as no time limit has been imposed in matters which the Commissioner decides to investigate on his own initiative.

When a complaint has been received at the Commissioner's office it is as quickly as possible subjected to a first examination with a view to decide whether to proceed with a regular investigation or not. In making this decision the Commissioner is the sole competent authority. As a result of the examination about 50 per cent of the complaints are for various reasons dismissed without further investigation. A great many of the cases dismissed concern persons or matters outside the Commissioner's jurisdiction. Typical examples are complaints concerning court judgments or the conduct of judges as well as complaints regarding Parliament, municipal administration or private affairs. It is, however, not always entirely easy to define the jurisdiction of the Commissioner especially in regard to municipal administration, as the position of some officials or institutions is of a mixed governmental and municipal character.

In some of the above mentioned cases the complainants are told to what authorities they could apply, or the complaints are referred to the competent authority. This is especially the case where a complaint concerns the municipal administration.

If the Commissioner finds that he cannot dismiss a complaint immediately, it is usually referred to the person or service branch concerned together with a request for the forwarding of a statement and all documents and records of the case. When these documents are received the matter is examined carefully at the Commissioner's office, and if it is found necessary the Commissioner will have personal interviews with the complainant, the civil servant complained of, the responsible authority and perhaps other persons who may be able to give relevant information. These interviews usually take place as rather informal talks in the Commissioner's office, and until now it has not been necessary to use the Commissioner's power to summon witnesses before a Court.

During the investigation the civil servants are given full opportunity to defend themselves, and as a special protection Section 7, Sub-Section 3 of the Act provides that the civil servant complained of at any time may demand that the matter shall be referred to a disci-

plinary investigation under the provisions of the Civil Servants Act. In such case the Commissioner will discontinue his investigation and transmit the case to the appropriate administrative authority, stating what has happened and enclosing the information obtained. So far no civil servants have made use of this right.

When the investigation is finished the Commissioner will make his decision and inform the parties of the result. The decision is usually given in the form of a letter to the complainant, in which the Commissioner gives a detailed statement of the facts of the case and of the reasons for his conclusion. Copies of the letter are sent to the civil servant and the authorities concerned, and if the Commissioner has found anything to criticize their attention is especially drawn to these circumstances.

With the Commissioner's decision the matter is closed, as there is no appeal to a higher authority against the decision.

#### V. Number and nature of cases

From year to year there has been a considerable increase in the number of cases. In 1955 (April-December) the Commissioner received 565 complaints of which 315 were taken up for regular investigation. In 1956 the similar numbers were 869 and 438, respectively, and in 1957 about 1,025 complaints were received. The number of investigations that year is about 50 per cent of the total number of complaints. Finally it may be mentioned that during the first four months of 1958 the number of complaints has continued to increase.

The result of the investigations is usually that there is found to be no basis for criticism either of the civil servants or of the Armed Services. This does not mean that these complaints always have been unreasonable. As the administration will often indicate no reason for its decisions, and as the complainant will often have an incomplete knowledge of the facts of the case or is unable to appreciate the facts he does not understand the decision which he maybe finds unreasonable or unjust. By giving the complainant an explanation it has often been possible for the Commissioner to set his mind at rest.

In about 10 per cent of the investigated cases the Commissioner has found it necessary to make criticism or to put forward recommendations of one kind or another towards the authority concerned. This may be thought to be a rather small percentage of the total number of cases investigated, but in appreciating the Commissioner's work it should be realized that it is not only the number of such cases which is significant but also, and perhaps mostly, the preventive effect of his office on the administration, thereby leading to increased confidence in the soundness of the administration and its decisions.

The complaints received cover the whole field of administration. The greatest part concerns the ministries (and here especially the

Ministries of Justice and of Finance), the local State authorities and the police. Before the passing of the Bill some members of Parliament gave expression to the fear that the new institution would victimize the minor civil servant who used his common sense and perhaps failed to follow the rules and regulations in every detail.

In my opinion these fears have proved to be unfounded. Certainly, the Commissioner receives complaints against minor civil servants, but they are only a small part of the total number of complaints. The majority of these are not directed against the individual civil servant, whether of higher or lower grade, but against institutions, and, as mentioned above, especially against the ministries. The reason for this is perhaps that usually it is possible to appeal against a decision to a higher authority and eventually to the minister. Although the person who is dissatisfied with a decision immediately may submit the matter to the Commissioner, he will very often prefer to try the usual possibilities of administrative appeal before going to the Commissioner.

I do not believe that the administration during the three years in which I have acted has been more inclined to adhere rigidly to the letter of statutes or rules.

At the beginning many civil servants certainly met the Commissioner with some scepticism, but I have endeavoured not to take a formalistic point of view in considering the cases, and it is my feeling that members of the civil service are aware of that, and that the sceptics are retreating.

It has also been said that the Commissioner's office would be a rallying-ground for the more quarrelsome individuals or professional troublemakers. Naturally the Commissioner has received some complaints which may only be characterized as quarrelsome, but often it has been possible to dismiss such complaints without further investigation, and they are not particularly numerous.

It is difficult in a short article to give an impression of the nature of the cases dealt with, but one class of cases deserves special attention because of the difficulties they have involved. They are cases in which the decision of the administration does not depend on the application of a rule of law but is left in the discretion of the administration.

This class of cases covers a very wide field, and hitherto the Courts have only been able to attack such decisions in very few cases. The Danish Courts have consistently refused to re-examine such decisions, if they might be held to fall within the limits of the discretion granted by the legislature to the administrative services and provided that it could not be proved that an unlawful end had been pursued (*détournement de pouvoir*).

In handling cases of this kind it is also difficult for the Commissioner to criticize. As an example may be mentioned the fact that it is often left to the administration to fix the alimony or maintenance

payable by a man to his former wife or his legitimate or illegitimate children. It will easily be understood that it is almost impossible for the Commissioner to criticize the amount at which this obligation is fixed.

If, however, in a case of the above mentioned kind the Commissioner finds that the decision is arbitrary or unreasonable, Section 3 of the Directives gives him a legal basis for criticism, although the Courts in similar cases would abstain from censure.

As a special point may be mentioned that in some cases it has been revealed that instead of exercising a discretion in each individual case, as it should do, the administration is following a firm rule established in practice. In such cases the Commissioner has questioned the decision and recommended a reconsideration.

## VI. The Commissioner and the Municipal Administration

As mentioned above the municipal administration is outside the Commissioner's jurisdiction. In the last year, however, the question has been raised of extending his jurisdiction to cover also this part of the administration.

There are in my opinion good reasons for such an extension. In Denmark the State and the municipal administration often work together. As an example may be mentioned that the lowest tax-authorities are municipal whereas the higher ones are Government agencies. In dealing with the cases it is unsatisfactory that the Commissioner is not able to criticize the activities of the lower authorities but only those of the higher ones.

It is also difficult for the citizens to understand that the Commissioner may investigate a complaint against a teacher at a State school but not an entirely similar complaint against a teacher who is engaged by a municipally-conducted school. The same applies for instance to hospitals some of which are run by the State, others by municipal authorities.

The municipal organizations have until now resisted the extension of the Commissioner's jurisdiction and have argued that an extension might be an attack on local autonomy. Further they have pointed out that through the possibilities for appeal against municipal decisions citizens have sufficient security that their rights are not violated. In my opinion these arguments cannot be decisive. As the Commissioner cannot himself modify the decisions it is difficult to see how his subsequent control may constitute an interference with local autonomy, and even though it is sometimes possible to appeal against a municipal decision it would ultimately be more satisfying to all parties if the Commissioner might also judge the administrative activities on the municipal level. In this connection it has also been suggested that the



Commissioner should not have jurisdiction before all possibilities for appeal were exhausted.

Parliament has not yet decided whether to extend the Commissioner's jurisdiction, but it is my impression that a decision in this direction will be made. It is here of interest that in May 1957 the Swedish Commissioner's jurisdiction was extended to cover to some extent the municipal administration.

### VIII. Conclusion

The Commissioner's office may not yet be considered as a fully established institution in Danish constitutional life. Naturally there have been some initial difficulties, but these may now be considered to be overcome.

A condition for the due functioning of the new institution has been that it enjoyed the confidence of Parliament, the administrative authorities and the public as a whole. In an article which I wrote after having acted for one year I stated that the central administration and its local branches had shown their readiness to cooperate loyally with the Commissioner, and this statement I can only confirm now after three years in office. The friendly attitude which from the very beginning the Press has shown the new institution has not changed. The work is still followed by the Press with great interest, and the Commissioner's decisions are often recorded and commented on in the newspapers.

Summing up our experience my staff and I are convinced that the new institution "Folketingets ombudsmand" has been and will be able to help in building or rather maintaining a sound administration in Danish democracy.

STEPHAN HURWITZ\*

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**Annex I****ACT NO. 203 OF JUNE 11, 1954 ON THE PARLIAMENTARY COMMISSIONER FOR CIVIL AND MILITARY GOVERNMENT ADMINISTRATION***Section 1*

After every general election the Folketing (parliament) will elect a parliamentary commissioner who, on behalf of the Folketing, shall supervise the civil and military government administration (hereinafter called the "Parliamentary Commissioner"). Judges shall, in their conduct of office, be entirely outside the jurisdiction of the Parliamentary Commissioner.

If the Parliamentary Commissioner no longer has the confidence of the Folketing, the latter may dismiss him and elect a new Parliamentary Commissioner.

*Section 2*

The Parliamentary Commissioner, who shall not be a member of the Folketing, shall have legal education.

*Section 3*

The Folketing shall lay down general rules for the Parliamentary Commissioner's activities. Subject to such rules, he shall, in the performance of his duties, be independent of the Folketing.

*Section 4*

The Parliamentary Commissioner's jurisdiction shall comprise ministers, civil servants and all other persons acting in the service of the State, except as provided by Section 1, para. 1.

*Section 5*

The Parliamentary Commissioner shall keep himself informed as to whether the persons mentioned in Section 4 commit mistakes or acts of negligence in the performance of their duties.

*Section 6*

Complaints against the persons mentioned in Section 4 may be lodged with the Parliamentary Commissioner by anybody. The

complainant shall state his name and lodge his complaint not later than one year after the date on which the subject matter of the complaint was committed. The Parliamentary Commissioner will decide whether the complaint gives sufficient grounds for an investigation. The Parliamentary Commissioner may also take up a matter for investigation on his own initiative. Any person deprived of his personal liberty is entitled to address written communications in sealed envelopes to the Parliamentary Commissioner.

### Section 7

The persons mentioned in Section 4 shall be under obligation to furnish the Parliamentary Commissioner with such information and to produce such documents and records as he may demand by virtue of his office.

Demands for information made by the Parliamentary Commissioner in pursuance of Sub-Section 1 shall be subject to limitations similar to those laid down by the Administration of Justice Act, Section 169, Sub-Sections 1 and 3, Section 170, Sub-Section 1, the principal rule in Section 170, Sub-Section 4, and Section 749.

If the Parliamentary Commissioner wants to take action on a complaint against any of the persons mentioned in Section 4, the complaint shall, as soon as possible, be communicated to the person concerned, unless this is absolutely incompatible with the investigation of the matter. The person concerned may, if he is a civil servant, demand at any time that the matter shall be referred to treatment under the provisions of the Civil Servants Act, Section 17, cf. Section 18.

The Parliamentary Commissioner may subpoena persons to give evidence before a law court on any matter which has bearings on his investigation. This procedure shall be subject to the rules governing examination of witnesses for investigation purposes, cf. the Administration of Justice Act, Chapter 74. Such court sessions are not open to the public. The person whom a complaint concerns is entitled to attend such examinations himself and to bring a counsel. The rules in force at any time governing the payment of costs for a counsel, etc. in disciplinary prosecution of civil servants shall be applicable by analogy.

### Section 8

The Parliamentary Commissioner shall observe secrecy in any matter coming to his knowledge in the performance of his duty, provided that such secrecy is necessary *ipso facto*. The obligation to observe secrecy shall not lapse when he resigns his office.

*Section 9*

The Parliamentary Commissioner may order the prosecuting authorities to institute preliminary proceedings or to bring a charge before the ordinary law courts for misconduct in public service or office, subject to Section 16 and 60 of the Constitution (The Court of the Realm).

The Parliamentary Commissioner may order the administrative authority concerned to institute disciplinary proceedings.

In any case, the Parliamentary Commissioner may always state his views on the matter to the person concerned.

*Section 10*

If any mistake or act of negligence of major importance, committed by any of the persons mentioned in Section 4, comes to the knowledge of the Parliamentary Commissioner, the latter shall inform the Folketing and the minister concerned hereof.

The Parliamentary Commissioner shall submit an annual report on his activities to the Folketing. The report shall be printed and published.

If the Parliamentary Commissioner informs the Folketing or a minister of a case, or if he brings out a case in his annual report, he shall, in such information or in his report, state what the person concerned has pleaded by way of defence.

*Section 11*

If the Parliamentary Commissioner becomes aware of any defects in existing laws or administrative regulations, he shall inform the Folketing and the minister concerned about them.

*Section 12*

The Parliamentary Commissioner shall receive remuneration at the same rate as a judge of the Supreme Court at the highest step in the salary scale. In addition, he may be granted a personal allowance in such amount as circumstances may warrant. He is entitled to "waiting money"<sup>1</sup> and to a pension according to provisions corresponding to those laid down in the Act on Remuneration and Pensions, etc. for Ministers, Sections 3-6.

The Parliamentary Commissioner shall not hold any office in public or private firms, enterprises or institutions, except with the consent of a committee which the Folketing has instructed to decide on this question.

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<sup>1</sup> Compensation payable to government officials who are temporarily out of office.

*Section 13*

The Parliamentary Commissioner shall engage and dismiss his staff. The number, salaries and pensions of his staff members shall be fixed in the same manner as that prescribed in the Folketing's Rules of Procedure for its own officials, etc. The expenditure incidental to the Parliamentary Commissioner's Office shall be charged to the budget of the Folketing.

*Section 14*

This Act shall enter into force on November 1, 1954.

*Section 15*

This Act shall be submitted to the Folketing for revision not later than the parliamentary year 1956/57.<sup>2</sup>

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<sup>2</sup> By Act No. 71 of March 29, 1957 the words "parliamentary year 1956/57" were amended to read "parliamentary year 1957/58".

## Annex II

**DIRECTIVES FOR THE  
PARLIAMENTARY COMMISSIONER FOR CIVIL AND  
MILITARY GOVERNMENT ADMINISTRATION**

The following directives for the Parliamentary Commissioner for Civil and Military Government Administration (hereinafter called the "Parliamentary Commissioner") are issued in pursuance of Act No. 203 of June 11, 1954, Section 3.

*Article 1*

The Parliamentary Commissioner shall, on behalf of the Folketing (Parliament), keep himself informed of the civil and military government administration.

*Article 2*

1. The Parliamentary Commissioner's jurisdiction shall comprise ministers, civil servants and all other persons acting in the service of the State, except as provided in paras. 2 and 3.

2. Judges shall, in their conduct of office, be entirely outside the jurisdiction of the Parliamentary Commissioner. Deputy judges, on the other hand, come within the Parliamentary Commissioner's jurisdiction in so far as complaints against their conduct of office cannot be brought before the New Trials Court.

3. The civil servants of the Established Church come under the Parliamentary Commissioners' jurisdiction, except in matters which directly or indirectly involve the tenets or preachings of the Church.

*Article 3*

1. The Parliamentary Commissioner shall keep himself informed as to whether any person comprised by his jurisdiction pursues unlawful ends, takes arbitrary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his or her duties.

2. The Parliamentary Commissioner shall be entitled to examine by request or on his own initiative, any civil and military action performed in the service of the State and coming within his jurisdiction.

3. The Parliamentary Commissioner shall be entitled to inspect any State agency; subject to limitations similar to those laid down in the Administration of Justice Act, Section 749, Sub-Section 1, he shall have access to all premises.

4. Any person acting in the service of the State shall be under obligation to furnish the Parliamentary Commissioner with such information and to produce such documents and records as he may demand for the performance of his duties.

5. Demands for information made by the Parliamentary Commissioner in pursuance of para. 4 shall be subject to the limitations involved by Article 2, paras. 2 and 3, and to limitations similar to those laid down by the Administration of Justice Act, Section 169, Sub-Sections 1 and 3, Section 170, Sub-Section 1, the principal rule in Section 170, Sub-Section 4, and Section 749.

#### *Article 4*

1. Any person deprived of his or her personal liberty is entitled to address written communications in sealed envelopes to the Parliamentary Commissioner.

2. Complaints about the treatment of persons deprived of their personal liberty through any procedure other than administration of criminal justice, shall be referred to the Supervisory Board appointed by the Folketing in pursuance of the Constitution, Section 71, Sub-Section 7; the Supervisory Board may invoke the assistance of the Parliamentary Commissioner in the consideration of such complaints if the latter are made against any person acting in the service of the State.

#### *Article 5*

1. Any person may complain directly to the Parliamentary Commissioner against persons or about subject matters which come within his jurisdiction; any such complaint should, as far as possible, be submitted in writing and be accompanied by the complainant's evidence.

2. The complainant's name and address must be stated in the complaint which must be lodged not later than one year after the date on which the subject matter of the complaint was committed.

#### *Article 6*

If a complaint concerns persons or subject matters which do not come within the Parliamentary Commissioner's jurisdiction, or if the complaint has been lodged too late, the Parliamentary Commissioner shall inform the complainant that he can take no action on the complaint. The Parliamentary Commissioner may, however, refer any such complaint to the appropriate authority and give the complainant reasonable guidance.

*Article 7*

1. If the Parliamentary Commissioner finds that a complaint which comes within his jurisdiction is unfounded or that the subject matter of the complaint is quite insignificant, he shall as soon as possible inform the complainant that he finds no reason to take action in the matter.

2. In cases where the subject matter of a complaint may be referred to a special authority, the Parliamentary Commissioner should take steps to have the matter referred to that authority before he takes any further action.

3. If the Parliamentary Commissioner finds that the examination of the subject matter of a complaint comes within the jurisdiction of the law courts, he may give guidance to the complainant with that possibility in view. In cases where the complainant intends to bring an action against a State authority or against any person acting, or having acted, in the service of the State, in respect of alleged mistakes or negligence in such service, the Parliamentary Commissioner may, subject to the stipulations of the Administration of Justice Act, Chapter 31, recommend that the complainant be granted free legal aid.

*Article 8*

1. If the Parliamentary Commissioner finds that a complaint should be taken up for examination, the party involved shall, as soon as possible, be informed of the complaint, possibly through the appropriate administrative authority, and asked to make a statement on the complaint, unless this procedure will be absolutely incompatible with the investigation of the matter.

2. Subject to the rules in Article 3, para. 5, the Parliamentary Commissioner may demand written declarations and other information from the person against whom a complaint has been lodged, and from his superior.

3. The Parliamentary Commissioner may subpoena persons to appear and give evidence before a law court about matters which have bearings upon his investigations. This procedure shall be subject to the rules governing examination of witnesses for investigation purposes, cf. Chapter 74 of the Administration of Justice Act. Such court sessions are not open to the public. The Parliamentary Commissioner may attend such examinations in person or by proxy. The person whom a complaint concerns is entitled to appear with a counsel, and he shall be advised to that effect in the writ of subpoena for the first sitting of the court. The writ of subpoena shall be served at an adequate notice. The Minister of Justice will issue rules as to who may act as counsel.



4. The rules in force at any time governing the payment of costs for a counsel, etc. in disciplinary prosecution of civil servants shall be applicable by analogy.

#### *Article 9*

1. If the Parliamentary Commissioner has indicated that he will take action on a complaint against a civil servant, the latter may at any time demand that the matter be referred to disciplinary investigation under the provisions of the Civil Servants Act, Section 17, cf. Section 18. The Parliamentary Commissioner will then discontinue his investigation and transmit the case to the appropriate administrative authority, stating what has happened and enclosing the information obtained.

2. This shall apply also if the administrative authority concerned initiates a disciplinary investigation or if a police investigation is instituted to ascertain if a punishable offence has been committed.

3. In the cases referred to in paras. 1 and 2 the Parliamentary Commissioner is entitled to demand that copies of records of examinations held in disciplinary investigation as well as copies of police reports and court records be sent him immediately and that he be informed about the outcome of the investigations made.

#### *Article 10*

1. If the Parliamentary Commissioner, on having made an investigation, finds that a minister or a former minister should be held responsible, under civil or criminal law, for his conduct of office, he shall submit a recommendation to that effect to the Folketing's Committee on the Parliamentary Commissioner's Office.

2. If the Parliamentary Commissioner deems that other persons coming within his jurisdiction have committed crimes in public service or office (Penal Code, Chapter 16), he may order the prosecuting authorities to institute preliminary investigations and to bring a charge before the ordinary law courts.

3. If the Parliamentary Commissioner finds that the misconduct of a civil servant is of such a nature as to warrant disciplinary prosecution, he may order the administrative authority concerned to institute disciplinary investigations.

4. Even if the subject matter of a complaint gives the Parliamentary Commissioner no occasion for action, he may always state his views on the matter to the person whom the complaint concerns.

#### *Article 11*

1. The Parliamentary Commissioner shall call the attention of the Folketing's Committee on the Parliamentary Commissioner's

Office and the appropriate minister to cases where he deems existing laws and administrative regulations to be inadequate. At the same time, he may propose such measures as he deems useful to promote law and order or to improve the central administration.

2. The Parliamentary Commissioner may request the Folketing's Committee on the Parliamentary Commissioner's Office to transmit to the Folketing his communications to the Committee.

#### Article 12

If the Parliamentary Commissioner's investigations of a case reveal that any person coming within his jurisdiction has committed mistakes or acts of negligence of major importance, he shall inform the Folketing's Committee on the Parliamentary Commissioner's Office and the appropriate minister of the matter.

#### Article 13

1. By the end of September each year, the Parliamentary Commissioner shall submit to the Folketing a report on his activities in the preceding calendar year. The report shall be printed and published. In that report, he will, *inter alia*, bring out decisions in individual cases which may be of general interest; he will also mention the cases referred to in Articles 11 and 12 about which information has been transmitted to the Folketing's Committee on the Parliamentary Commissioner's Office, and to the ministers concerned.

2. If any case which is mentioned in the report, or about which information has been transmitted to the Folketing's Committee on the Parliamentary Commissioner's Office or to a minister, contains criticism of any person or administrative sector, such report or such information shall show what the person or the sector concerned pleaded by way of defence.

3. If in his report the Parliamentary Commissioner mentions cases where he found a complaint unfounded, the name or address of the person whom the complaint concerns shall not be mentioned unless he has expressed a desire for such mention.

#### Article 14

The Parliamentary Commissioner shall engage and dismiss his staff, whose number, salaries and pensions shall be fixed in the same manner as that prescribed in the Folketing's Rules of Procedure for its own officials, etc.

*Article 15*

1. The Parliamentary Commissioner shall observe secrecy about any matter coming to his knowledge in the performance of his duty, provided that such secrecy is necessary *ipso facto*. The staff engaged by the Parliamentary Commissioner shall be bound by the same obligation.

2. The obligation to observe secrecy shall exist also after resignation or retirement.

*Article 16*

1. The Parliamentary Commissioner shall not be a member of the Folketing.

2. The Parliamentary Commissioner shall not, except with the consent of the Folketing's Committee on the Parliamentary Commissioner's Office, hold any office in public or private firms, undertakings, or institutions.

3. Subject to the limitations laid down in these Directives, the Parliamentary Commissioner shall, in the performance of his duties, be independent of the Folketing.

Adopted by the Folketing, March 22, 1956.

Gustav Pedersen  
Bruun de Neergaard

# THE LEGAL PROFESSION AND THE LAW: THE BAR IN FRANCE

## I. THE BAR AND THE LAW

In France, the Law is imperfect, though honourable. It can be compared to an Old Lady living in a very old house. Wars, invasions and revolutions have shaken the house and shattered the furniture. Throughout the Centuries, and particularly during the last fifty years, new buildings have risen against its walls in a disorder which is anything but scientific. Nevertheless, the Old Lady stays on, dignified and self-reliant, uncertain of her own wisdom and yet almost completely serene inasmuch as she possesses a quality whose perfection belongs to God and not to man.

Barristers are the imperfect servants of this imperfect legal system.<sup>1</sup> Their vocation is to fight for truth. The light of truth is their weapon; goodwill is their shield. Occasionally however they fight for a mistaken cause. By tradition they seek to eradicate this crime against the intellect as well as certain other less serious offences. Sometimes they succeed.

It is therefore necessary to know the broad outline of that tradition in order to understand the French judicial system and to have an accurate picture of the Bar.

## II. THE LEGAL SYSTEM

### A. Complexity

It would be impossible to understand the barrister's role without giving a rough sketch of the French legal system. The personality of the Old Lady is not a simple one. Her psychology is difficult to analyse at least as difficult as in the case of the English legal system. There is little we can do about it. In the older nations, and sometimes in the younger ones, some institutions have a historical explanation, but in the long run their only justification is the fact that they exist. The function creates the organ, but the organ keeps the function alive.

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<sup>1</sup> The French word "Avocat" is translated as "Barrister" throughout the article.

## B. Separation of powers

As a whole, the present organization of the French judicial system dates from the time of the Revolution. The legislative philosophers of those days were imbued with Montesquieu's doctrine: "There is no liberty (*Esprit des Lois*, XI, 6) if the judicial authority is not separate from the legislative and executive authorities. If it were linked to the legislative authority, there would be an arbitrary power of life and death over the citizens since the judge would be the lawmaker. If it were linked to the executive authority, the judge could have the powers of a tyrant." These are fine formulae. They were correct or at least opportune, for in the 18th Century the interference of the judiciary with actual administration had caused much confusion. However, the application of those principles has caused further confusion.

On the basis of a series of apparently logical deductions, the ordinary courts were first forbidden to judge the actions of the administration. Then, since the administration could not judge itself, special tribunals known as administrative Courts were set up. Thus the judiciary was effectively separated from the executive. However, this resulted at the same time in an inevitable contradiction, by bringing the actions of the administration under the supervision of a judicial authority. It is true that this authority is accorded exclusively to a special class of judges, who are not the ordinary judges. But times have changed. Even if they had the power to do so, the ordinary judges and magistrates would not be tempted nowadays to impede the actions of civil servants and of the administration. However, administrative courts do exist, and since they exist their continuance is justified by giving them a special technical jurisdiction. Hence the setting up and development of two distinct juridical systems which are parallel in theory and yet become intermingled. Until a quite recent Act, the responsibilities involved in motor-car accidents were assessed differently, in different courts, according as the car was driven by an employee of the State in the course of his duty or by an employee of a private firm.

## C. Courts

The internal logic of the system has led to the creation of two Supreme Courts, the Council of State (*Conseil d'Etat*), which controls all administrative Courts, and the Supreme Court of Appeal (*Cour de Cassation*), which controls the ordinary Courts (*tribunaux judiciaires*). A *Tribunal des Conflits*, whose members are drawn in equal numbers from the Council of State and the Supreme Court of Appeal, has the task of defining the fields of jurisdiction of the administrative and ordinary Courts. Below the Supreme Court of Appeal there are, in

decreasing order of importance, the Courts of Appeal, the District Courts (*Tribunaux d'Arrondissement*), also called Courts of First Instance, and the *Juges de Paix*. Below the Council of State are the administrative Courts. There are also a number of Special Courts, set up for the implementation of special legislation.

#### D. Judges and Prosecutors (*Magistrats*)

Apart from the *Juges de Paix*, whose status and recruitment are governed by special regulations, '*les magistrats de l'ordre judiciaire*' (i.e.) of the ordinary Courts is divided into (a) judges of the Bench (*magistrature assise*), whose task is to pass judgment, and (b) prosecutors (*magistrats du Parquet - magistrature debout*), who form the body of Public Prosecutors and whose task it is to demand enforcement of the law. The latter act mainly in criminal cases, since they are in charge of the prosecution, but also in civil cases. They also have administrative duties (supervision of law officials, control of the registration of births, marriages and deaths, and protection of persons declared incapable). They come under the authority of the Minister of Justice in a system which is headed in each Court of Appeal by a District Prosecutor (*Procureur Général*). In theory they are removable, and may be dismissed. Judges of the Bench are appointed for life. A Higher Council of the Magistracy (*Conseil Supérieur de la Magistrature*), which is independent of the Government, guards jealously the irremovability of judges. In fact, however, magistrates often do pass from the Bench to the *Parquet* and *vice versa* during their career, depending on the vagaries of promotion.

All magistrates may be appointed to the highest posts of their profession, including the Supreme Court of Appeal. Apart from some very rare exceptions, they are recruited from among barristers or probationers with at least two years' training, who have passed the necessary professional examination, or, without that examination, from among barristers and solicitors with at least ten years' seniority. However, one should not be deceived by this method of recruitment: the interpenetration of the Bar and the Magistracy is very much less pronounced in France than it is in England. Almost all future magistrates sit for their professional examinations at the age of 25. If they have attended the Probationers' Conference regularly and paid attention to the teaching of a good *Bâtonnier*, they know the traditions of the Bar. Some of them may have distinguished themselves in the activities of the Probationers' Conference. They may have been nominated to plead *ex officio*. But nearly always they have been taken over, even before the examination, by prosecuting magistrates to whom they have acted as secretaries. Isolated from the outside world, they thus learn to meditate, in accordance with the wish expressed by d'Aguesseau (in 1702), on "the noble and sublime words with which

the Scriptures describe the glory and knowledge of Magistrates: Judges of the Earth, ye are Gods and children of the Most High". It is later in their career that they acquire the experience of men, which is so necessary to Gods. They consider this method of education satisfactory on the whole. They remain close to the barristers in view of their common University training, their own short stay within the Order of Barristers, and, above all, through daily contact. Members of the French Bar respect and defend the Magistracy: they feel injured when attempts are made to humble it, and honoured when it distinguishes itself.

From what has been said about the separation of powers it will be understood that the *Magistrature administrative* (i.e., of the administrative Court) is a special body. Members of the Council of State are recruited either from among the highest civil servants or from among the best graduates of the National School of Administration, who have had to reach extremely high standards in the entrance competition and in their finals. The Council of State does not deal exclusively with contentious matters. It also acts as a consultant to the Government and its members often hold high positions in active branches of the Administration. Some of them bear an outmoded but attractive title, inherited from the *Ancien Régime*: they are called *Maîtres des Requêtes*. Some of the judges of the administrative Courts are also graduates of the National School of Administration, but others are appointed directly by the Minister of the Interior.

### E. The Collegiate System and Deputies

The *Juge de Paix* sits alone on the Bench, as do the Presidents of the District Court, the Commercial Court and the administrative Court, respectively, in certain very urgent cases (*juge des référés*). In all other Courts the Bench consists of several judges. The single-judge system has been tried many times in the ordinary Courts in France during the last few years. On the whole – both the Bar and the Magistracy have failed to give their approval – perhaps wrongly, since a good single judge may be an excellent judge.

Under the present judicial system barristers are sometimes requested to deputize for an absent judge in a District Court or a Court of Appeal (or even in an administrative Court). In principle this honour usually falls to the senior barrister present in Court. Apart from this, barristers are often called upon to deputize for *Juges de Paix*, and therefore to sit as sole judges.

In Assize Courts and Special Courts judicial functions are also performed by judges who are not members of the "*Magistrature*" or of the Bar.

## F. Ordinary Courts: Civil matters

In the ordinary jurisdiction there are in principle two degrees of jurisdiction. According to their nature and their importance, cases are dealt with in the first instance either by the *Juges de Paix* (in each *Canton*) or by the District Courts (*Tribunaux d'Arrondissement*). The latter hear appeals against judgments delivered by the *Juges de Paix*. The Courts of Appeal, whose jurisdiction extends over several *Départements*, hear appeals in cases dealt with by the District Courts at first instance.

The appearance of solicitors is not compulsory before the *Juges de Paix*. It is obligatory in Civil matters before the District Courts and the Courts of Appeal. Barristers plead before all three types of Court.

In civil matters the jurisdiction of the *Juges de Paix* and *District Courts* applies to a relatively limited category of disputes. They deal mainly with accidents, questions of status (divorce, paternity and affiliation cases), disputes relating to landlord and tenant, sales of property, testate and intestate succession, matrimonial status, and, more rarely, with company and industrial property matters (trademarks, designs and models, patent rights). These Courts nevertheless bring a great influence to bear on the framing of the law.

Disputes between businessmen are heard at first instance by the Commercial Courts, and appeals are dealt with by the Court of Appeal. The Commercial Courts were established in the 16th Century. Their members are all in business; they are elected by the body of businessmen in the area in question. In Paris and certain large towns, industrialists and merchants consider it a great honour to be elected to this office. They often have very extensive legal knowledge in addition to their wide experience of commerce, and they endeavour to judge very conscientiously the matters brought before them. There is not a Commercial Court in every District (*Arrondissement*), and where there is none, commercial matters are dealt with by the ordinary Courts. Laws relating to exchange, maritime law, company law, and laws on unfair competition developed in France have almost all been based on decisions of the Commercial Courts. Before these Courts there is no obligation for a solicitor or a barrister to be present, but in practice the parties are almost invariably defended by a barrister. In Paris and in some other towns, commercial counsels (*agrés*) also play an important part at the Bar with efficiency and distinction.

The Labour Conciliation Boards (*Conseils de Prud'hommes*), which decide labour disputes, are, like the Commercial Courts, very ancient institutions. Matters submitted to them are increasingly important, since the field of social law increases in extent almost daily. Appeals against the decisions of these Boards can be made to the ordinary Courts. When, as often happens, there is no *Conseil de*



*Prud'hommes* in a given town, labour disputes are referred to the *Juge de Paix*.

The Commercial Courts and *Conseils de Prud'hommes* are special tribunals in the sense that their jurisdiction is restricted to well-defined matters. But they are highly respected and experienced Courts. There are many other, younger, Special Courts. These are often organized on a basis of parity (*paritaire*) which means that they consist of judges who are deemed to represent the conflicting interests of the parties. There are special judges for farming leases. Other judges decide on contentious matters of social security; they are appointed *ad hoc*. This puts one in mind of the Macers' Court described by Walter Scott in "Guy Mannering."<sup>2</sup>

### G. Ordinary Courts: Criminal matters

There is no question of drawing up here a complete list of Criminal Courts. Leaving out the Special Courts, which are relatively few and not very busy (Military and Naval Courts, Disciplinary and Political Tribunals), the French system is fairly simple. It is based on the distinction drawn between (a) minor infractions (*contraventions*), punishable by a small fine or a prison sentence of a few days, (b) offences (*délits*), punishable by a fine which may be very heavy and by a prison sentence of anything up to several years and (c) felonies (*crimes*), punishable by a sentence to "*détention aggravée*" (solitary confinement or hard labour) which may be for life, or by the death sentence. Each category of infringement of the law is dealt with by the appropriate Court. The *Juge de Paix* sitting as a Police Court Magistrate (*Juge de Simple Police*), and the District Court sitting as a Court of Summary Criminal Jurisdiction (*Tribunal Correctionnel*),

<sup>2</sup> "... Well, have you carried through your law business?"

"With a wet finger," answered the lawyer; "got our youngster's special service retoured into Chancery. We had him served heir before the macers."

"Macers? Who are they?"

"Why, it is a kind of judicial Saturnalia. You must know, that one of the requisites to be a macer, or officer in attendance upon our Supreme Court, is, that they shall be men of no knowledge."

"Very well!"

"Now, our Scottish Legislature, for the joke's sake I suppose, have constituted those men of no knowledge into a peculiar court for trying question of relationship and descent, such as this business of Bertram, which often involve the most nice and complicated questions of evidence."

"The devil they have? - I should think that rather inconvenient," said Mannering.

"O, we have a practical remedy for the theoretical absurdity. One or two of the judges act upon such occasions as prompters and assessors to their own door-keepers. But you know what Cujacius says, *Multa sunt in moribus dissentanea multa, sine ratione*. However, this Saturnalian court has done our business; and a glorious batch of claret we had afterwards at Walker's..."

(*Guy Mannering*, 1870 edition, p. 426.)

deal respectively with minor infractions and offences, as Courts of First Instance. (The judges of the *Tribunal Correctionnel* are the same as those of the District Court, except that in large towns they are assigned for a given period to different "Chambers", some of which are criminal).

Felonies are dealt with by the Assize Courts (*Cours d'Assises*). These Courts usually sit every three months in the chief town of each *Département*, and consist of three professional judges and a jury of presumably respectable citizens. Their decisions are the result of a collaboration of judges and jury in a joint discussion. The President of the Assize Court is always a judge of the Court of Appeal. Assize Courts do not state the grounds on which their judgments are based, and these judgments are sometimes disconcerting. André Maurois has written that, in criminal matters, the English system has long since "excluded reason from the field of justice". Most probably, the English think the same of the French system. We are thus in perfect agreement.

#### H. Examining Judge

The preliminary investigation of a criminal case is entrusted to a judge selected from among the members of a District Court. His task is to provide the Court with the data it needs in order to deal with a case. The examining judge (*Juge d'Instruction*) is the only magistrate in France who has the power of inquiry. This means that he does not merely hear the statements of the prosecution and of the defence. Before making his decision, he actively seeks the truth, and has considerable powers at his command for this purpose: the police are under his orders; he can order searches and demand expert opinions; he has the much-feared right – which he uses liberally – to take the parties into custody pending trial; but he may only interrogate the defendants in their counsel's presence and after they have seen the documents in the case. Lastly, his decision is not whether the defendants are guilty or not, but whether or not they may be presumed to be guilty: if so, he sends them for trial before the competent Court (by issuing an order of transfer – *ordonnance de renvoi*); if not, he abandons the proceedings (by declaring a non-suit – *ordonnance de non-lieu*). Preliminary investigations are secret in theory, but too many unfortunate examples have shown that they are not proof against the indiscretions of the Press. Among members of the juridical profession, the examining magistrate is a "star"; when Justice itself comes up for trial, he is nearly always the main defendant. He often deserves to be found Not Guilty. His job is a very difficult one.

Orders of the examining magistrate may be appealed against, but only in certain cases, before the *Chambre des Mises en Accusation*, which is a division of the Court of Appeal and whose powers were recently increased by statute.

### I. The Supreme Court of Appeal (*Cour de Cassation*)

All ordinary Courts without exception, both Civil and Criminal, come under the authority of the Supreme Court of Appeal. This supreme authority does not issue its decisions as a Court of Third Instance. It does not make an appreciation of facts, which have been fully established by the judges at the lower level. It may reverse judgments referred to it only for vice of form or for an error in law. Thus it dwells on Olympus, far above human passions and contingencies. It proclaims the law. Before doing so, it thinks carefully. But when it proclaims the Law, it in fact creates it. In doing this it has often anticipated actual legislation. It is both respectable and respected. Does it occasionally err? There are no witnesses, except perhaps Legal Comment (*La Doctrine*), which is itself often very much divided. A prominent prosecutor, addressing the Paris Court of Appeal some years ago in a maritime case, had succeeded in discovering a subtle contradiction in certain decisions of the Supreme Court: "For this is the disability of the jurist," he said, "which puts him at a certain disadvantage as compared with the sailor: we have to navigate among principles, and our sky sometimes offers for our guidance more than one Pole Star." The author of this puzzling metaphor now sits at the Supreme Court of Appeal, at the same level as those stars, which, seen thus closely, probably look like the inscrutable eyes of the Sphinx.

### J. Administrative Courts

There remain but the administrative Courts to be described. Their role grows more and more important in view of the increasing multiplicity of State activities. Administrative contentious matters nowadays comprise litigation arising out of the organization and management of public services, litigation about public works, public property, and a large part of the fiscal contentious field, as well as electoral disputes, contentious matters within the government service, and, more generally, disputes as to the legality of administrative measures. Until recently the Council of State dealt with most of these matters in the first instance and without appeal, only a few of them coming within the first-instance jurisdiction of the *Conseils de Préfecture Interdépartementaux*. Congestion at the *Conseil d'Etat* led to the necessity of giving a much wider scope to the jurisdiction of the *Conseils de Préfecture*, which have become the administrative Courts. There are twenty-four of these. Their decisions may be appealed against before the Council of State, which, however, still acts as a court of first instance in certain matters. It should be added that the supervision of the administrative Courts over decisions of the Administration is indoubtedly effective. The only regret - apart from the

complexity of the system and the resulting conflicts of jurisdiction – is that the parties concerned must usually wait a long time before they are granted a hearing.

### K. Proceedings

Proceedings before the administrative Courts are conducted in writing. They are conducted verbally before the Commercial Courts and the *Conseils de Prud'hommes*, and both in writing or orally, before the Civil Courts, Courts of Appeal and Criminal Courts.

The problem of knowing which is the best system is very much debated in France. It must be well understood that, in any case, a French judge is passive. The only judge authorized to act on his own initiative is the examining judge. The others read, or listen. A French litigant prefers that the judge should hear him, because he never knows whether the judge has read the documents whereas he does know whether the judge is listening or not. Compelling the judge to listen therefore appears to him to be a guarantee of a fair hearing.

In practice, in criminal cases, the judge always reaches his decision on the basis of written documents, that is, on documents collected by the prosecution or by the examining judge. But he also takes into account information he acquires in Court during the verbal proceedings in which he takes part. Before the district Courts and the Courts of Appeal, solicitors exchange documents usually written by the barristers. These documents, or conclusions, contain a statement of their respective arguments, with which the judge is obliged to deal. There are no exchanges of documents before the Commercial Courts and *Conseils de Prud'hommes*. But in all cases and before all Courts (including criminal Courts), if the case is an important one, the barrister hands the Court a file containing a memorandum of his speech – in point of fact, his whole speech in writing – together with the documents of the case and a copy of legal decisions or expert opinions which he has quoted in support of his argument. For a French barrister the preparation and presentation of this file are an art in themselves. The judge must be able to find in it easily the document or reference he needs. The file, which is often very big, is therefore arranged and indexed with great care. After the hearing the judges take the file away to read and study or to have it read and studied by one of themselves. According to their temperament, some judges form an opinion in Court, others only when studying the file. It goes without saying that all documents communicated to the Court in the file must also have been communicated to the counsel of the other party. On the other hand, no file is laid before an administrative Court since all documents were communicated to it at the same time as the written memoranda of the case, but counsel may make verbal observations.

Except in criminal cases, judges rarely come into direct contact

with the parties and witnesses. French procedure differs greatly from English procedure in this respect. The talent of English barristers shows itself mainly, it would seem, in examination and cross-examination; that of French barristers, in their speeches. In civil cases the judges do not even see the witnesses. These were heard, long before the decisive hearing, by an investigating judge who has received their evidence and dictated it himself to a clerk of the Court. This dictation is often a synthesis and always an interpretation. Thus the judges make their decision on the basis of evidence that is both transposed and frozen. Moreover, ever since an ancient edict of the Parliament of Toulouse the authority of which was consecrated by the Ordinance of Moulins (1566), it has been admitted in France that "writings are better than witnesses" (*lettres passent témoins*), which means that proof by written evidence surpasses proof by personal testimony. The reverse rule obtains in England, as it did in Ancient Rome. Which is the less imperfect of the two methods? Is a statement which gives the appearance of the living truth, extracted from a worried and panting witness, less deceiving than the frozen interpretation of a true statement made to an indifferent magistrate – indifferent because he will not be the judge – by a calm and relaxed witness? Is the man who writes more sincere than the man who speaks? These questions probably have no answer, like nearly all questions appertaining to the depths of human nature.

### III. RULES AND TRADITIONS OF THE LEGAL PROFESSION

#### A. Short history of the Bar

St. Yves of Tréguier, born in 1253, was an "official", i.e., an ecclesiastical magistrate. In addition, he pleaded for the poor. He ended up as a monk, which was not necessarily a more meritorious state. In the 15th Century, a Farcecal play described the characteristics of "*Maitre Patelin*", a much less scrupulous lawyer who boldly deceived his judge by suggesting a disreputable line of defence but who, himself, as a result of an identical stratagem, lost payment of the fee he had been demanding so ruthlessly. This satire however proves nothing. Throughout all ages and countries, literature treats lawyers badly. Though it be true that the law is an expression of the morals and customs of the majority and castigates only offenders against society, it is gratifying to note that, as early as 1270, King Louis IX (St. Louis) promulgated "Establishments" based on Roman Law, including a chapter entitled "How a lawyer should behave in Court". This text, which received its final shape in an Ordinance of Philip the Bold in 1274, requires the lawyer to confine himself to honourable methods; his word will be considered as that of his client when he speaks in the latter's presence and is not gainsaid; there should be

no insults, or coarseness, either by word or gesture; he should not transact business with his client during the case; finally, the lawyer must swear an oath that he will handle all cases carefully, diligently and conscientiously, that he will only accept such cases as appear to be just causes and withdraw as soon as it appears that a case is not an honest one. The Ordinance of 1274 goes so far as to regulate the assessment of fees, which should be assessed both by reference to the importance of the case and to the lawyer's skill. These rules still govern the legal profession in France.

With reference to one important point, the English Bar adopted – at a much later date and for most lofty motives – a different conception of the prime duty of the lawyer. In his outstanding article on “The Legal Profession and the Law – the Bar in England and Wales”, which appeared in the Preceding numbers of this Journal, Mr. William W. Boulton pointed out that, since the end of the 18th Century, English lawyers do not consider they have the right to refuse to act in any case in the righteousness of which they do not honestly believe. Further divergencies have appeared in modern times, but the parallel development in the history of the English and French traditions is an outstanding fact, though not a surprising one since feudal society throughout Western Europe was very closely linked in its customs: the essential relationships between men, conditioned by war, love and justice, were governed by the same usages. Furthermore, from the 11th Century onwards England was ruled by Norman and Angevin princes, who rapidly inherited the vast territories of Eleanor of Aquitaine, queen of both countries in turn and mother or grandmother of their respective kings. The fact that our princes and “fountains of justice” sprang from a common ancestor has undoubtedly contributed to the shaping of our common traditions.

During the 14th Century there appeared in France and in England, at the same time, lawyers whose task was not to plead but to represent litigating parties. They were called “attorneys” in England and “*procureurs*” in France, and have become the “solicitors” and “*avoués*” of today. But, whereas the number of solicitors in England has increased to many times that of barristers (17,000 as against 2,000 according to Mr. William W. Boulton) and whereas they have extended their professional scope right into the field of non-contentious matters, the French *procureurs* were restricted on successive occasions by a *numerus clausus* (for the first time under Charles V), and their activity was always limited to matters pending before a given tribunal, to which they were attached. Nevertheless, the existence of attorneys or solicitors and of *procureurs* or *avoués* has helped to define the figure of the English barrister and the French *avocat*, both of whom are now freed of certain tasks which, rightly or wrongly, are considered less noble than the art of speech.

Another common feature of our respective traditions is the

formation of a strongly organized community of lawyers. The French Order of Lawyers, though less of a community than the English Inns of Court, nevertheless originated as a College. The Ordinance of 1327 by Philip VI of Valois specified the duties of its members. A Regulating Decree of 1344 set up its hierarchy. At the top were the Consultants (*consiliarii*), whose title referred not only to the advice they gave to litigating parties but also and chiefly to the honour accorded them by the Court in seeking their advice and inviting them to sit on its own benches. Then came the practising barristers (*proponentes*), and lastly the "freshmen" or "hearers" (*novi, audientes*), who would be called probationers (*stagiaires*) today and whose main duties were to follow the Court cases and listen to the teaching of their elders. These provisions were confirmed or elaborated in subsequent Ordinances or Regulations, two of which (of August 1424 and May 1425) were by King Henry VI of England who, by right of conquest and marriage, occupied Paris for a short time.

The internal discipline of the Bar, however, was not achieved by princes. Although the barristers as a whole constituted a corps of lawyers, they were not a corporation. The barristers' only common bond was the exercise of their profession. They had common obligations (the Ordinance of 1327 required them to proceed to the *Châtelet* at sunrise, allowing themselves only the necessary time to attend a short Mass . . .), they were graded in their duties and prerogatives, and, like their English colleagues, they drew up freely among themselves the necessary rules to safeguard the honour and reputation of their Order.

A Brotherhood, which was entirely religious, had established itself at the Law-Courts, in St. Nicholas's Chapel, as early as 1342. It included barristers and attorneys. The logical head of this Brotherhood was therefore a barrister. This barrister was called *Bâtonnier*, or staff-bearer, since, when there was a procession, it was his duty to carry the staff from which the Saint's banner hung. At first this office was held by the most senior barrister. By the end of the 16th Century it became elective. The *Bâtonnier's* moral authority established itself more and more firmly in the period that followed. In addition, by the 18th Century a Committee of Elders already had real disciplinary powers: this is the origin of our modern Council of the Bar (*Conseil de l'Ordre*)

The Revolution of 1789, which upset so much in France and in Europe, did away with the Order of Barristers. In point of fact, however, the former lawyers went on exercising their profession. Thus it was a former barrister of the Bordeaux Parliament, Raymond de Sèze, who defended King Louis XVI before the Convention at the peril of his life, with the help of Tronchet and Malesherbes. The latter was executed soon afterwards.

Napoleon had no love for barristers. "They are seditionmongers," he said, "artisans of crime and treason. I wish it were possible to cut

out the tongue of any barrister who uses it against the Government." He nevertheless restored the barristers by a Decree of 1810, the preamble of which justified this step as being "one of the measures most likely to maintain honesty, scrupulousness, disinterestedness, the desire to conciliate, the love of truth and justice, and an enlightened zeal for the weak and the oppressed."

There followed, over a period of more than a hundred years, various fragmentary and imprecise regulations, but at the same time a considerable effort at internal organization. Thus arose firm traditions, founded on the jurisprudence of the more important Orders of Barristers and especially on that of the Paris Bar. These traditions were codified in legislative or statutory texts in 1920, 1941, and lastly in 1954 (Decree of 10th April). They are in a state of constant evolution. In this modern world the French Bar still feels its way forward. It endeavours to adapt itself to commercial life without losing sight of its ideals. It is not surprising that this is not achieved easily: the experience of centuries sustains and weighs us down at one and the same time. This weight of centuries prevents us perhaps from seeing ourselves as we really are.

## B. The independence of the Bar

The first rule of the Bar is independence. The barrister partakes in the judge's search for an elusive truth. He must therefore have a free mind, which precludes any form of subjection. Hence the impossibility for a barrister to hold any salaried post or even a public appointment. Barristers may however be professors of Law, Members of Parliament, or Ministers, but in the latter case tradition demands that they cease pleading. Apart from these exceptions the independence rule is absolute. Thus a barrister may not be the manager or director of a commercial undertaking. In fact, offences against these rules are rare, and severely punished by the Councils of the Bar.

However, one of the consequences of what used to be the prevalent interpretation of the barrister's independence has recently been given up by most French Bars. According to the purest tradition of the 19th Century – a tradition less in evidence in earlier ages – a barrister might only act as consultant and plead in Court. He was forbidden to be in actual charge of a case, that is, to represent his clients before the various Courts, since this role was assigned to the solicitors (*avoués*). But it so happens that in France the solicitor's role is limited to appearing at the barrister's side before the District Courts and the Courts of Appeal. In all other cases the solicitor's appearance is optional. The number of solicitors is very small (1,913 as against 5,800 barristers). Thus, in the many Courts where solicitors were not present, barristers came gradually to represent their clients in addition to pleading for them. Various legal instruments have given



barristers the authority to do this, and even oblige them to do it in some cases. Were they to forego their independence through bowing to practical necessity and obeying the requirements of the Law? This question has raised a controversy which brings to mind the Quarrel of the Ancients and the Moderns.

The barrister, according to the "Ancients", has increased his stature through the ages, for the simple reason that he was not the trustee of his client. This lack of proxy powers formed the very basis of his independence. The attorneys of old, who drafted and signed the various papers concerning a case, had to respect the brief they were given as trustees. This did not apply to the barristers, as shown by the old saying, "*Verba volant, scripta manent.*" Why should the barrister take on a responsibility for which he is not prepared? The example of the English barristers is quoted in support of this argument.

So far, so good – the "Moderns" would answer – but in England there is always a solicitor by the barrister whereas in France there is not always an *avoué* to support the *avocat*. It is not always possible to demand that the interested party be present in Court to take the place of the absent *avoué*. To ask the party concerned to sign papers prepared by the *avocat* would be a farce. Furthermore there are in France barristers of high standing who do represent their clients and plead at the same time. They are the barristers of the *Conseil d'Etat* and of the *Cour de Cassation*. The same applies to all barristers in Alsace-Lorraine, who benefit by a special status inherited from the pre-1914 German administration. Are they any the less independent? And why should a barrister seek to shirk his real responsibilities? Independence is one of the fruits of freedom, and freedom implies responsibility. Despite a certain amount of opposition, this theory has almost everywhere prevailed.

This outlook assuredly widens the gap between ourselves and our British colleagues. It was by a movement in the opposite direction that they reached the point where they forbade themselves to refuse a brief. When it is a case of safeguarding at one and the same time the freedom of the defence and the respect due to the judge, every refinement is permissible. The English barrister likens himself to a taxi driver at the disposal of all passers-by. Such modesty seems excessive. The English barrister puts us, rather, in mind of a virtuoso who can enjoy the utmost inner sense of freedom when playing a sonata composed by someone else. In France, apart from the exceptional case where a brief is imposed by the *Bâtonnier* or by the President of certain Courts, we have the right not to take the fare aboard if his destination does not suit us, and not to play the sonata if we think the music is poor. Our freedom is expressed on a different plane. We do not claim to be better, but doubtless we gain in the way of personal conviction whatever we may lose in the way of abnegation.

### C. Professional dignity

The barrister's dignity is a corollary of his independence. As an immediate participant in the administration of justice, which is its own sovereign, he owes himself respect and must command respect. Under the Old Regime, barristers had obtained a number of Parliamentary Decrees which granted them precedence over Doctors of Law, attorneys, notaries, physicians, and deputy Public Prosecutors. They even claimed that the very exercise of their profession conferred nobility upon them *ipso facto*. The Crown never acknowledged this claim. But even if the barristers themselves were not always noble, their profession assuredly was. Whence came the prohibition for them to participate in commercial transactions, which has always been respected. Thus it is that a barrister may not accept a bill of exchange, for this would constitute a commercial operation capable of causing bankruptcy of the signatory in the event of non-payment.

A barrister's dignity requires him to meet his clients in his own chambers and nowhere else. This injunction is not always easy to enforce, despite the supervision of the Bar Councils. Important clients do not easily agree to inconvenience themselves when they wish to see a barrister, who may often be younger than they or of an inferior social standing. In the last few years it has been found necessary to recognize that a barrister could not oblige a whole Board to meet him in his chambers. Furthermore, a barrister has always been allowed to visit a bedridden client and to consult with clients in detention at the place where they are confined.

A barrister's professional dignity forbids him to seek clients either directly or indirectly. Detailed regulations, which vary from one Bar to another, guard the barrister in this respect against the temptations to which he might fall a victim. External evidence of the existence of his chambers and his designation on his letter paper must be unobtrusive, if they are permitted at all. No great problems arise in this respect. However, the Councils of the Bar are often caused embarrassment by the activities of the Press. It is patently impossible to prevent newspapers from reporting on legal matters and especially on the more notorious criminal cases, but it does happen sometimes that their accounts read like publicity in favour of this or that barrister. The borderline between straight reporting and publicity is not easy to define. An even more difficult matter would be to prove a barrister's complicity in, or condonation of, the journalists' blatant indiscretions. In any event, the prohibition of any form of publicity remains a hard-and-fast rule, the principle of which is undisputed and which the disciplinary authorities endeavour in all honesty to uphold.

### D. Disinterestedness of barristers

Justice cannot be the subject of a contract. French barristers are

therefore strictly forbidden to enter into *quota litis* agreements. Quite recently the Bars of France intervened in Court cases against business agents (*agents d'affaires*) who make a practice of calling on victims of motor-car accidents and of taking over their case against the party at fault, their fee being a percentage – usually a very high one – of the damages that may be awarded. French Law forbids such practices, which are considered unethical since they are an exploitation both of distress and of justice. Several Bars are not content to take proceedings against those guilty of such speculation and to demand their punishment, but also forbid their members to collaborate with such people by accepting their briefs.

Barristers' fees are not fixed by any tariff (except in Alsace-Lorraine, where a special system obtains). Their fees are traditionally reckoned on the basis of three factors: the amount of difficulty involved in the work, the importance of the case, and the barrister's personal standing. A fourth factor that is taken into account but will tend to reduce the fee is the extent of the client's financial distress. Even in an important and difficult case a well-known barrister may often claim only a modest fee from a needy client. There is in any case a whole category of clients whose defence will be completely free of charge under the legal-aid system. There are offices for this purpose at every Court, which establish whether or not the litigant is without means: if he is, he is granted the invaluable right of free defence and the barrister may neither claim nor accept any fee. French barristers have for a long time considered as a priceless honour the obligation of playing their part in the administration of justice free of charge. But the burdens that go with this honour are becoming extremely heavy and now give rise to some complaint. In Criminal matters legal aid is a right, and is granted on request. Most often the legal-aid cases are conducted by junior barristers, appointed *ex officio* by the *Bâtonnier* as a matter of routine. They can thus undergo or complete their professional training and climb the first rungs towards fame. But in important and particularly difficult cases, it frequently happens that the *Bâtonnier* appoints *ex officio*, subject to the regime of the legal aid system, an experienced barrister who holds a prominent position among his colleagues. In a horrifying and most distressing case – that of Oradour-sur-Glane – heard by the Bordeaux Military Court in 1953, two former *Bâtonniers* of the Bar of Bordeaux were appointed *ex officio* by the then *Bâtonnier* to defend the accused. The hearing lasted a whole month, mornings and afternoons.

Before the Act of December 21, 1957, it was extremely difficult for a French barrister to claim payment of his fees before a Court when he had not asked for, or obtained, a sufficient advance payment and his client was unwilling to pay. However, this difficulty did not arise often. In practice, the fee, which may vary widely, is agreed directly between the barrister and his client. It is scarcely ever questioned where

the barrister enjoys a good standing. When it is argued, it is usually because the client, rightly or wrongly displeased with his counsel, has chosen a different barrister for the same court case or for a different case. In such an event, the new barrister may not accept the brief until he has assured himself that his colleague's fee has been paid. If it has not, and if the sum claimed is disputed by the client, the matter is laid before the *Bâtonnier*. In the more important Bars, the *Bâtonnier's* authority carries such weight that often the clients themselves ask him to state the fee they should pay their counsel. The *Bâtonnier's* decision is usually respected.

Such are the essential rules which govern and support the disinterestedness, the dignity, and the independence of the Bar.

### E. Partnership and patronage

Other rules are of a more technical nature and do not affect to any great extent the traditional concept of the barrister's role. There is, for example, the permission recently granted to barristers to form partnerships subject to the provisions of the local regulations of each Bar. Whether they are in partnership or not, barristers must retain the same ideals and discipline. In any case, partnership has not been practised to any great extent so far. The French barrister is an individualist. Having chosen the most independent profession, he is not drawn to the idea of partnership. But this does not mean that, in years to come, there may not be a movement in favour of a new technique, that of team-work, which may be better adapted to modern economy and probably less expensive. It is possible – and some think this desirable – that barristers will thus succeed in building up for themselves the nucleus of an intangible patrimony out of their clientele, whereas under present arrangements each circle of clients usually disappears with the death of the barrister concerned. Sometimes a clientele is handed down to a barrister's son, son-in-law, or secretary, who, being a barrister himself, has worked in the chambers of a "Master" and becomes more or less his heir. This institution of "patronage" is not governed by any legal instrument or authority. It is based entirely on custom, but occupies a place of considerable importance in the French Bar. In the larger towns there are but few cases of professional success that were not based on the teaching of a senior and on his own reputation. The links thus established between a master and his secretary often become a close personal relationship. Such links do not exist to the same extent in any other profession.

### F. Actual exercise of the profession

To complete the account of the features of the French Bar, it should also be mentioned that in France the title of barrister is not

merely a title: it corresponds to a social function which the barrister must fulfil in accordance with the relevant regulations and with tradition, failing which he loses the title. A barrister who no longer has a real domicile in the town where he is a member of the Bar may find his name omitted *ipso facto* from the Rolls of the Order. The same applies if it is public knowledge that he no longer performs any professional duties. This rule, however, is flexible in its application; individual circumstances and the general interest of the Order are taken into account, particularly as detailed supervision of professional activities are extremely difficult in large towns and especially in Paris. In addition, the fiscal burden on barristers is so heavy that few of them nowadays are tempted to remain on the Rolls if they no longer intend to practise.

### G. Autonomy of the Bar

The Roll of the Order mentioned above must be considered within the general framework of the legal profession. It should first be emphasized that, in France, the Bars are autonomous. Section I of the Decree of April 10, 1954, provides that "barristers who plead before each Court of Appeal or each Court of First Instance in a town where there is no Court of Appeal form an Order of Barristers (*Ordre des Avocats*)." There is therefore a large number of Orders of Barristers, with a wide range of membership. The Order of Barristers of the Paris Court has more than 2,000 members. In some small towns the Bar may number only a few members. The "National Association of Barristers" (*Association Nationale des Avocats*) and the "Bâtonniers' Conference", though having no intrinsic powers, especially as regards discipline, endeavour to safeguard the general interests of the profession at a national level. The "Young Barrister's Union" (*Union des Jeunes Avocats*) aims at keeping alert the Councils of the Bar and their Presidents who may be numbed by old age.

### H. Organic functioning

Within each Bar the government of the Order is a form of aristocracy. Barristers may be democrats as citizens and political men, but the Venetian style of the constitution of their Order, however paradoxical it may appear nowadays, has never been seriously questioned. In Bars with more than twenty members, the General Assembly of the Order may only debate in Sections, which are called Columns (a reference to the columns of the Rolls), and the Columns may only express opinions, which are submitted to the Council of the Order for its decision. This means that the Council of the Order has absolute power. This Council is elected by the General Assembly, which, in the more important Bars, meets only to vote. In the smaller Bars (with

less than six members) the Civil Court acts as Council of the Order.

All Bars, large and small, have their *Bâtonnier*, whom they elect in General Assembly. The *Bâtonnier* convenes the Council of the Order and presides over it. He carries out its decisions. He personifies the Order. He exerts an educational control over young barristers in training (*stagiaires*) and a discreet but effective domination over all colleagues. In the larger Bars he has great responsibility. His term of office usually lasts two years. A former President of France (Poincaré), after having occupied the highest office in the country, considered it a very great honour to be elected *Bâtonnier* of the Order of Barristers at the Paris Court of Appeal.

Presided over by the *Bâtonnier*, the Council of the Order discusses all the Order's business. Its powers are at the same time administrative and disciplinary.

In the administrative field, the Council administers the Order's assets and decides on the names to be entered on the Roll, which shows all barristers by order of seniority and also includes a list of probationers. The Order has always claimed to be the master of its own Roll. It claims the right to refuse to enter on the list of probationers or on the Roll of the Order any person whom it deems undesirable; but decisions of the Council of the Order as to admissions and exclusions may be referred to the Courts of Appeal, which use their supervisory powers with a certain amount of discretion.

### I. Probationers

Probationers (*avocats stagiaires*) are recruited from among Bachelors of Law (*Licenciés en Droit*) who have obtained a Certificate of Professional Aptitude and have been sworn in as barristers. The latter ceremony takes place before the First Chamber of the Court of Appeal. The candidate is presented by the *Bâtonnier* and "swears, as defender or as counsellor, not to say or publish anything contrary to the laws and regulations, to morality, to the security of the State or to public order, and never to forget the respect due to the Courts and to the Public Authorities." Probation lasts from three to five years. During that time the probationers must attend the Court hearings this being an extremely vague obligation and not easy to check in view of the large number of hearings – and all meetings of the Probationers' Conference (*conférence du stage*), where his presence is checked with some degree of strictness. At these meetings the young barristers plead in mock trials presided over by the *Bâtonnier*, who in addition teaches them the traditions of the Bar. The probationers compete between themselves for the title of Secretary of the Probationers' Conference, a title very much sought after in the more important Bars and especially in Paris, since it brings into prominence in various ways those who have obtained it. When they have completed their

probationary period, young barristers come off the probationers' lists and "go up to the Roll", which means that henceforth their names will be entered on the Roll of the Order.

#### J. Discipline

A barrister who has been guilty of an offence under the Rules of the Order may be punished by a warning, a reprimand, temporary suspension, or by being struck off the Roll. When he appears thus before his peers, a barrister has all the rights of a defendant before a Criminal Court. The dossier is communicated to him and he may ask one of his colleagues to defend him. Nothing is more difficult for a barrister than to plead before the Council of the Order sitting as a disciplinary Court, and there is nothing more unpleasant for him than to sit in that Court as a judge. Disciplinary decisions of the Councils of the Order are subject to scrutiny by the Courts of Appeal.

#### K. Official title and exclusive rights

The powers of the Council of the Order as regards admission to the Roll and disciplinary action are all the more important as nobody in France can be a barrister if his name is not entered on a Roll. If this Roll is that of an Order established in a town with a Court of Appeal, barristers of that Bar are "Barristers at the Court of Appeal of . . ." If it is a town with a Court of first Instance, the barristers are "Barristers at the Bar of . . ." In either case they have the same prerogatives. Indeed, the Bars of some towns with a Court of Appeal (Aix-en-Provence, Douai, Riom) are less important than Bars in towns within the same jurisdiction but without a Court of Appeal (Nice, Marseilles, Lille, Clermont-Ferrand). Barristers registered on a Roll may plead before any Court whatsoever, in their own town or elsewhere in Metropolitan France and in the French Union. They have exclusive rights to plead before almost all Criminal, Civil and Administrative Courts. They may appear at the Bar as soon as they have given proof of their barrister's title.

#### L. Barristers at the Higher Courts of State (*Avocats aux Conseils*)

However, only barristers belonging to a special Order may appear before the Supreme Court of Appeal (*Cour de Cassation*), the Council of State (*Conseil d'Etat*) and the *Tribunal des Conflits*. They used to be called Barristers of the King's Council (*Avocats aux Conseils du Roi*) and are now called Barristers of the Council of State and of the Supreme Court of Appeal (*Avocats au Conseil d'Etat et à la Cour de Cassation*). These barristers, who are all domiciled in Paris, have at the same time an official function, as have the solicitors (*avoués*),

in that they are appointed by Decree, that their number is limited to 60, and that they have the right to hand over their function to a successor whose name they submit for the approval of the President of the Republic. The head of their Order is not called *Bâtonnier* but President. Their Council of the Order has administrative and disciplinary functions similar to those described above. The *Avocats aux Conseils* may, in theory, plead before any Court whatsoever. In practice they voluntarily limit their activities and only appear before Administrative Courts apart from the Higher Courts to which they are attached.

#### M. Dress

Barristers wear a gown in Court. This rule is strictly observed in Criminal Courts, Civil Courts of First Instance, and Courts of Appeal. In other Courts some barristers do not observe it. However, the Bar of Paris and most of the more important Provincial Bars adhere to it faithfully in all circumstances. The barrister's gown has not changed for a hundred and fifty years.

#### N. Allied professions

There are in France other individual bodies fulfilling an auxiliary role in the administration of justice who have certain characteristics in common: first, that their competence is limited to defending the interests of parties before the Courts to which they are attached; secondly, that they have a limited number of duties, which they may transfer to successors presented by them. These are: (a) solicitors (*avoués*) who exercise their functions separately, i.e., as individual bodies, before the Civil Courts of first instance and the Courts of Appeal, where they represent their clients without having the right to plead; and (b) commercial counsel (*agrés*), of whom there are 180 and who both represent their clients and plead for them in competition with the barristers, before certain Commercial Courts.

The bailiffs (*huissiers*) are minor officials, whose duties include the serving of summonses (with a number of exceptions) the enforcement of Court decisions in civil and commercial cases, and the policing of the Courts. They are law officials and their office is transferable.

Notaries (*notaires*) are less directly connected with the administration of justice, but have important duties and generally enjoy a well-deserved respect. They are law officers whose main duty is to take official cognizance of deeds to which the interested parties must, or wish to, give an official character of authenticity, to date such deeds officially and retain them in official custody.

Finally there are in France, and especially in Paris, many legal advisers and business agents (*agents d'affaires*) who are neither



barristers nor law officials but whose activities are very similar to those of English solicitors except for the fact that they do not have direct access to the Courts and that their discipline is not clearly defined. As a body, barristers are in a state of permanent conflict with these people but individually they often welcome their assistance.

### O. The situation of the barrister

The search of the inner depths of man is the noble task of Justice, the common task of judges and barristers. It leads to the very borders of the unknowable. But we are not philosophers. We work in a concrete world, and that is why our justice constantly falls short of its own ideals. If it insists on ignoring its own shortcomings, if it prefers to imagine itself to be perfect, it makes itself imperfectible. If it is coward enough to condone its own mediocrity, it again renounces perfection. Justice is thus driven to fight at the same time against a sterile pride and a degrading scepticism.

The alternations of this pride and this scepticism characterize the professional atmosphere of a barrister's life. The praise and gratitude he receives and the satisfaction he derives from success give him a species of glory which may well go to his head. But he also knows criticism, ingratitude and failure. He must find his balance between exaltation and discouragement, between vanity and indifference. Generally, he succeeds in this only by acknowledging that his moral condition be governed by a fundamental insecurity. Doubtless, this is the fate of all men, or, at least, of those who do not seek solely their intellectual comfort. For them, insecurity is both a triumph of the spirit and a gift from Heaven. In this respect, barristers have been overwhelmed: to ensure their spiritual progress, they have received the grace of an abundant insecurity which keeps them ceaselessly on the alert.

Insecurity starts early. How can a young barrister know whether he has the necessary qualities for his profession? "The Marquis de B..." said Victor Hugo (when he was himself a Peer of France), "has assurance, composure, self-possession, a good voice, the gift of speech and sometimes wit, the quality of imperturbability, in short, all the appurtenances of a good orator. All he lacks is talent!" How many young probationers, when studying their chances, have mistaken the accessoires for the principal? Even then, talent is not everything, at least if one thinks only of the talent of oratory. A man who reveals himself capable of presenting a case brilliantly will be less successful with his advice if he lacks judgment or the quality of imagination which enables him to discover the hidden truth in a maze of facts. Only after many years - five, ten may be fifteen years - can a barrister know his own worth. Even then he will have surprises; because the most scrupulous conscience is not enough, nor is the will to be fair

and loyal, nor an exhaustive knowledge of legal science and of men, nor the daily practice of professional reactions. In a barrister's behaviour there always exists an unpredictable element; it is a disposition of the mind or of the body which eludes the control of the most rigorous inner discipline, such as an excess of work, a secret attack of sloth, a moment of inattention, an abnormal slowness or unusual speed, or a moment of weakness for which the barrister can hardly be held responsible. Then he loses his self-esteem like the surgeon, the athlete, the race-horse. Indeed, for the barrister too and for him even more than for others every single professional action is a test since there is scarcely anything mechanical in his art, since everything is a matter of selection and decision; and it is the permanent nature of these tests that causes the barrister's permanent insecurity.

In a process which the layman cannot understand and which is therefore often disputed, the barrister's insecurity spreads from the field of the mind to the physical field. Berryer's reply is famous. He was the greatest French barrister of his day and probably one of the greatest orators of all time. In 1864, English barristers arranged a triumphal reception for him, presided over by Gladstone. He had pleaded in the most famous cases. He had defended the great ones of this world. When surprise was expressed that he had not made a fortune, he said: "Yes indeed, but to make a fortune I should have had to stoop." He is not an exceptional example. As a whole, the French Bar is not rich. Some barristers, few in number, receive reasonable fees. The Inland Revenue takes a goodly share. They usually spend what is left. The temptation of a life of luxury is always the corollary of insecurity. Only the really rich know how to live meanly.

Individual conditions vary enormously, especially in the more important Bars. In Paris and in the large towns there exists a kind of proletariat which consists of those that have not been able to pass through the narrow door to fame. It is difficult to help them. The whole system of French social security is inapplicable in their case since they belong to a liberal profession. On the other hand it is impossible to restrict access to the Bar by subjecting barristers to a "*numerous clausus*", which would only sanction privileges, to the detriment of the principle of a competition ever open to the most gifted. Some people think that, at this stage, insecurity comes very close to injustice. It must be agreed that the most gifted are not necessarily the best servants of Justice. Barristers could be named who acquire renown and therefore a clientele because they are skilled in distorting the truth. The race of talkers is as ancient as the Old Lady of the Law herself. But in this profession, whatever may be said, honesty pays in the long run, except, perhaps, before an Assize Court with a jury drawn from the people, for reasons which will be clear to jurists all over the world. Everywhere else a barrister who cheats his judge will not

cheat him three times. If he cheats his client once he will not do it twice.

It remains true that a barrister is not infallible. Neither is the judge. The law itself is uncertain. Human truths can change. A queer sort of justice, Pascal said. But Louis de Broglie wrote: "It is the magnificent and painful fate of scientific research never to come to an end. . ." Why should we demand of Justice that which we no longer dare to demand of the so-called exact sciences?

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# JUDICIAL PROCEDURE IN THE SOVIET UNION AND IN EASTERN EUROPE

Introduction . . . . .	271
Survey of Legislation: Criminal and Civil Procedure	
A. Soviet Union . . . . .	271
B. Baltic States . . . . .	274
C. People's Republics . . . . .	276
Criminal Procedure	
A. Initiation of Criminal Proceedings	
1. Historical . . . . .	285
2. Soviet Union . . . . .	286
3. People's Republics . . . . .	288
B. Arrest . . . . .	290
C. Defense	
1. In Pre-Trial Proceedings . . . . .	291
2. Defense at the Trial . . . . .	294
D. Confession	
1. Soviet Union . . . . .	298
2. People's Republics . . . . .	302
E. Fabricated Testimony and Cases . . . . .	305
F. Suspicion Tantamount to Guilt . . . . .	306
G. Secret Trials . . . . .	307
H. Trials in Absence of Defendant . . . . .	308
I. Sentence	
1. Sentence by Order . . . . .	309
2. Sentences "ex post facto" . . . . .	309

Civil Procedure

A. Preliminary . . . . .	311
B. General Powers of the Court	
1. Historical . . . . .	311
2. Soviet Union . . . . .	312
3. People's Republics . . . . .	312
C. Specific Powers of the Court	
1. Soviet Union . . . . .	313
2. People's Republics . . . . .	314
D. Powers of the Government Attorney in Civil Cases	
1. Soviet Union . . . . .	316
2. People's Republics . . . . .	316
E. Cases exempt from the Jurisdiction of Civil Courts	
1. Soviet Union . . . . .	317
2. People's Courts . . . . .	318

# JUDICIAL PROCEDURE IN THE SOVIET UNION AND IN EASTERN EUROPE \*

## INTRODUCTION

At present, in the countries which are in the Soviet orbit, legislation in both criminal and civil procedure, and to a great extent the practice in these fields, follow that in the Soviet Union. In some of these countries the codes of criminal and civil procedure now in force are in a large measure restatements in vernacular language of Soviet procedural rules. In other countries where the old codes were retained, a number of essential changes were made introducing Soviet procedural features, thus bringing their codes closer to those of the Soviet Union.

For that reason...the present work aims to outline judicial procedure of the Soviet type in general. This is done by describing in more detail the procedure in the Soviet Union, noting, wherever this is needed, the concurrence with or departure from the Soviet pattern to be found in the people's republics. Again, not a complete picture of the Soviet criminal and civil procedure is presented, but only those features which depart from traditional standards applied in other parts of the world. Moreover, in describing the criminal procedure, an attempt is made to outline not rules written in codes and other statutes, but the standards actually followed by courts and other authorities...

## SURVEY OF LEGISLATION

### A. Soviet Union

When the Soviet regime came into being criminal and civil procedure in Russia was regulated by quite modern codes enacted in 1864 and drafted after the pattern of the French Code. They were amended several times, the last important amendments being those of 1912 and 1917. Being the product of the liberal judicial reform of 1860's, it was based upon the most advanced European doctrine of the time and was written in a lucid language with a minimum of technical

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\* The following article consists of selected chapters from a two-volume work on "Government, Law and Courts in the Soviet Union and Eastern Europe", edited by Dr. Vladimir Gsovski and Dr. Kazimierz Grzybowski, to be published by Stevens & Sons Ltd. (London). The books will appear in autumn 1958. Some of the other chapters in the main work are: Administration of Justice, Substantive Criminal Law, Civil Law, Labour Law and Land Law.

expressions. In line with the Continental European procedure, the jury tried most important criminal cases but did not participate in the trial of civil cases.<sup>1</sup>

### 1. Criminal Procedure

At the beginning of the Soviet regime, courts and administrative agencies with penal power were not guided by any definite rules of procedure, nor were there any such rules promulgated.<sup>2</sup>

After 1922, individual Soviet republics began to enact their own codes of criminal procedure which carried nevertheless essentially the same provisions taken from RSFSR code. In June 1922, the first Code of Criminal Procedure was enacted in the RSFSR.<sup>3</sup> However, it was superseded in February 1923 by a new code,<sup>4</sup> which with several direct and indirect amendments, is still in force. Some of the new rules are incorporated into the code, others are included in separate pieces of legislation. On October 31, 1924, federal general principles on criminal procedure were enacted.<sup>5</sup> However, they are seldom referred to and did not produce any substantial changes.

Among the indirect and informal changes, the complete recasting of the pretrial investigation should be mentioned. A recent textbook states:

In 1927-1928, the transfer of the investigation machinery from the judicial agencies to the agency of prosecution took place. From that time on, *without a formal change of sections of the Code of Criminal Procedure* the public prosecutor became the director of the pre-trial investigation. The court lost the right to supervise the conduct of investigation by deciding the complaints of the investigation against the disposition of the public prosecutor.<sup>6</sup> (Italics supplied.)

Consequently, the official text of the Code of Criminal Procedure was modified by additional legislation, court decisions, and established practices. It is customary in the Soviet Union for the Ministry of Justice of the RSFSR to publish almost every year a pocket edition of the official text, brought up to a certain date and supplemented with additional legislation and excerpts of court decisions. The last-known and consulted edition brought the text up to February 1, 1956.<sup>6a</sup>

<sup>1</sup> For details please refer to the chapter in the book dealing with "Administration of Justice: Soviet Union".

<sup>2</sup> For details of this period which lasted until 1922, see *ibid.*, Chapter One, Sections A and C, and Chapter Eight.

<sup>3</sup> RSFSR Laws 1922, text 230. RSFSR is the abbreviation for Russian Soviet Federal Soviet Republic, the largest of the fifteen republics in the USSR.

<sup>4</sup> RSFSR Laws 1923, text 106.

<sup>5</sup> USSR Laws 1924, text 206.

<sup>6</sup> M. A. Cheltsov, *Sovetskii ugolovnyi protsess* (Soviet Criminal Procedure), 2nd ed., 1951, p. 61.

<sup>6a</sup> Since the writing of the article a new edition of the Code of Criminal Procedure of the RSFSR was issued dated April 1, 1957.

For the Ukraine the code was enacted on September 15, 1927,<sup>7</sup> for Byelorussia in 1923,<sup>8</sup> for Uzbekistan of June 29, 1929.<sup>9</sup> These codes are printed very irregularly. The Ministry of Justice of the USSR published a Concordance of the Sections of the Codes of Criminal Procedure of the Soviet Republics.<sup>10</sup> It gives a comparative text of the codes of the following republics: RSFSR, Ukraine, Byelorussia, Azarbeidjan, Georgia, Uzbekistan and Tadzhikistan.

The RSFSR code is also in force in Kazakstan, Kirghizia, Latvia, Lithuania, and Estonia, while the Ukrainian code is in force in Moldavia.

## 2. Civil Procedure

Prior to 1923, no Soviet decree dealt especially with civil procedure. Some isolated provisions on the subject are to be found in the separate acts dealing with court organization and judicial procedure. Originally the new courts were instructed to follow the Imperial Code of Civil Procedure of 1864, insofar as it was in contradiction with decrees of the Soviet government, but finally any reference to the old laws prohibited.<sup>11</sup>

When the first Soviet Code of Civil Procedure for the RSFSR was prepared in 1923, it sought to introduce into civil procedure some ideas which could be considered the latest fashion in European jurisprudence on the eve of World War I. These ideas, however, were accepted in an exaggerated form. The Code of Civil Procedure of the RSFSR was enacted on July 7, 1923 and went into effect on September 1, 1923.<sup>12</sup> It has since been amended several times and served as a pattern for civil codes of other Soviet republics.

The RSFSR Code is also in force in the republics of Kazakstan, Kirghizia, Latvi, Estonia, and Lithuania. The Ukrainian Code of November 5, 1929 is applied in the Moldavian Republic. The Byelorussian Code was adopted on July 26, 1923; the Georgian Code was enacted on April 11, 1924 and was re-promulgated on May 17, 1931 in an amended form. The Armenian Code was adopted on September 27, 1923, the Uzbek Code, on September 30, 1927; the Tadzhik Code, on April 15, 1929; the Azerbaidzan Code, on January 17, 1925; and the Turkmanian Code, on December 19, 1928.<sup>13</sup>

<sup>7</sup> Ukrainian Laws, 1927, text 167.

<sup>8</sup> Byelorussian Laws, 1923, text 41, amended several times.

<sup>9</sup> Uzbek Laws, 1929, Text 95 and 328.

<sup>10</sup> *Sopostavitel'naia tablitsa statei ugodovni protsessenai 'nykh kodeksov soduznikh respublik*, 1953.

<sup>11</sup> See: V. Gsovski, *Soviet Civil Law* (Ann Arbor, Michigan Law School), 2 vols., 1948-49.

<sup>12</sup> RSFSR Laws 1923, text 478. For the full translation of the amended text in English, see Gsovski's *Soviet Civil Law*, Vol. 2, No. 44.

<sup>13</sup> A. F. Kleinman, *Sovetskii grazhdanski protsess* (Soviet civil procedure), 1954, p. 21.



The USSR Ministry of Justice has also published a concordance of the sections of the codes of civil procedure of Soviet republics in 1953.<sup>14</sup>

### B. Baltic States

Prior to their establishment in 1918 as independent states, Estonia, Latvia and Lithuania had belonged to the Russian Empire and the general laws of the Russian Empire were also in force in their territories. The new independent republics recognized the principle of continuity of former laws. In Estonia and Latvia it was provided that laws which were in force prior to the Bolshevik revolution in Russia (in November 1917) remained in force unless obviously incompatible with the new legal order or amended by subsequent legislation.<sup>15</sup> In Lithuania, the Russian laws were taken over in the form they were effective on August 1, 1914.<sup>16</sup>

Among the Russian laws thus taken over by the Republics of Estonia, Latvia, Lithuania, were also the Codes of Civil and Criminal Procedure of 1864. Due to differences in the legal status of provinces which later constituted the new republics, the Russian Codes of Civil and Criminal Procedure had become effective in Estonian and Latvian territory only in 1889.<sup>17</sup> In the autonomous territory of Klaipeda (Memel) which came to Lithuania from Germany, the German Codes of Civil and Criminal Procedure as in force on January 10, 1920, remained in force.<sup>18</sup>

The Russian Code of Criminal Procedure in Latvia and Lithuania was amended on numerous occasions and the latest edition in Latvia was that of 1926.<sup>19</sup> In Estonia it was replaced by a new Estonian Code

<sup>14</sup> *Sopostavitel'naia tablitsa statei grazhdanskovo protsessnal'nykh kodeksov soiuznykh respublik*, 1953.

<sup>15</sup> Part. I of Estonian Provisional Administrative Acts of November 1, 1918, *Riigi Teataja* (cited hereinafter *RT*) 1918, No. 1; and the Provisional Statute on Latvian Courts and Judicial Procedure of December 6, 1918, *Pagaide Valdības Vestnesis* (cited hereinafter *VV*) 1918, No. 1.

<sup>16</sup> Sec. 106 of the Provisional Constitution of Lithuania of November 2, 1918.

<sup>17</sup> Under the provisions of the Peace Treaty of 1721 between Russia and Sweden, by which the provinces of Estonia and Livonia were ceded to Russia, these provinces retained their own laws and certain local autonomy. This applied also to the province of Curonia (Southern Latvia) acquired by Russia in 1795. In the Course of the active russification of the Baltic provinces the local procedural laws were replaced by general Russian laws as of July 9, 1889. Lithuanian territory was divided between several provinces which did not enjoy an autonomous status like the Baltic provinces proper and there the 1864 Russian codes were in force from the beginning.

<sup>18</sup> In regard to civil procedure see the articles in Lesko-Loewenfeld, *Der Zivilprozess in den europäischen Staaten und ihren Kolonien*, Berlin 1931, 376-454.

<sup>19</sup> For Lithuania see V. Friedstein, "Der Einfluss der litauischen Verfassung auf die übernommene russische Gesetzgebung," *Zeitschrift für Ostrecht* (Berlin), Vol. 6 (1932), pp. 567-582 and O. Buehler, "Der Rechtszustand in Litauen," *Niemeyers Zeitschrift für internationales Recht*, Vol 34 (1925), pp. 232-262.

of Criminal Procedure which went into effect on February 1, 1935.<sup>20</sup> This new code represented a modernization and codification of the existing laws.

The 1864 Code of Civil Procedure contained special provisions (Secs. 1799-2097) which were applicable only in the former Baltic provinces (Estonia, Livonia, Curonia), since the substantive civil law in these provinces was governed not by the Russian Civil Code but by the Baltic Civil Code (*Baltisches Privatrecht*) of 1864, a codification of former local laws.

In all three states the 1864 Code of Civil Procedure remained in force, although it was continuously amended. In Latvia a new Civil Code was adopted in 1937<sup>21</sup> and this caused substantial changes also in procedural laws. As a result, in 1938 a new codified edition of the Code of Civil Procedure was issued and it was renamed Laws on Civil Procedure (*Civilprocesa likums*).<sup>22</sup>

The application of the special Baltic procedural provisions of the 1864 Code of Civil Procedure was extended in 1924 in Estonia<sup>23</sup> and in 1937 in Latvia<sup>24</sup> to the eastern regions of these countries which prior to their independence had administratively belonged to Russian provinces where the Russian Civil Code was in force.

A draft of a new Estonian Code of Civil Procedure was completed in 1935<sup>25</sup> but its final passage had to wait the adoption of a new Civil Code which, however, was prevented by the Soviet occupation in 1940.

Under Soviet occupation the RSFSR Code of Civil Procedure and the Code of Criminal Procedure (both of 1923) were put into force in the Baltic Republics. The effective date of the Soviet codes in Latvia was November 26, 1940,<sup>26</sup> in Estonia January 1, 1941,<sup>27</sup> and in Lithuania January 31, 1941.<sup>28</sup>

All amendments to the Codes of Civil Procedure now in force in the Soviet Republics of Estonia, Latvia and Lithuania, have been made in accordance with the respective changes in the RSFSR Code

<sup>20</sup> Published in *RT* 1934, No. 89, item 720, under the title of *Kriminaal kohtupidamise seadustik* and put into effect by the Enacting Law of October 30, 1934 (*RT* 1934, No. 94, item 755).

<sup>21</sup> Enacted on January 28, 1937 and effective as of January 1, 1938.

<sup>22</sup> Containing amendments up to January 31, 1938.

<sup>23</sup> Law of June 6, 1924, *RT* 1924, No. 77/78, item 38.

<sup>24</sup> Law of December 16, 1937, Collection of Laws and Government Regulations 1937, No. 202.

<sup>25</sup> *Valitsusasutiste tegevus* 1935/36 a. (Government Activities Report), Tallinn, Riigikantslei, 1936, p. 36.

<sup>26</sup> *Latvijas PSR Augstakas Padomes Prezidija Zinotājs* 1940, No. 74.

<sup>27</sup> *ENSV Teataja* 1940, No. 73, item 1007.

<sup>28</sup> *Auksiausios Tarybos Zinios* 1941, No. 1(3), item 39. In the territory of Klaipeda the Soviet codes went into effect only after the end of the World War II, since this territory had been administrated by Germany since March 22, 1939.

which, in turn, followed the federal legislation. Thus the federal edicts of July 8 and November 10, 1944, as well as an edict of April 10, 1942, caused changes in the Code of Civil Procedure of the RSFSR. These changes were enacted by RSFSR edicts of June 1, 1942 and April 16, 1945. The corresponding Soviet Estonian legislative acts followed on December 1, 1944 and on June 14, 1945.<sup>29</sup> Sec. 21 of the Code was amended by an RSFSR edict of May 6, 1955, and the Soviet Estonian edict followed on August 20, 1955,<sup>30</sup> effecting the same change in the jurisdiction of People's Courts in the Soviet Estonian Code. There have been no reported changes in the Codes of Criminal Procedure, except for a federal edict of April 19, 1956, repealing certain portions of the Codes of Criminal Procedure of the constituent republics.<sup>31</sup> No republican legislation to this effect has yet been published.

On February 11, 1957, the Supreme Soviet of the Soviet Union passed a law which transferred to the jurisdiction of the constituent republics the legislation on procedural codes.<sup>32</sup> The federal authorities retained only the right to establish the basic principles of legislation pertaining to civil and criminal procedure. This does not seem, however, to change the legislative practice heretofore established. No new legislation has been enacted under this authority and the RSFSR Codes of Civil Procedure and Criminal Procedure, as amended, are still in force in the Soviet Republics of Estonia, Latvia and Lithuania.

### C. People's Republics

#### ALBANIA

##### 1. Criminal Procedure

Prior to the declaration of its independence (1912), Albania was a part of the Ottoman Empire and Turkish law was applied there. After the separation from Turkey the Ottoman laws continued to apply. This situation lasted until 1926 when a legal reform replaced almost the entire Turkish-Moslem legislation applied in Albania.

In the field of the criminal procedure, however, the Turkish Code of 1879, as amended, which was based on the French Code of Criminal Procedure, continued to be in force. There were no substantial amendments to it during the period of Albanian independence.

As a general rule, the Albanian laws, among them also the Code of Criminal Procedure, remained in force after the occupation and the

<sup>29</sup> Confirmed by the Estonian Supreme Soviet on July 13, 1946, *Sovetskaia Estoniia* No. 169 of July 20, 1946.

<sup>30</sup> Confirmed by the Estonian Supreme Soviet on January 31, 1956, *Rahva Haal* No. 28 of February 2, 1956.

<sup>31</sup> *Vedomosti* 1956, No. 9, item 193.

<sup>32</sup> *Ibid.* 1957, No. 4, item 63. See also the article of V. N. Sukhodrev in *Sovetskoe Gosudarstvo i Pravo*, 1957, No. 5, pp. 85-93.

incorporation of the country by Italy in 1939. Then Italian military tribunals were introduced and many crimes heretofore under the jurisdiction of civil courts were transferred to the jurisdiction of these military tribunals where the procedure was governed by the provisions of the Italian Code of Military Criminal Procedure.

In 1940 Italian occupation authorities proclaimed martial law in the entire territory of Albania which remained in effect until the surrender of Italy in September 1943. As a result, the jurisdiction of military tribunals was further extended. Under German occupation which followed the Italian surrender, the previous legal system of Albania was re-established, but after the collapse of the German resistance the new Albanian Government by Law 61 of May 17, 1945<sup>33</sup> repealed the entire legislation enacted by the occupation authorities and restored the Albanian laws to be used whenever there was a gap in the legislation of the peoples' regime and in any case they were not in conflict with this new order. But since 1946 the Communist government enacted a number of individual laws dealing with procedural matters.<sup>34</sup>

In 1953 all previous legislation on criminal procedure were replaced by the new Communist Code of Criminal Procedure,<sup>35</sup> which code is based entirely on the Soviet Code of Criminal Procedure.

Some minor changes to this code with regard to the jurisdiction of courts were made by two decrees a few months later.<sup>36</sup>

## 2. Civil Procedure

Until 1926 the situation with respect to civil procedure was almost the same as for the criminal procedure.

Subsequently substantial changes in civil procedure were effected by the law of 1927<sup>37</sup> as amended by the "Law amending Articles 29 and 30 of the *Shtojë e Pare te Procedures Civile*"<sup>38</sup> concerning the review of the civil cases by the Court of Cassation, and the law of April 1, 1929<sup>39</sup> which reformed the entire civil procedure and brought its provisions into line with the new substantive law of Albania (Civil Code of 1929 *et al.*).

Later amendments in 1931<sup>40</sup> and 1937<sup>41</sup> provided for speedier trials in possessory actions, for some changes in the execution of judgments, changes of some procedural forms for appeal, and improve-

<sup>33</sup> *Gazeta Zyrtare*, No. 12, 1945. (Hereinafter abbreviated to *G.Z.*)

<sup>34</sup> *G.Z.* No. 102, 1946.

<sup>35</sup> Law No. 1650, enacting the Code of Criminal Procedure, *G.Z.* No. 7, 1953.

<sup>36</sup> *G.Z.* Nos. 10 and 17, 1953.

<sup>37</sup> *Shtojë e pare e Procedures Civile*.

<sup>38</sup> *Fletorja Zyrtare*, No. 48, 1927. (Hereinafter abbreviated to *F.Z.*)

<sup>39</sup> *Shtojë e Dyte e Procedures Civile*.

<sup>40</sup> *F.Z.* No. 72, 1931.

<sup>41</sup> *F.Z.* No. 63, 1937.

ment of interlocutory execution of judgments in the decisions of courts of peace.

In 1946 the Minister of Justice of the People's Republic of Albania issued the first Order No. 2579 "On Some Norms of Procedure for Civil and Criminal Cases".<sup>42</sup> While for the latter new laws were enacted, for the civil procedure these rules seem to be still in force.

At present, in addition to the Order of 1946, Decree 1671 "On Some Procedural Dispositions for Civil and Penal Cases", enacted in 1953,<sup>43</sup> patterned after Soviet procedural laws, governs procedure in civil cases.

## BULGARIA

### 1. Criminal Procedure

After the liberation of Bulgaria in the Turkish-Russian war of 1877-78, the Russian High Commissioner in the newly established Bulgarian state issued provisory procedural rules for the courts.<sup>44</sup> These were gradually replaced by regularly enacted laws. On April 7, 1897<sup>45</sup> the Code of Criminal Procedure was enacted effective July 1, 1897. This code was a close translation of the Imperial Russian Code of Criminal Procedure of 1864 which was strongly influenced by the French Code.

Although the old code was not formally repealed immediately after the Soviet invasion in September 1944 and the establishment of the new government, its provisions and basic principles became ineffective step by step. First, special procedural rules were promulgated for certain groups of offenses, as for example the Law on People's Courts of 1944.<sup>46</sup> This law, according to a legal writer of today, "freed the people's courts of all the formalities of inherited procedure."<sup>47</sup> Then a number of amendments were issued affecting the fundamental principles of the old code, such as, for example, the Law on the Abolition of Courts of Appeal of 1947<sup>48</sup> and the Law on the Amendment of Criminal Procedure of 1948.<sup>49</sup>

It was not until 1952 that the new government promulgated a new Code of Criminal Procedure<sup>50</sup> patterned after that of the Soviet Union and entirely repealing the code of 1879. In the course of years this

<sup>42</sup> G.Z. No. 102, 1946.

<sup>43</sup> G.Z. No. 10, 1953.

<sup>44</sup> Published in August 24, 1878.

<sup>45</sup> D.V. No. 77, April 7, 1897.

<sup>46</sup> D.V. No. 219, October 6, 1944.

<sup>47</sup> Stefan Pavlov, *Nakazatelen protsess i sudojstvo* (Criminal procedure and organization of courts) Sofia, 1950, p. XIV.

<sup>48</sup> D.V. No. 289, December 11, 1947.

<sup>49</sup> D.V. No. 234, October 6, 1948.

<sup>50</sup> IPNS No. 11, February 5, 1952.

Code underwent certain changes, the most important being made in 1956.<sup>51</sup>

## 2. Civil Procedure

With respect to civil cases the procedural rules for the courts issued by the Russian High Commissioner were superseded by the first Bulgarian law of Civil Procedure of 1892,<sup>52</sup> which was drafted after the pattern of the Imperial Russian Statute of Civil Procedure of 1864. The original law of 1892 underwent changes in 1907 and 1922. In 1930, it was repealed by a new Law of Civil Procedure,<sup>53</sup> modeled to a great extent on Austrian and German codes. This law remained in force until 1952, but it was amended several times<sup>54</sup> by the new government, gradually introducing Soviet features and institutions into Bulgarian procedural law. In 1952 a new Code of Civil Procedure<sup>55</sup> was enacted repealing the law of 1930 entirely and accepting the Soviet concept of civil procedure.

## CZECHOSLOVAKIA

After the formation of modern Czechoslovakia on October 28, 1918 in Czech lands (Bohemia, Moravia and Silesia) the Austrian procedural laws, and in Slovakia, the Hungarian procedural laws continued to apply. These laws were uniformly amended by Czechoslovak legislation. In 1950 new codes of criminal and civil procedure, uniform for the entire country, were enacted.

## 1. Criminal Procedure

The new codification of 1950 superseded the following old ones: the Code of Criminal Procedure for Courts, Law No. 119 of 1873, in Czech lands, and the Code of Criminal Procedure for Courts, Law No. XXXIII of 1896 in Slovakia.

At the present time criminal procedure is governed by the following codes which are uniform for the entire country: the Code of Criminal Procedure for Courts of 1950<sup>56</sup> which was changed and amended by Law No. 67 of 1952; in 1956 this code was repealed (except for a few provisions of minor importance) by the Code of Criminal Procedure for Courts of 1956<sup>57</sup> which took force on January

<sup>51</sup> Amendments: *IPNS* No. 89, November 6, 1953; *IPNS* No. 90, November 9, 1953.

<sup>52</sup> *D.V.* No. 31, February 8, 1892.

<sup>53</sup> *D.V.* No. 246, February 1, 1930.

<sup>54</sup> *D.V.* No. 9, January 14, 1948; *D.V.* No. 133, June 9, 1948; *D.V.* No. 228, September 29, 1948.

<sup>55</sup> *IPNS* No. 12, February 8, 1952, as amended.

<sup>56</sup> Law No. 87, Coll. 1950.

<sup>57</sup> Law No. 64, Coll. 1956.

1, 1957. The Code of Criminal Procedure for Administrative Authorities of 1950<sup>58</sup> which was changed and amended by Law No. 102 of 1953, is still in force.

## 2. Civil Procedure

The following old laws were superseded by the new codification of 1950: in Czech lands, the Laws on the Jurisdiction of Courts, Law No. 111 of the 1895 Imperial Laws and the Code of Civil Procedure for Courts, Law No. 113 of the 1895 Laws. In Slovakia, the Code of Civil Procedure, Law No. I of 1911.

Civil Procedure is now governed by the Code of Civil Procedure for Courts of 1950<sup>59</sup> which is still in force as amended by the Laws No. 68 of 1952,<sup>60</sup> No. 52 of 1954<sup>61</sup> and No. 66 of 1956.<sup>62</sup>

## HUNGARY

### 1. Criminal Procedure

The Code of Criminal Procedure of Hungary was enacted in 1896<sup>63</sup> and became effective January 1, 1900. Several amendments were enacted in 1914, 1921, 1928 and 1930 but the general structure of criminal procedural law remained unchanged. Only simplifications were introduced and obsolete provisions revised or even repealed. After World War I it remained in force in former Hungarian provinces of Czechoslovakia, Romania and Yugoslavia. In Yugoslavia it was superseded by the new Code of 1929, and in two other countries only by the post-World War II codes.

In 1945 the post-war regime enacted the Law of People's Courts<sup>64</sup> which had jurisdiction over war crimes and anti-popular crimes. This jurisdiction was later extended and several provisions of criminal procedure were suspended or repealed.

After the Communist take-over, the Soviet-dominated legislature passed the bill of a new Code of Criminal Procedure in 1951, in force since January 1, 1952.<sup>65</sup> In 1954 the legislature amended the Code to

<sup>58</sup> Law No. 89, Coll. 1950.

<sup>59</sup> Law No. 142, Coll. 1950.

<sup>60</sup> Law No. 68, Coll. 1952 changing and amending the Code of Civil Procedure for Courts of 1950; see also the Proclamations No. 2, Coll. 1953.

<sup>61</sup> Law No. 52, Coll. 1954 to extend the Jurisdiction of State Notaries.

<sup>62</sup> Law No. 66, Coll. 1956 to change and amend the Law on the Organization of Courts (No. 66, Coll. 1952).

<sup>63</sup> Law No. XXXIII of 1896, *Bunvadi perrandtartas* (Code of Criminal Procedure), *Országos Torvenytar*, December 22, 1896.

<sup>64</sup> Law No. VII of 1945, *Nepbirósági törvény* (Law of the People's Court). Promulgated in *Országos Torvenytar* September 16, 1945.

<sup>65</sup> Law No. III of 1951, *Bunvadi perrendtartás* (Code of Criminal Procedure), *Magyar Közlöny*, May 22, 1951.

such an extent that the government issued both the Code and the amendment in a consolidated text at the same time.<sup>66</sup> By this amendment a great number of Soviet features were incorporated in the new code.

## 2. Civil Procedure

The Hungarian pre-war Code of Civil Procedure was enacted in 1911<sup>67</sup> and together with its implement law of 1912, went into effect in 1914. These regulations remained in force until the end of 1952, but certain amendments were enacted in 1925, 1930 and 1948, when the obsolete and untimely provisions were revised and simplified. However, the code as a whole remained unaffected.

After the Communist takeover, the Soviet-dominated legislature enacted a new code of civil procedure in 1952<sup>68</sup> which was amended in 1954. This amendment was so extensive that the government found it necessary to issue the consolidated text of the Code and the amendment.<sup>69</sup> In the new code the government accepted several Soviet procedural features and institutions which were incorporated in the structure of Hungarian procedural law.

## POLAND

After the formation of modern Poland in 1918, procedural laws in criminal and civil matters continued to be governed by the laws of Austria, Germany and Russia. Uniform rules of criminal or civil procedure for the whole country were enacted by the Code of Criminal Procedure of March 19, 1928<sup>70</sup> and the Code of Civil Procedure of November 29, 1930.<sup>71</sup>

In postwar Poland no totally new procedural codes have been enacted thus far. However, the Code of Criminal Procedure was substantially changed in 1949 and was later amended several times in

<sup>66</sup> Law No. V of 1954, *A bünvádi perrendtartásról szóló 1951 évi III törvény módosításáról* (Amendment of the Law No. III of 1951 on the Code of Criminal procedure), *Magyar Közlöny*, separately and in consolidated text, June 29, 1954. (Hereinafter abbreviated to *BP.*)

<sup>67</sup> Law No. I of 1911, *Polgári perrendtartás* (Code of Civil Procedure), *Országos Törvénytár*, January 15, 1911.

<sup>68</sup> Law No. III of 1952, *Polgári perrendtartás* (Code of Civil Procedure), promulgated in *Magyar Közlöny*, June 6, 1952.

<sup>69</sup> Law No. VI of 1954, *A polgári perrendtartásról szóló 1952 évi III törvény módosításáról* (Amendment of the Law No. III of 1952 on the Code of Civil Procedure), *Magyar Közlöny*, June 29, 1954. (Hereinafter abbreviated to *Pp.*)

<sup>70</sup> *Dziennik Ustaw*, No. 83, Law No. 725. (Hereinafter abbreviate to *Dz.U.*)

<sup>71</sup> *Dz.U.* No. 83, Law No. 651.



adjustment to the ever-changing policy of the government.<sup>72</sup> Its last amendment was on December 21, 1955.<sup>73</sup> The Code of Civil Procedure was substantially amended on July 20, 1950.<sup>74</sup>

## ROMANIA

### 1. Criminal Procedure

The first code of criminal procedure of Romania was enacted on December 2, 1864.

After 1918, when Romania more than doubled its territory, four main types of procedural criminal legislation were applied in various provinces: a) the Romanian Code of Criminal Procedure of December 2, 1864 in the Old Romanian Kingdom; b) the Hungarian Law of Criminal Procedure No. XXXIII of 1886 in Transylvania, Banat, Crisena, and Maramures; c) the Law of Criminal Procedure of June 30, 1873 in Bucovina; and d) the Imperial Russian Criminal Procedure of November 20, 1864, in Bessarabia which was replaced on May 2, 1919 by the Romanian Code of Criminal Procedure of December 2, 1864. This legislation, as amended, remained in force in the respective provinces until the end of 1936, being superseded by unified provisions enacted for the whole country.

The "Code of Criminal Procedure, Carol II" of 1936,<sup>75</sup> the result of 15 years of studies and revisions, is still in force in the present Romanian People's Republic, established on December 30, 1947. This code was amended and republished in 1948 as the Code of Criminal Procedure of the Romanian People's Republic. General subsequent changes made in the form of repeals, amendments and special laws were made with the objective of meeting the policy of the new regime: Criminal Procedure: a) Decree-Law No. 132 of June 19, 1952; b) Law No. 3 of April 4, 1956; and c) Decree-Law No. 90 of April 6, 1956; special laws affecting Criminal Procedure: a) Decree-Law No. 132 of April 2, 1949; b) Law No. 79 of June 19, 1949; c) Law No. 5 of June 19, 1952; and d) Law No. 2 of April 6, 1956.

### 2. Civil Procedure

The Old Kingdom of Romania had its first Code of Civil Procedure enacted in 1865. This code was amended and remodeled in 1900. At the end of World War I the Old Kingdom was enlarged by the reunion of the several Romanian provinces which for various periods of time had been under foreign domination. The laws governing

<sup>72</sup> *Dz.U.* No. 32, Law No. 238; *Dz.U.* No. 38, ex 1950, Law No. 348, uniform text *Dz.U.* No. 40, ex 1950, Law No. 364.

<sup>73</sup> *Dz.U.* No. 46, Law No. 49.

<sup>74</sup> *Dz.U.* No. 38, Law No. 349, uniform text *Dz.U.* Law No. 394.

<sup>75</sup> *Monitorul Oficial* No. 66, Part I of March 18, 1936.

judicial organization and civil procedure in the liberated provinces were as follows: in Transylvania, Hungarian Code of Civil Procedure of 1911 which took effect on January 15, 1915; in Bukovina, the Austrian Code of Civil Procedure of July 14, 1895; and in Bessarabia, the Russian Code of Civil Procedure. When the country was once reunited the government of Romania undertook a program of unification of the laws. While a code of civil procedure was under study, several legislative enactments were gradually achieving partial uniformity. Thus, the Law on the Organization of the Judiciary of 1924 and its subsequent amendments, the Law on the Organization of the Court of Cassation of 1925, the Law on the Acceleration of Judicial Procedure (1925 and 1929), etc. served this purpose. A new Code of Civil Procedure was approved in 1939 by King Carol II and bore his name, but World War II caused its suspension *sine die*. When the Romanian People's Republic was proclaimed in 1947 the Code of Civil Procedure of 1900 was in force. The Code of Civil Procedure of 1948 was a republication of the old code with a few changes. It was only later that amendments to the Code and new laws established rules which constitute important departures from the traditional standards of procedure.

## YUGOSLAVIA

### 1. Criminal Procedure

Yugoslavia (the Kingdom of the Serbs, Croats and Slovenes) came into being after World War I on December 1, 1918. Until the enactment of new legislation for the whole country the laws which were in force in the various areas were retained. Thus, in the beginning, Yugoslavia had six codes of criminal procedure, to wit: the Serbian Code of April 10, 1865; the Croatian Code of May 17, 1875; the Austrian Code for Bosnia and Herzegovina of January 30, 1891; the General Austrian Code for Dalmatia and Slavonia of May 27, 1873; the Hungarian Code of 1896 for Vojvodina, and the Montenegrin Code of January 30, 1910.

A unified Code on Criminal Procedure was enacted February 16, 1929 for the whole country.

The Code of 1929 was in force until the present regime came into power. Officially it was repealed by the Law of October 23, 1946.<sup>76</sup> Some procedural rules were included in the Law on the Organization of People's Courts, No. 349, 1946, and a new Code on Criminal Procedure was enacted and went into effect on December 6, 1948.

<sup>76</sup> *Sluzbeni List* No. 86, Item 695, Law Repealing Provisions of Laws Enacted Prior to April 6, 1941, and (those Enacted) during the occupation by the Enemy.

The provisions of both the Law of 1946 and the Code of 1948 were applied simultaneously. It is the Code of 1948 that was superseded by the Code enacted on September 30, 1953<sup>77</sup>. It may be noted that although Yugoslavia is newly organized as a federation of six republics both Codes were enacted by the federal government and applied to the whole territory of Yugoslavia.

## 2. Civil Procedure

When the Yugoslav state came into being on December 1, 1918 in the field of civil procedure, the following legislative enactments were in force: a) Code of Civil Procedure of February 20, 1865 (jurisdiction of the courts of appeal in Belgrade and Skoplje); b) Code of Civil Procedure of November 1, 1905 (jurisdiction of the Supreme Court in Podgorica); c) Code of Civil Procedure of April 14, 1883 (jurisdiction of the Supreme Court in Serajevo); d) Hungarian Code of Civil Procedure of 1911 (jurisdiction of the Court of Appeal in Novi Sad); e) Provisional Code of Civil Procedure of September 16, 1852 (jurisdiction of the Supreme Court in Zagreb); and f) Code of Civil Procedure of August 1, 1895 (jurisdiction of the Supreme Courts in Ljubliena and Split).

This legislation remained in force until 1929 when the Code of Civil Procedure of July 13, 1929 was enacted.<sup>78</sup>

After World War II, the new government issued the decree of February 3, 1945 repealing all the provisions which were contrary to the laws enacted by the new government prior to this date. In fact, the Code of Civil Procedure of 1929 was only slightly affected by this decree. The above decree was amended by the decree of October 23, 1946 which declared the laws enacted prior to April, 1941 to have lost their legal effect. However, it was provided for by the same decree that the principles of law contained in the repealed legislative enactments may still be applied unless there are no other laws enacted in the respective field and they are not in conflict with the Constitution of 1946. In this way, most of the provisions of the Code of Civil Procedure of 1929 continued to be applied although they could not be referred to in court decisions.

Shortly before the adoption of the Code of Civil Procedure, a special law to speed up civil proceedings before regular courts was enacted on April 25, 1955.<sup>79</sup>

This situation lasted until a new Code of Civil Procedure applicable for the entire country was enacted on December 8, 1956 effective as of April 23, 1957.<sup>80</sup>

<sup>77</sup> *Službeni List* No. 40, 1953.

<sup>78</sup> *Službeni Novine Kraljevine Srba, Terrata Hrvata i Slovanaca*, Br. 179, 1929.

<sup>79</sup> *Službeni List FНРY* Br. 19, 1955.

<sup>80</sup> *Službeni List FНРY*, Br. 4, 1957.

## CRIMINAL PROCEDURE

### Special Features of Soviet Type Criminal Procedure

There are two criminal procedures in operation in the countries covered by this book: one is outlined in the officially enacted codes of criminal procedure and the other is actually followed by courts and administrative agencies engaged in various phases of penal prosecution. The *de facto* proceedings could be ascertained from the official Codes of Criminal Procedure only to a limited extent, but ample authentic material is offered by numerous speeches by persons of authority, and articles and other material published in the post-Stalin period. In particular, the speech of Khrushchev at the secret session of the Central Committee of the Communist Party of the Soviet Union on February 25, 1956<sup>81</sup> is the most important document in which the Soviet leader revealed the unwritten rules of *de facto* procedure practiced over a long period in the Soviet Union.

The real criminal procedure is not always reflected in the official codes and sometimes it is in conflict with their provisions, but it is the law which is actually applied.

An attempt is made in this chapter to present the principles of criminal procedure actually followed.

#### A. Initiation of Criminal Proceedings

##### 1. Historical

In all countries which are included in the Soviet orbit a French type of procedure was in operation before sovietization. Serious cases were judicially investigated in pre-trial proceedings. These served as a guarantee for an innocent person or a person not subject to prosecution for a lawful, formal reason. The purpose was to prevent an obviously innocent person or one not subject to trial from being brought to court. The cases in which a pre-trial investigation of the type described was mandatory were not uniformly defined in various jurisdictions. In some of them it was mandatory for cases in which a lengthy imprisonment was involved, in others it was mandatory wherever a loss of civic rights threatened the defendant. The results of such a judicial investigation could be used later in evidence at the trial. It was conducted by a judge who was independent from the public prosecutor. The data incriminating the suspect were to be

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<sup>81</sup> In this study the text of the speech of the First Party Secretary, N.S. Khrushchev at a session of the XXth Party Congress of the Communist Party of the Soviet Union on February 25, 1956 was quoted as translated and published by the U.S. Department of State and released for the press on June 4, 1956.

collected with judicial impartiality equally with those exonerating him. Such investigation was under the supervision of the court and redress to it was open to the party. This applied also to the question of keeping the suspect in custody. In some jurisdictions, such as *Yugoslavia*, defense was allowed at this stage. The judge conducting an investigation never drew up the charges, which was the duty of the public prosecutor to whom the records of the investigation were submitted by the judge investigator.

In contrast to this judicial investigation was the police examination which was under the control of the public prosecutor. Its results, however, could not be used in evidence during the trial.

## 2. Soviet Union

This essential difference is to some extent reflected in the official Code of Criminal Procedure in effect in the republics of the *Soviet Union*, dated roughly 1923-1924. However, Soviet law professors, in text books on criminal procedure designed for future judges, and lawyers frankly admit that Soviet pre-trial proceedings depart from what is prescribed in the codes of criminal procedure. They saw that there is no difference between police examination and judicial investigation under Soviet law. Soviet law professors do not refer to any amendments to the procedural codes but describe the process of departure from the provisions as a matter of fact. They recognize the fact, that, for example, the RSFSR Code (in force also in the Baltic States, Kirgizia, Kazakstan and some other republics) has a special Chapter VIII on Police Investigation and several chapters (IX through XVIII) on pre-trial investigation and that the codes of Byelorussia, the Ukraine, Azerbaijan, Armenia and Turkestan are similar, although the Ukrainian Code has some departures, but nevertheless they are prepared to state: "Very soon, however, the boundary lines between police examination and pre-trial investigation began to be erased."<sup>82</sup> The result of both may be used in evidence at the trial. Soviet writers refer to the fact that some of the latest procedural codes of the Soviet republics have abandoned even this terminology and use a new one, "inquiry" (*rassledovanie*), which covers both and is guided by the public prosecutor.<sup>83</sup> They see the difference only in the officials who conduct the inquiry, that is, in the more important or complex cases they are conducted by special agencies, investigators, public prosecutors and agencies of the MVD (now State Security Committee, KGB) and in less important cases by the police. All these proceedings are lacking in judicial character.

<sup>82</sup> Cheltsov, *Sovetskii ugovolnyi protsess* (Soviet Criminal Procedure), 2nd ed. 1951, pp. 228-229.

<sup>83</sup> Codes of Criminal Procedure of Uzbekistan of 1929, of Tajikistan of 1934 and Provisional Rules for Inquiry in criminal cases in Georgia of 1931. See Cheltsov, *op. cit.*, p. 229.

Moreover, the recent regulations on public prosecutors and the Statute of Government Attorneys of 1955 make it plain that the personnel conducting the investigation (inquiry) is totally subordinate to the government attorney (public prosecutor), and is authorized to draw the bill of charges. It is also the public prosecutor and not the court who may decide concerning the custody of the suspect.

The Code of Criminal Procedure is explicit only on one point, viz., it expressly exempts from the provisions of the Code the determination of political crimes which are investigated by the agencies of the secret police.<sup>84</sup> The following are pertinent statements of Soviet legal scholars:

There is no difference in principle between police examination and pre-trial investigation in soviet criminal procedure although both these concepts are maintained in the Code of Criminal Procedure now in force. Police examination and pre-trial investigation have equal judicial significance. Material of the examination as well as material of pre-trial investigation is evidence and may be used by the court as evidence in rendering judgment.<sup>85</sup>

The bourgeois legislator attaches a judicial character to pre-trial investigation. The investigator who conducts is officially considered a judge independent from prosecution (*Juge d'instruction* in France, *sudebnyi sledovatel* in Czarist Russia) therefore acts of pre-trial investigation are given the force of evidence in court and may be read at the trial. On the contrary the acts of a police examination have no force of evidence and may not be read in court. . . The soviet legislator does not allow such a difference between records of police examination and those of pre-trial investigation. If one or another is made while preserving the procedural requirements they have the same procedural significance.<sup>86</sup>

The following recent statement of a Soviet professor shows that the police competes with investigating agencies and in fact prevails over them:

Section 108 of the Code of Criminal Procedure enumerated precisely crimes the investigation of which must be carried out by the investigating agencies attached to district attorneys. However, for the last few years almost all criminal cases have been investigated by the police. In the police (department) there are investigation sections employing well qualified personnel; this is essentially a parallel acting investigation machinery.<sup>87</sup>

<sup>84</sup> Code of Criminal Procedure, 1956 ed., Sec. 108, para. 2.

<sup>85</sup> Strogovich, *Uchebnyk ugovnogo protsessa* (Textbook of Soviet Criminal Procedure), 1938, p. 118, N. B. Karev, D.S.m.

<sup>86</sup> Cheltsov, *op. cit.*, p. 223.

<sup>87</sup> Mitrichev, "About a Single Investigation Machinery," *Izvestia*, July 2, 1957, p. 2. Also "Agencies of police by law are agencies of police examination and not of pre-trial investigation but in fact take upon themselves in a number of cases which under Sec. 108 RSFSR Code of Criminal Procedure a similar section of the codes of other republics require pre-trial investigation. . . this direct violation of law. . . as the police agencies came into being special officers - investigators. . . which are not provided for by any law. . . police investigators are an illegal institution." Strogovich "O doznanii i predvaritel 'nom sledstviu" (Concerning police examination and pre-trial investigation), *Sotsialisticheskaia zakonnost*, 1957, No. 5, pp. 20-21.

### 3. People's Republics

In *Albania*<sup>88</sup> pre-trial proceedings consist of examination and investigation. The first examination is conducted by the police, the chiefs of military units and other administrative agencies; if there is no police authority in the place the examination is performed by the chairman or secretary of the village people's council. The second, the investigation, is conducted by the investigators attached to the office of the public prosecutor or by the office of State Security. The investigators of State Security are in charge of conducting the pre-trial examination of crimes against the state. The Code expressly provides that the results of pre-trial proceedings may be used at the trial. Moreover, according to Section 247, para. 2 of the Code of Criminal Procedure:

If a defendant refuses to testify before the court then the testimony given by him to the agencies of pre-trial investigation and other agencies of inquiry shall be read.

The present *Bulgarian* Code of Criminal Procedure differentiates between police examination and pre-trial investigation conducted by different officials: the former, by the People's Police (militia), the Office of State Security, and other administrative agencies specially authorized by law;<sup>89</sup> the latter, by investigators attached to the People's Police.<sup>90</sup> Pre-trial investigation of crimes against the People's Republic, i.e., political or counterrevolutionary offenses<sup>91</sup> is carried out only by the investigators of the Secret Police.<sup>92</sup> Both the police inquiry and pre-trial investigation are supervised by the government attorney and their results may be used in evidence at the trial.<sup>93</sup>

In *Czechoslovakia* the institution of investigating judges was abolished by the Communist Code of Criminal Procedure for courts of 1950<sup>94</sup> and all pre-trial proceedings including the investigation were entrusted to the government attorneys<sup>95</sup> who conducted them either personally or through the police.<sup>96</sup> And the police records as well as the records from the files of the government attorney could be used as evidence at the trial. The present Code of 1956<sup>97</sup> transferred the conduct of formal pre-trial proceedings from the government attorney to the police. The police, however, have to submit the results to special

<sup>88</sup> Secs. 99, 102, 106, 112, 247.

<sup>89</sup> Sec. 131.

<sup>90</sup> Secs. 142-143.

<sup>91</sup> Secs. 70-99 of the Criminal Code.

<sup>92</sup> Sec. 143, para. 2.

<sup>93</sup> Sec. 197.

<sup>94</sup> Law No. 87. Coll. 1950.

<sup>95</sup> Secs. 2, 3, 11, 13-19 of the Code of 1950.

<sup>96</sup> Sec. 76-86 of the Code of 1950.

<sup>97</sup> Law No. 64, Coll. 1956, in force since Jan. 1, 1957.

examining officers called investigators. They conduct the pre-trial proceedings and personally re-examine the defendants, witnesses and the like and collect all other available evidence.<sup>98</sup> As a rule, evidence produced by the police may be used at the trial only if it could not be taken by the investigators or by the court. Investigators are attached either to the government attorney's office or to the Ministry of Interior. The latter investigate and examine all serious offenses.<sup>99</sup> They are non-judicial officers and are supervised by the government attorney. The public prosecutors decide upon complaints against investigators.<sup>100</sup>

The *Hungarian Code of Criminal Procedure* provides for only police investigation to be conducted by the police, the state security agencies of the Ministry of Interior (AVO or secret police), and offices of the prosecution. Every investigation is supervised by the public prosecutor and the results of it may be read at the trial.<sup>101</sup>

Under the *Polish Code* as amended in 1949 the pre-trial proceedings were transferred to either an agent of the security police or an agent of the prosecution.<sup>102</sup> Neither agent is a judicial officer nor is he under the control of the court or bound by rules of unbiased judicial proceedings. Officers conducting investigations are appointed by, and subordinated to, the administrative authorities or to the prosecution. The records of the police inquiry may be used at trials and have a probative value equal to those of the former pre-trial judicial investigation.<sup>103</sup> In this way, confessions made by a defendant, or testimony made by witnesses during pre-trial proceedings and included in the records by the police have an official authority similar to that of the judicial records of pre-war times.

In *Romania* the functions of investigating judge and committing magistrate were abolished in 1952 and all prosecuting and investigating functions were transferred to the newly created institution of the "*prokuratura*", i.e., the Office of the Attorney General and its subordinate agencies. The present code distinguishes between two prosecuting functions: a) the "inquiry" performed by operative agents of the *prokuratura* and the agents of the Office of State Security, called *securitate*; and b) the investigation which may also be conducted by the State Police (Militia) and the regular Military Police. The government attorney, in the exercise of his supervisory power, intervenes during any phase of pre-trial prosecution, gives orders to subordinate agencies, and does the investigation himself.

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<sup>98</sup> Secs. 172-188 of the Code of 1956.

<sup>99</sup> Secs. 172 and 175 of the Code of 1956.

<sup>100</sup> Secs. 173-175, 186-188 of the Code of 1956.

<sup>101</sup> Secs. 86-89.

<sup>102</sup> Art. 235.

<sup>103</sup> Art. 299.



Under the *Yugoslav* Code of Criminal Procedure of 1953, the pre-trial proceedings include the preliminary investigation or inquiry (*izvidjaj*) and the judicial investigation (*sudska istraga*). Both may be conducted either by court or police. Proceedings of inquiry are instituted by order of the public prosecutor who also indicates the authority which will carry it out, i.e. an investigating judge, a judge of the county court, or by an authorized agency of the Ministry of Internal Affairs (police).<sup>104</sup> It is entirely within the discretion of the public prosecutor to determine who of the above mentioned officials shall carry out the inquiry. Evidence produced by the police during the inquiry may be used by the trial court if proof of such evidence cannot be repeated at the trial.<sup>105</sup> Upon the completion of the inquiry, the public prosecutor shall determine whether to take further steps or to discontinue the case.<sup>106</sup> Judicial investigation is mandatory for major crimes punishable by death or imprisonment for not less than 20 years, or when an arrest is ordered before the filing of the information. In all other instances judicial investigation is optional.<sup>107</sup> The motion is brought either by the public prosecutor or by the injured party as the accuser. Judicial investigation is ordered by the investigating judge who may thereafter entrust the investigation to a judge of the county court or to an authorized investigating official of the State Security Administration (*Uprava Drzavne Bezbednosti*).<sup>108</sup>

## B. Arrest

The *Soviet* Constitution requires that any arrest to be valid must have the approval of at least the public prosecutors if not of the judge.<sup>109</sup> Even this guarantee, i.e. approval by a prosecutor instead of a judge, meager as it is, is not followed: people are arrested without the approval of the prosecutor. In this connection Khrushchev revealed the following in his speech:

Comrade Eikhe was arrested on 29 April 1938 on the basis of slanderous material, without the sanction (approval) of the Prosecutor of the USSR, which was finally received fifteen months after the arrest. . .<sup>110</sup>

We have examined the cases and have rehabilitated Kossior, Rudzutak, Postyshev, Kosaryev and others. For what causes were they arrested and

<sup>104</sup> Secs. 139, 141.

<sup>105</sup> Sec. 143.

<sup>106</sup> Sec. 140.

<sup>107</sup> Sec. 156.

<sup>108</sup> See the book, of which this chapter is a part, Vol. I, Part Two, Administration of Justice, *Yugoslavia*, Chapter Nine, (A). The Security Agencies.

<sup>109</sup> Sec. 127.

<sup>110</sup> Khrushchev, *op. cit.*, p. 19.

sentenced? The review of the evidence shows that there was no reason for this. They, like many others, were arrested for this without the Prosecutor's knowledge. In such a situation there is no need for any sanction (Prosecutor's approval), for what sort of sanction could there be when Stalin decided everything. He was the chief prosecutor in these cases, Stalin not only agreed to, but on his own initiative, issued arrest orders.<sup>111</sup>

The only other country for which such material is available is *Poland*. Under the Polish Constitution a government attorney's decision placing a person under arrest is equivalent to a court warrant<sup>112</sup> and under the Code of Criminal Procedure a decision to detain a suspect in a case is within the power of the district attorney.<sup>113</sup> However, a leading Polish legal periodical reveals the facts describing the so called "cabinet trials". These were conducted by the judges acting under the pressure of the Party. Mass arrests were ordered on the grounds of the Party directives, especially against the peasants for non-delivery of agricultural products to the government.<sup>114</sup> In many cases of arrest people remained in prison under investigation but without trial for several years.<sup>115</sup>

## C. Defense

### 1. In Pre-trial Proceedings

*Soviet* criminal procedure is characterized by limited opportunities for defense. There being no essential difference between police inquiry and judicial investigation, it may be stated that the suspect has no right of defense during these stages. Although the Judiciary Act of 1938, Sec. 8, and the Constitution of 1936, Sec. 103, state that "the accused shall be secured the right of defense", the counsel for the defense is completely excluded from participation in the pre-trial proceedings. These provisions are generally understood to mean that the defense counsel is admitted only at the trial. His role at the trial is discussed *infra*.<sup>116</sup>

Without exception all constitutions of the people's republics contain provisions concerning the right of a defendant to defense. However, corresponding provisions of their codes of criminal procedure as well as the practice in this field reveal a completely different picture.

<sup>111</sup> Khrushchev, *op. cit.*, p. 25.

<sup>112</sup> Art. 74.

<sup>113</sup> Art. 152.

<sup>114</sup> *Prawo i Zycie*, No. 16, 1956, pp. 3 and 6.

<sup>115</sup> Report presented at the Judiciary Committee of the Parliament by the Attorney General, Minister of Justice, Chairman of the Supreme Military Court and Military Prosecutor, *New York Times*, October 15, 1956, and *Ekspres Wieczorny*, November 23, 1956.

<sup>116</sup> See "Defense at the trial," pp. 144.

The *Albanian* Constitution of 1950 guarantees in Article 82 to all citizens the right to defense, and there is no mention of a category of crimes in which this right may not be exercised. However, there is no provision in the *Albanian* Code of Criminal Procedure for a defense lawyer who would participate in the pre-trial investigation. Even a defendant under arrest has no right to communicate with a lawyer or anybody in order to obtain assistance in gathering evidence pertinent to his plea and in organizing his defense.

In *Bulgaria*, despite the general provisions of the Code that "citizens are given all necessary procedural means for the defense of their rights and legal interests"<sup>117</sup> and that the accused "has the right of defense"<sup>118</sup> during the preliminary stages of a criminal trial, no defense by a legal counsel was practically possible or legally prescribed. The accused was completely in the hands of the Police authority and the Office of State Security. This was the law until November 9, 1956. On that date, it was amended in the sense that during police inquiry and pre-trial investigation the offender may be accompanied and assisted by a defense counsel.<sup>119</sup>

Under the *Czechoslovak* Code of 1956, the defendant has the right to appoint and recall his defense counsel at any stage of the criminal proceedings, and to make motions in his own defense, as well as to file legal remedies;<sup>120</sup> he must be expressly instructed at all stages about these rights by the investigating agents, the government attorney or the judges conducting the proceedings.<sup>121</sup> The defense counsel is authorized to make all motions and file legal remedies on behalf of his client during any stage of the police investigation and pre-trial proceedings as well as during the execution of penalties.<sup>122</sup> After the defendant has been formally notified of the results of the pre-trial investigation by the investigator, the defendant may confer with his defense counsel without the presence of an official agent.<sup>123</sup> Prior to that he might see the defendant only by permission of the prosecutor and in the presence of an official.

Although the *Hungarian* Code of Criminal Procedure carries provisions permitting the defense counsel to act at any stage of the proceedings<sup>124</sup> during the investigation, his rights are restricted to making motions and taking steps, both oral and written, at any time. The defense counsel has not the right to be present at the examination of the suspect and the witnesses. He may be present at the other

<sup>117</sup> Sec. 3.

<sup>118</sup> Sec. 8, para. 2.

<sup>119</sup> Secs. 139 and 152, as amended in 1956.

<sup>120</sup> Sec. 31, para. 1.

<sup>121</sup> Sec. 31, para. 2 and Sec. 35.

<sup>122</sup> Sec. 38.

<sup>123</sup> Secs. 38, 183, 184.

<sup>124</sup> *Bp.* Sec. 50, para. 1.

acts of the investigation provided this does not "jeopardize the success of the procedure". In this connection a Hungarian lawyer wrote in a legal review:

The truth is that the defense counsel may communicate with his client at the very best only after the investigation has been concluded; the files usually will be made accessible to him only after the preliminary session of the court.<sup>125</sup>

Under the *Polish Code*<sup>126</sup> an accused may be assisted by a defense counsel during the pre-trial investigation. The counsel is permitted to have access to the files, read the records, and make copies of them.

With reference to the communication with his lawyer of a suspect in custody the Code has the following provisions:

*Art. 84.* Before the presentation of the bill of charges the counsel for the defense may have consultation with the accused who is in custody only with the consent of the public prosecutor and in his presence; after the presentation of the bill of charges he may hold consultation with him privately.

The Code does not make clear whether the consent of the prosecutor is still required for a conference of the counsel for the defense with his client after the presentation of the bill of charges. The presence of the suspect and his council at the individual acts depends upon the investigator.<sup>127</sup>

In *Romania* the defendant in a pre-trial investigation has little if any opportunity for defense according to the Code of Penal Procedure as amended in 1952 and 1956.<sup>128</sup> A provision of the code states:

*Sec. 234.* Counsel for the defense cannot participate in proceedings leading to an indictment except to the extent specifically provided in the law. During a criminal investigation the defendant's attorney may submit petitions and memoranda to the investigating authorities.

While under arrest a defendant "cannot receive or send telegrams, letters or have any other communication without the permission of the investigating authority."<sup>129</sup> The defendant cannot communicate freely with his counsel and cannot participate in the pre-trial investigation; his contribution to the defense is strictly limited. The defendant's only right is to be informed personally of all the activities of the investigators and to make statements "which could contribute to a clear disposition of the case."<sup>130</sup> According to commentators, among them Paraschivescu-Balaceanu and Alexa Augustin,<sup>131</sup> this new

<sup>125</sup> See No. 64.

<sup>126</sup> Art. 199.

<sup>127</sup> Sec. 242.

<sup>128</sup> Collection of Laws, Decrees, etc., March-April, 1956.

<sup>129</sup> Sec. 261.

<sup>130</sup> Secs. 264(1), 208.

<sup>131</sup> *Scanteia*, April 1, 1956.

provision amounts to an obligation on the part of the defendant "during the criminal investigation until the trial the defendant participates and assists in establishing the real truth."

The *Yugoslav* Code admits the defense during the pre-trial proceedings but with several restrictions on the rights of the defense counsel. The defense counsel has no right to talk to the defendant before he has been interrogated,<sup>132</sup> he may not be present during the interrogation of the defendant or witnesses and he may be denied the right of being present during the search and seizure proceedings.<sup>133</sup> Even after the defendant has been interrogated, the investigating official may forbid him to converse or correspond with his defense counsel if the official thinks that the interest of the investigation so requires.<sup>134</sup>

## 2. Defense at the Trial

Under the *Soviet* criminal procedure, defense counsel is admitted only at the trial. This is discussed *supra* (p. 291) and follows also from Sec. 239 of Code, which states that the question of admittance and appointment of a counsel for defense arises only after the case is committed for trial. There is also another essential limitation: the court may prohibit a duly accredited member of the Bar from taking the defense in a given criminal case. According to the express provisions of the RSFSR Code of Criminal Procedure, still in force:

*Sec. 382.* The *gubernia* court shall have the right not to admit as a counsel for defense any formally authorized person if it considers such person not appropriate for appearance in the court in the given case depending upon the substance of the special character of the case.<sup>135</sup>

The provisions of this Section frustrate the free choice of counsel for defense by the defendant, or at least limit it considerably. An additional handicap is presented by the practice of courts and legal aid offices to appoint counsel for defense not for the whole case but for each individual hearing.<sup>136</sup> Moreover, the criminal court may order to hear the case "without presence of the parties". The court must admit the counsel for defense only if it admits the prosecutor. (Sec. 381 quoted *infra* trial in absence of defendant).

The *Albanian* Code of Criminal Procedure of 1953 circumscribes the constitutional guarantee of the right of defense to the extent that

<sup>132</sup> Sec. 73, para. 1.

<sup>133</sup> Sec. 150.

<sup>134</sup> Sec. 73.

<sup>135</sup> Translated from the official text as of February 1, 1956.

<sup>136</sup> Cheltsov, *op cit.*, p. 114.

it is possible to try even the most serious cases without the participation of a legal counsel for the defense. The defendant may obtain a lawyer to plead his case in court during the trial only in cases in which a government attorney participates at the trial, when the defendant does not speak Albanian, and where there are conflicting interests among the parties. Special provisions of the Code<sup>137</sup> dealing with the trial of crimes of counterrevolutionary terrorists in a summary proceedings expressly exclude the participation of the counsel for the defense: "Trial of the case shall take place without the participation of the prosecution and the defense."<sup>138</sup> In political cases, which are tried by the military court, the court may refuse the lawyer who was the choice of the defendant.

In *Bulgaria*, under the present criminal procedure, a defense counsel is permitted during the trial. Moreover, an offender who is accused of having committed a crime punishable by death or deprivation of liberty for not less than 10 years, must be accompanied and assisted by the defense counsel.<sup>139</sup> If he does not have any, the court must appoint *ex officio* a defense attorney for the offender. However, as the practice reveals, lawyers are not willing to take over the defense especially of political offenders. And lawyers appointed by the court are rather representing the interests of the regime than that of their clients; for instance, the defense of the Traicho Kostov trial assisted the prosecution, and admitted the guilt of his client. His defense was reduced to the plea for a lenient sentence.<sup>140</sup>

In *Czechoslovakia*, the defendant may have a counsel to defend him during the trial. Defense by a legal counsel is even obligatory in certain cases, for instance, if the offense carries the death penalty or confinement for more than 5 years<sup>141</sup> and the like. At the trial and appellate proceedings, the defense counsel may participate at any official act at which the defendant is authorized to participate.<sup>142</sup>

Regardless of these extensive rights granted by the law to legal defense, in reality Czechoslovak legal counsels lack the freedom of action which is necessary for any effective legal representation. Should a legal counsel try to exercise his authority for the benefit of his client in a way which defies the government's policy, he might expose himself to disciplinary and/or even criminal prosecution, and consequently to the possibility of being deprived of his profession.

This situation was exposed as early as 1950 by the then President

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<sup>137</sup> Sec. 342-345.

<sup>138</sup> Sec. 343.

<sup>139</sup> Sec. 175.

<sup>140</sup> Ivan Sipkov, "Bulgarian Bar under Communist Government," *Federal Bar News*, (Washington, D.C.) Vol. 2., No. 5, February 1955: 137-139, 162.

<sup>141</sup> Secs. 181, 217.

<sup>142</sup> Sec. 38.

of the Republic, K. Gottwald who warned at the convention of People's Judges that -

...defense counsels induce their clients to tell lies, although the defense counsels are under the legal obligation to assist (the courts) in finding the real truth.

To this Dr. Cepicka, the then Minister of Justice, replied that "an excess over the limits of legal defense may constitute a criminal offense" and pointed out that the "screening of defense counsels has already been carried out by the reduction of their number." He also added:

...activities of legal counsels, advocates and notaries public must be put in the pillory...In criminal matters, especially the right to defense, is still abused for the benefit of individuals who have committed open treason... against the people. It shall be our duty to bring to light such conditions... as soon as possible...If the will of the people were followed the number of advocates would be very small.

...It would be incorrect to assume that legal defense and representation have no place in our people's administration of justice. Legal defense and representation are also required for its correct functioning but both must assist, not hamper, the application of law and the administration of justice.<sup>142a</sup>

Under the Code of Criminal Procedure in *Hungary*, a defense counsel can act at the trial either by a power of attorney, or by an official appointment by the court. In cases in which it is necessary officially to appoint a defense counsel, the president of the trial bench appoints the counsel from the attorneys registered in the list made for this purpose.<sup>143</sup>

The actual application of these provisions, however, has profoundly circumscribed the role of a defense counsel. A communist lawyer writes in the legal periodical of the Hungarian Lawyers Association, as follows:

...the possibility provided by law as an *exception* is applied in practice as the general rule, and the (general) rules provided by law prevail only in exceptional cases. The truth is that the defense counsel may communicate with his client at the very best, only after the investigation has been concluded; the files usually will be made accessible to him only after the preliminary hearing of the court; the appearance before the investigative authorities is possible only in exceptional cases and in the offices of certain prosecutors; and it is impossible before the police authorities.<sup>144</sup>

The ineffective formal defense the defendant receives in a Hungarian court is revealed by the records, officially published by the Hungarian

<sup>142a</sup> *Spravedlnost ve službách lidu a socialismu* (Justice in the Service of the People and of Socialism), 1950, pp. 13, 45, 51, 52, 77.

<sup>143</sup> *Bp. Sec. 50, para. 1.*

<sup>144</sup> György Bolgar, *A védelem szerepe a nyomozás és az előkészítés során* (Defense During Investigation and Preliminary Court Hearing), *Magyar Jog*, III, No. 6, 1956, 168, published by Magyar Jogász Szovetség, Budapest, Hungary.

Government, of the trials of Cardinal Mindszenty, Laszlo Rajk, etc. It appears from these cases that the defense counsel never made a substantial effort to defend his client by furnishing evidence, making objections, and arguing with the prosecution; instead, the defense counsel assisted the prosecution, admitted the guilt of his client, and asked for a lenient sentence.<sup>145</sup>

The same opinion is authoritatively expressed by Molnar, as follows:

...in the past we had legal provisions for procedure which, if properly enforced, would have prevented the illegalities. However, some of these provisions – often as a consequence of confidential instructions – were not enforced. For instance, provisions of the Code of Criminal Procedure protecting personal freedom were not properly enforced, and the right to defense often became a mere formality throughout the entire administration of justice.<sup>146</sup>

In *Poland* the rights of the accused to defense are identical in political and common crimes. No discrimination is provided by the rules of criminal procedure. There have been in force, however, provisions of the Law of June 27, 1950, on the organization of the Bar<sup>147</sup> which may cause some restrictions of the defense in political cases. It carries the following provision: "A lawyer shall not be allowed to give legal aid which would be incompatible with the general interest of the socialized economy."<sup>148</sup> Article 95 provides as follows: "Lawyers... shall be subject to disciplinary action for conduct infringing the interests of the working masses." Article 28: "The Bar shall co-operate with the courts and other authorities in safeguarding the legal order in People's Poland and shall be entrusted with giving legal assistance in conformity with the law and the interests of the working masses."

In *Romania*, during trial, defendant may have counsel to defend him. However, efficiency of defense is limited by the fact that counsel is not freely chosen. The attorney for the defense is appointed by the Collective Lawyers Office.<sup>149</sup>

The Bar has been purged of all of the old "capitalist" and "reactionary" members. The new members, who are selected "from the working class" and educated in one or two-year "law schools", work under the strict control of the Collective Lawyers Office and of the Council of the Bar and they must cooperate to "strengthen the people's legality." Lawyers are also subject to discipline and penal responsibili-

<sup>145</sup> *The Trial of Jozsef Mindszenty* (Budapest: Hungarian State Publishing House, 1949) and *László Rajk and His Accomplices Before the People's Court* (Budapest: 1949).

<sup>146</sup> *Szabad Nép* XIV, No. 177, June 26, 1956.

<sup>147</sup> *Dz.U.* 1950, No. 30, Law No. 275.

<sup>148</sup> Art. 53, sec. 2.

<sup>149</sup> Decree No. 39 of 1950 and Decree No. 281 of 1954; Collection of Laws, Decrees, etc., July, August, 1954.



ty when "guilty of attitudes or acts which could prove hostile to the regime of the people's democracy."<sup>150</sup>

In practice, however, counsel for the defense joins the prosecuting attorney in the incrimination of the defendant; at most, the plea is limited to "the prisoner admits his guilt and awaits just punishment", and counsel asks for consideration of extenuating circumstances.<sup>151</sup>

Under the *Yugoslav* code, no particular restrictions are imposed on the rights of a defense counsel during trial.

## D. Confession

### 1. Soviet Union

The provisions of the *Soviet Union* codes never stated that confession is the queen of evidence,<sup>152</sup> nor was it expounded in treatises by Soviet scholars. Nevertheless, a student of officially published records of Soviet major trials of Soviet dignitaries who fell in disgrace and of foreigners accused of espionage is struck by the fact that confession is the only evidence on which the defendant's guilt has been founded. If the confession is deleted, there remains no evidence, not only of the guilt, but even of the incriminating facts.

That this is true of many trials was frankly recognized by Khrushchev in his speech in February 1956 (see quotations below). Confession is the only evidence of guilt in the cases of Beria and Bagirov.<sup>153</sup>

This extraordinary significance of confession in Soviet trials is especially unexpected because in general the Soviets took the Russian Imperial and continental European point of view that confession is not equal to the plea of guilty in Anglo-American court procedure. Confession has no formal procedural meaning; it does not relieve the prosecution from adducing evidence and the court from evaluating it. It does not authorize the court to proceed directly to sentencing. The Soviet court, like any European court, must give an over-all evaluation of all the facts in the case, and may acquit the defendant who confessed.<sup>154</sup>

In confessing, the defendant in the continental court, and for that matter also in the Soviet court, merely acknowledges the correctness

<sup>150</sup> Secs. 1 and 43 of Decrees No. 281 of 1954 and Sec. 48 of Decree No. 39 of 1950.

<sup>151</sup> Examples: *Trial of the Group of Plotters, Spies and Saboteurs*, Alex. Pop and others, Bucharest, 1949; *Trial of the Group of Spies and Traitors in the Service of Imperialist Espionage*, V. Ciobanu and others, Bucharest, 1950.

<sup>152</sup> In connection with the discussions in the Sections D (Confession), E (Fabricated Testimony and Cases) and F (Suspicion Tantamount to Guilt).

<sup>153</sup> See report on these cases in the book, end of Part Two, Administration of Justice, *Soviet Union*.

<sup>154</sup> Sec. 282, Code of Criminal Procedure.

of the alleged facts and recounts his deed but does not relinquish his defense, and does not agree that the court proceed immediately to the pronouncement of the penalty.

Under these circumstances confession in Soviet courts did not relieve the court from taking all other available evidence, and, in fact, the records in the major Soviet trials show that the Soviet courts proceeded in this manner. What singles out the Soviet procedure is the fact that no corroborative evidence of any cogency was produced and that the pronouncement of guilt has been based only upon confession.

Vyshinsky in his monograph on evidence in Soviet law took an evasive stand. On the one hand he is not prepared to receive bluntly the medieval point of view that confession is the queen of evidence, "the full proof of guilt". Likewise, other Soviet writers, especially those of the post-Stalin era, consider confession the kind of evidence that must be corroborated with another kind.<sup>155</sup> The same is true of some decisions of the USSR Supreme Court.<sup>156</sup> Nevertheless, Vyshinsky warns against an abstract answer to the question detached from the circumstance of the case. Denying in general the independent force of confession, he insists on an exception for the cases of "conspiracy and criminal bands, in particular cases of anti-Soviet counter revolutionary activities."

In cases of plots and similar cases the question of attitude to the depositions by the accused must be raised especially cautiously whether we answer it by its recognition as a means of proof or deny such quality. With all cautiousness in the raising of this question one cannot deny that in cases of that nature this kind of evidence has independent significance.<sup>157</sup>

In the last edition (1950) Vyshinsky is more outspoken:

In such cases it is also necessary to verify carefully all circumstances of the case, which verification checks upon the statements of the defendant. But the statements of the accused in the cases of that kind acquire the character and significance of basic evidence, most important and conclusive evidence.<sup>158</sup>

These and similar statements by Vyshinsky were understood by Soviet lawyers as a justification of confession as a queen of evidence. At least Soviet professor Piontkovskii stated recently that, "He (Vyshinsky) attributed to the confession of an accused in cases of anti-Soviet crimes an independent significance as an evidence. This

<sup>155</sup> Strogovich, *Material'naiia istina i sudebnye dokazatel'stva v sovetskom ugolovnom protsesse* (Real truth and Evidence in Court in the Soviet Criminal Procedure), 1955, p. 344.

<sup>156</sup> Ruling of the Plenary Session of the USSR Supreme Court of February 3, 1944 in case of Anachko quoted in Strogovich, *op. cit.*, p. 344, and also *Sbornik postanovlenii plenuma i opredelenii kollegii verkhovngo suda SSSR*, 1944.

<sup>157</sup> Vyshinsky, *Teoriia sudebnykh dokazatel'stv v sovetskom prave* (Theory of Evidence in Soviet Law), 1946, pp. 209-210, 3rd ed. 1950, pp. 264-265.

<sup>158</sup> Vyshinsky, *op. cit.*, p. 264.

oriented the investigative and judicial agencies in an obviously wrong way, it would also direct the investigation to a wrong track and created the possibility of rendering unfounded sentences.<sup>159</sup>

The recent discussion in the Soviet legal press of the role of confession in connection with the planned reform is another indirect indication that an undue stress was attached to the confession in Soviet practice.

No Soviet law has been made public allowing the use of physical pressure to make suspect confess or to obtain the desired testimony from witness. On the contrary, the Code of Criminal Procedure (Sec. 136) states "the investigator shall not have the right to seek testimony or confession by the use of violence, treats and other similar methods." However, these provisions were not allowed or enforced.

a) At the 20th Congress of the Communist Party, Khrushchev revealed continuous and numerous departures from this principle. Torture was directly ordered by high Soviet officials and Stalin himself. In the first place Khrushchev read the following coded telegram sent by Stalin in the name of the Central Committee of the Communist Party to the People's Commissariat for the Interior and its agencies on January 20, 1939:

The Central Committee of the All Union Communist Party (Bolsheviks) explains that the application of methods of physical pressure in NKVD practice is permissible from 1937 on in accordance with permission of the Central Committee of the All-Union Communist Party (Bolsheviks) . . . It is known that all bourgeois intelligence services use methods of physical influence against the representatives of the Socialist proletariat and that they use them in their most scandalous forms. The question arises as to why the Socialist intelligence service should be more humanitarian toward the mad agents of the bourgeoisie, toward the deadly enemies of the working class and of the Kolkhoz workers. The Central Committee of the All-Union Communist Party (Bolsheviks) considers that physical pressure should still be used obligatorily, as an exception applicable to known and obstinate enemies of the people, as a method both justiciable and appropriate.<sup>160</sup>

b) Personal instructions by Stalin were no less definite:

Stalin personally called the investigative judge (in Moscow, doctor's case of 1953), gave him instructions, advised on which investigative methods should be used; these methods were simple – beat and once again beat.<sup>161</sup>

When we examined this "case" after Stalin's death, we found it to be fabricated from beginning to end.<sup>162</sup>

c) Khrushchev further related many instances of the use of torture:

Eikhe (former alternate member of the Politbureau) was forced under torture

<sup>159</sup> *Prontkovskii*, "O nekotorykh voprosakh pravovoi nauki" (Concerning some questions of legal science), *Izvestiia*, March 1, 1957, p. 2.

<sup>160</sup> Khrushchev, *op. cit.*, p. 26.

<sup>161</sup> *Ibid.*, p. 41.

<sup>162</sup> *Ibid.*

to sign ahead of time a protocol of his confession prepared by the investigating judges in which he and several other eminent Party workers were accused of anti-Soviet activities.<sup>163</sup>

In a letter which he sent to Stalin on October 27, 1939 Eikhe stated:

My whole case is a typical example of provocation, slander and violation of elementary basis of revolutionary legality.<sup>164</sup>

and concerning his confession of counterrevolutionary activities he added:

The case is as follows: not being able to suffer the torture to which I was submitted by Ushakov and Nikolayev – and specially by the first one – who utilized the knowledge that my broken ribs have not properly mended and have caused me great pain – I have been forced to accuse myself and others.

The majority of my confession was suggested or dictated by Ushakov, and the remainder is my reconstruction of NKVD materials from Western Siberia for which I assumed responsibility.<sup>165</sup>

The grievances of Kedrov against the use of torture, as reported by Khrushchev, were no less impressive:

Here is what the old Communist, Comrade Kedrov, wrote to the Central Committee through Comrade Andreyev (Comrade Andreyev was then a Central Committee secretary):

I am calling to you for help from a gloomy cell of the Lafortorsky prison... Today I, a 62 year old man, am being threatened by the investigating judge with more severe, cruel and degrading methods of physical pressure. They (the judges) are no longer capable of becoming aware of their error and of recognizing that their handling of my case is illegal and impermissible. They try to justify their actions by picturing me as a hardened and raving enemy and are demanding increased repressions. My torture has reached the extreme. My health is broken, my strength and energy are waning, the end is drawing near.<sup>166</sup>

These cases were not exceptional. The use of physical pressure was so general that Khrushchev could state:

When Stalin said that one (person) or another should be arrested it was necessary to accept on faith that he was "an enemy of the people". Meanwhile Beria's gang, which ran the organs of state security, outdid itself in proving the guilt of the arrested and the truth of the materials which it falsified. And what proofs were offered: The confessions of the arrested, and the investigative judges accepted these "Confessions". And how is it possible that a person confesses to crimes, which he has not committed? Only in one way – because of the application of physical methods of pressuring him, tortures, bringing him to a state of unconsciousness, deprivation of his judgment, taking away of his dignity.<sup>167</sup>

<sup>163</sup> *Ibid.*, p. 19.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*, p. 20.

<sup>166</sup> *Ibid.*, p. 43-44.

<sup>167</sup> *Ibid.*, p. 25.

d) Officials who used tortures were of the firm belief that there was nothing illegal in it, so well was the practice of torture established and so sure were they that it met with the approval of their superiors.

Not long ago – only several days before the present Congress – we called to the Central Committee Presidium session and interrogated the investigating judge Rodos, who in his time investigated and interrogated Kossior, Chubar, and Kosaryev... At the Central Committee Presidium session he told us: "I was told that Kossior and Chubar were people's enemies and for this reason I, as investigating judge, *had to make them confess that they are enemies.*"<sup>168</sup> (Italics supplied). He could do this only through long torture which he did receiving detailed instructions from Beria. We must say that at the Central Committee Presidium session he cynically declared: "I thought that I was executing the orders of the Party."<sup>169</sup>

## 2. People's Republics

A repercussion of this Soviet attitude with respect to confession as queen of evidence is to be found in all countries included in Soviet orbit.

A recent piece of *Bulgarian* legislation confirms that confession after the pattern of Soviet law was treated in Bulgaria as substituted for all other evidence. By the Law of November 9, 1956<sup>170</sup> a new paragraph 2 was added to Section 41<sup>171</sup> of the Bulgarian Code of Criminal Procedure as follows:

Confession by the accused shall not relieve the agencies concerned from the duty to collect also other evidence in the case.

An article in the official legal periodical makes it plain that this was not the practice of agencies administering justice thus far.

In judicial proceedings in the past there were cases in which the sentences of the court were based exclusively upon the confession made by the defendant without being supported by other evidence.<sup>172</sup>

In *Czechoslovakia*, it became a matter of public knowledge that the political trials, especially the trial against Rudolf Slansky, the former secretary of the Czechoslovak Communist Party, and his 13 co-defendants, were staged for the purpose of political terror, and that the conviction of the defendants was based primarily on confessions which were forced from the defendants by some illegal means, such as physical torture. It was also obvious that much of the so called factual

<sup>168</sup> *Ibid.*, p. 26.

<sup>169</sup> *Ibid.*, p. 27.

<sup>170</sup> *IPNS* No. 90, November 9, 1956.

<sup>171</sup> The first paragraph of Section 4 reads: "The accused should not be forced to make a confession with the promise, intimidation, or any other compulsory measure."

<sup>172</sup> "Sotsialisticheskaya zakonnost v svetlinata na resheniata na 20 Kongres KPSS", *Sotsialisticheskovo pravo*, No. 6, 1956, p. 6.

evidence was faked.<sup>173</sup> In this connection, the declaration of the Prime Minister Vilem Siroky made before the Central Committee of the Czechoslovak Communist Party at its meeting of April 19, 1956 is very significant. He said:

In fact, our Code of Criminal Procedure still admits such a concept of justice by which the confession of the defendant is sufficient for a decision concerning his guilt. . . In the past, security agencies, government attorney's office, and judicial agencies considered that their task consisted of one thing: to attain at any cost, the confession of any citizen who was suspected or accused of some criminal activity.<sup>174</sup>

The *Hungarian* Code of Criminal Procedure provides that confession of the defendant itself does not relieve the court from the consideration of other evidence.<sup>175</sup> In fact, a great number of sentences were based on the defendant's confession, without any other evidence. The Attorney General admitted in his report:

An exaggerated significance was attached in the past to the mere confession. We must examine with the greatest criticism the old, but wrong principle: *confessio est regina probatorum*. We must point out that confession is not at all the queen of evidences, but only one evidence which must be considered by the court.<sup>176</sup>

On the other hand, although the Code of Criminal Procedure provides that the accused must not be forced by violence, threatening or any other means of coercing to confession,<sup>177</sup> the Attorney General of the People's Republic, Gyorgy Non, in his report to the Hungarian Parliament, admits:

Many of the supervisors, leaders and officers of the state security authority (AVH, secret police) misused their authority, because of the lack of proper control. Using moral and physical force in a line of the cases they made false and fabricated evidences, coerced untrue confessions.<sup>178</sup>

In *Poland* the methods of the Security Police for obtaining confessions were revealed for the first time during the Poznan trials, held in September and October, 1956. At these trials the defendants testified,

<sup>173</sup> "Czech Premier Blames Beria for Tito Slander," *New York Times*, May 23, 1956, p. 11. Prime Minister Siroky declared that the "charges of Titoism, made against R. Slansky in the Prague trial, were based on falsified documents produced by L. Beria."

<sup>174</sup> "Leninskou cestou k novemu rezmachu a novym vitezstvim," *Rude Pravo*, May 12, 1956. On May 10, 1956, Artur London, one of the 14 co-defendants in the Slansky trial in Czechoslovakia, who was sentenced to life imprisonment, made public the statement that "torture was used in 1952 to make him confess to treason and espionage. "Torture Used, Rehabilitated Czech Says," *Washington Post and Times Herald*, May 11, 1956, p. 8.

<sup>175</sup> *Bp. Sec. 4, para. 2.*

<sup>176</sup> Gyorgy Non, Attorney General, Report to the Hungarian Parliament from the session of July 31, 1956, p. 1443.

<sup>177</sup> *Bp. Sec. 94, para. 4.*

<sup>178</sup> Minutes of the Hungarian Parliament from the session of July 31, 1956, p. 1434.

and it was admitted by the Government Attorney, that during investigations the Security Police beat and kicked them, dragged them by the hair, beat their faces with rods and smashed them into walls.<sup>179</sup> The most striking methods of torturing suspects by the police were presented at the VIIIth Plenary Session of the Polish United Workers' Party (Communist) held in October 1956. One of the members of the Presidium of the Central Party Control Board revealed that many innocent people were detained by the police.

People were caught in the streets and after seven days of investigation, unfit to live, were sent to a lunatic asylum in Tworki. People hid away in the Tworki lunatic asylum in order to save themselves from being taken by the Security Police. They pretended to be mad. In a panic even decent people escaped abroad to avoid our system... This was a method and of such methods a system was established... The whole city knew that people were being murdered, the whole city knew that there were prison cells where people remained for (as long as) three weeks ankle deep in human excrement... These methods were applied by the top ranking officers of the Security Police, and they were followed by their subordinates... The whole city knew that a former director of the Investigation Division of the Ministry of Security Police (Rozanski) personally tore off people's nails, poured water over them and ordered them to stand outdoors in the freezing cold.<sup>180</sup>

The discussion at the VIIIth Plenary Session of the Party revealed that the Party supervised proceedings in criminal matters through its Politburo Commission for Security Matters. The Chief of the Security Police<sup>181</sup> was one of the members of the supreme authorities of the Party. The Commission also issued directives as to the method of proceedings in individual cases of greater importance to the Party. This Commission received instruction from the Soviet NKVD directly or indirectly through its agents placed in the government administration under the disguise of "advisers". At the VIIIth Plenary Session of the Party it was expressly admitted by the Chief of the Commission for Security Matters that Beria, the head of the Soviet NKVD, and even Stalin himself exerted pressure upon him in individual criminal cases.<sup>182</sup> This system resulted in "manufacturing evidence through a falsification of facts", and the methods applied by the police during pre-trial investigations presented above.<sup>183</sup> The merest suggestion of "espionage" was enough to touch off extensive secret police arrests, and later, "with the help of well known methods, false confessions were obtained".<sup>184</sup>

<sup>179</sup> *New York Times*, September 29, 30 and October 6, 1956.

<sup>180</sup> Leon Wudzki, *Nowe Drogi*, No. 10, (1956), p. 60 and 61.

<sup>181</sup> Stanislaw Radkiewicz.

<sup>182</sup> Jakub Berman.

<sup>183</sup> *Nowe Drogi*, No. 10, 1956, p. 85-95.

<sup>184</sup> Report presented at the Judiciary Committee of the Parliament by the Attorney General, Minister of Justice, Chairman of the Supreme Military Court and Military Prosecutor, *New York Times*, October 15, 1956 and *Ekspres Wieczorny*, November 23, 1956.

### E. Fabricated Testimony and Cases

The law of testimony in the *Soviet Union* and the people's republics as well is not strictly followed by the investigating authorities in criminal cases. In many cases they were commissioned with preparing evidence against people, who, for some reason, were condemned by higher authorities. In many instances, they even prepared the sentences in advance. This practice of obviously fabricated cases and testimonies of witnesses prepared in advance was widely commented by Khrushchev:

Now when the cases of some of these so called 'spies' and 'saboteurs' were examined it was found that all their cases were fabricated. Confessions of guilt of many arrested and charged with enemy activity were gained with the help of cruel and inhuman tortures.<sup>185</sup>

The vicious practice was condoned of having the NKVD prepare lists of persons whose cases were under the jurisdiction of the Military Collegium and whose sentences were prepared in advance. Yezhov would send these lists to Stalin personally for his approval of the proposed punishment. In 1937-38, 383 such lists containing the names of many thousands of Party, Soviet, Komsomol, Army and economic workers were sent to Stalin. He approved these lists.

A large part of these cases is being reviewed now and a great part of them is being voided because they were baseless and falsified. Suffice it to say that from 1954 to the present time the Military Collegium of the Supreme Court has rehabilitated 7,679 persons, many of whom were rehabilitated posthumously.<sup>186</sup>

On February 2, 1940, Eikhe (alternate member of the Politbureau) was brought before the court. There he did not confess his guilt but said the following:

"In all the so called confessions of mine there is not one letter written by me with the exception of my signatures under the protocolls which were forced from me. I have made my confession under pressure from the investigative judge who from the time of my arrest tormented me..." On February 4, Eikhe was shot... It has been definitely established now that Eikhe's case was fabricated; he has been posthumously rehabilitated.<sup>187</sup>

During the examination in 1955 of the Komarov case Rozenblum revealed the following facts; when Rozenblum was arrested in 1937 he was subjected to terrible torture during which he was ordered to confess false information concerning himself and other persons. He was then brought to the office of Zakovsky, who offered him freedom on condition that he make before the court a false confession fabricated in 1937 by NKVD concerning "sabotage, espionage and diversion in a terroristic center in Leningrad..."

The case of the Leningrad Center has to be built solidly and for this reason witnesses are needed...

"You, yourself," said Zakovsky, "will not need to invent anything. The NKVD will prepare for you a ready outline for every branch of the center;

<sup>185</sup> Khrushchev, *op. cit.*, p. 19.

<sup>186</sup> *Ibid.*, p. 24.

<sup>187</sup> *Ibid.*, p. 21.



you will have to study it carefully and to remember well all questions and answers which the court may ask."<sup>188</sup>

Available material shows that this practice of pre-fabricated testimony and cases was followed also in the people's republics. For instance in *Poland*, at the VIIIth Plenary Session of the Party it was expressly admitted by the Chief of the Commission for Security Matters that Beria, the head of the Soviet NKVD, and even Stalin himself exerted pressure upon him in individual criminal cases. This system resulted in "manufacturing evidence through the falsification of facts", and the methods applied by the police during pre-trial investigations presented above.<sup>189</sup> These methods were based on the theory that "hostile agencies were assumed in advance to be at work in every sphere of political and economic life." The most striking example of this method was the execution of 15 high ranking Army, Air Force and Navy officers in 1952. They were linked with the case of Major General Stanislaw Tatar, Chief of Operations of the Polish war-time underground army, who was sentenced to life imprisonment for espionage.

#### F. Suspicion Tantamount to Guilt

In the *Soviet Union* social origin, past activities or departure from the Party line were and are considered, in many cases, sufficient grounds for branding a person as an "enemy of the people", and thereby making him liable to trial and conviction. This brand was equal to a condemnation. Speaking about the use of this qualification, Khrushchev said:

Stalin originated the concept 'enemy of the people'. This term automatically rendered it unnecessary for the ideological errors of a man or of men engaged in a controversy (to) be proven; this term made possible the usage of the most cruel repression, violating all norms of revolutionary legality, against anyone who in any way disagreed with Stalin, against those who were only suspected of hostile intent, against those who had bad reputations. This concept, 'enemy of the people', actually eliminated the possibility of any kind of ideological fight or the making known of one's views on this or that issue, even those of a practical character. In the main, and in actuality, the only proof of guilt used, against all norms of current legal science, was that of the 'confession' of the accused himself; and, as subsequent probing proved, confessions were acquired through physical pressures against the accused.<sup>190</sup>

According to Khrushchev, Dr. Timashu wrote the letter to Stalin in which she declared that doctors were employing improper methods of medical treatment:

Such a letter was sufficient for Stalin to reach an immediate conclusion that

<sup>188</sup> *Ibid.*, p. 22, 23.

<sup>189</sup> See discussions in Section D (Confession), pp. 303—304.

<sup>190</sup> Khrushchev, *op. cit.*, p. 7.

there were doctor-plotters in the Soviet Union. He issued orders to arrest a group of eminent Soviet medical specialists. He personally issued advice on the conduct of the investigation and the method of interrogating the arrested persons. He said that the academician Vinogradov should be put in chains, another person should be beaten. Present at this Congress as a delegate, Comrade Ignatiev is the former Minister of State Security. Stalin told him curtly: "If you do not obtain confessions from the doctors we will shorten you by a head." (pp. 40-41).<sup>191</sup>

The Soviet practice that suspicion based on social status is tantamount to presumption of guilt is also followed in the people's democracies. Under the new concept in their criminal codes of a crime as a "socially dangerous act", all persons not actually supporting or even opposing the regime in power are branded as "kulaks", "capitalists", "Fascists", and "reactionists" and are therefore considered as real and potential "enemies of the people".<sup>192</sup>

### G. Secret Trials

*Soviet* law allows secret trials on numerous occasions. Although Sec. 103 of the USSR Constitution and the Judiciary Act of 1938 state that "cases in all USSR courts shall be heard in public" this statement is followed by the rule "except as provided by law", and Soviet law is generous in providing for cases to be tried secretly. In the first place, the whole rule applies only to cases tried "in courts", consequently does not apply to cases tried by agencies which are not courts, i.e., agencies of the MVD and KGB (former NKVD and Cheka). Secondly, the military courts which until recently also tried civilians for several crimes may and do conduct their trials in secret. This is especially true of trials by the Court Martial Division of the Supreme Court. The trial of General Tukhachevsky and other generals in 1937 is an example.

In *Poland*, during the first years of the regime, special criminal divisions were established in each district court to try cases arising out of the decree of November 16, 1945.<sup>193</sup> In addition, in 1950 special secret criminal division was set up within the IVth Division of the Provincial Court in Warsaw as well as in Supreme Court upon the motion of the Deputy Attorney. It was recently revealed that the division of the Supreme Court reviewed 506 cases in which 396 persons were sentenced. Many cases in which death sentences were rendered were not entered in the court files and there were many difficulties to find them.<sup>194</sup>

<sup>191</sup> *Ibid.*, p. 40-41.

<sup>192</sup> The problem is dealt with in more details under Sections D (Confession).

<sup>193</sup> Decree on Crimes Particularly dangerous During the Period of State Reconstruction.

<sup>194</sup> *Zycie Warszawy*, November 1, 1956; *Prawo i Zycie*, No. 17, 1956, p. 5.

According to recent reports of the Parliamentary Judiciary Committee, secret trials in criminal cases mainly in the Mokotow prison (in Warsaw) have been organized by the Security Police. In this way, between 1950-1954, 628 persons were sentenced. The Committee further revealed that these trials were conducted "in a manner of brutal violation of the principles of justice. They were strictly secret and the accused persons were deprived of the right to choose a defense counsel."<sup>195</sup>

Also the *Hungarian* code of criminal procedure authorizes the court to exclude the public from a trial if the preservation of a state secret, military secret, or official secret is necessary. Pronouncing the sentence is "generally" public, but delivering the decisions secretly is not forbidden. The abuses with the secrecy were so frequent that the Attorney General found it advisable to report:

... the Minister of Justice, the Minister of the Interior, the Minister of Defense and the Attorney General will determine by a joint instruction those legal conditions which may assure the rights of the defense counsel also in those cases where the law permits a secret trial in the interest of the state secret and moral.<sup>196</sup>

#### H. Trials in Absence of Defendant

A special feature of *Soviet* criminal procedure is *trial without presence of parties*. "Parties" according to the Code of Criminal Procedure are the public prosecutor, the defendant and his counsel. From 1934 to 1956 there were instances in which the trial without parties was mandatory upon the court. Cases involving economic subversion, acts of terrorism against Soviet officials, and sabotage<sup>197</sup> (RSFSR Criminal code, Secs. 58-7, 58-8, 58-9) had to be tried in this manner. A sentence to death had to be executed at once and no appeal was allowed.<sup>198</sup> These two laws were repealed on April 19, 1956. However, there is still on the statute books the provision of the Code of Criminal Procedure which leaves it up to the court whether to hear a criminal case with or without parties. The only change introduced by the repeal of the laws of 1934 is that there are no mandatory cases which must be tried without parties. Sec. 381 of the RSFSR Code of Criminal Procedure provides as follows:

Sec. 381. Admission of prosecution and defense at the trial in the *gubernia* court shall not be mandatory and shall be decided in each case in an executive

<sup>195</sup> *Nowy Swiat*, New York, July 17, 1957.

<sup>196</sup> Gyorgy Non, Attorney General, Report to the Hungarian Parliament from the Session of July 31, 1956, p. 1443.

<sup>197</sup> RSFSR Criminal Code, Secs. 58-7, 58-8, 58-9.

<sup>198</sup> Acts of April 19, 1934, and September 14, 1937, USSR Laws 1934, Sec. 454, 1937, text 226.

session of the court depending upon the complexity of the case, upon the extent to which the crime is proven, and upon the special political or public interest in the case. The *gubernia* court must admit or appoint the counsel for defense if the prosecutor was admitted.

The renouncement of counsel by the defendant shall not prevent the admission of the prosecutor.

## I. Sentence

### 1. Sentences by Order

Another special feature of the real Soviet criminal procedure is sentencing by order and "ex post facto". To this point, Khrushchev reported:

The vicious practice was condoned of having the NKVD prepare lists of persons whose cases were under the jurisdiction of the Military Collegium and whose sentences were prepared in advance. Yezhov would send these lists to Stalin personally for his approval of the proposed punishment. In 1937-1938, 383 such lists containing the names of many thousands of Party, Soviet, Komsomol, Army and economic workers were sent to Stalin. He approved these lists.<sup>199</sup>

Available material published in *Polish* official legal periodicals reveals the same practice of sentencing by order. Thus, during the mass arrests in Poland ordered on ground of directives of the Party especially against the peasants for non-delivery of agricultural products to the government, the judges were called by the Party secretaries and instructed as to the judgments to be rendered by them. Even the extent of punishment was directed by the secretaries in individual cases before trial.<sup>200</sup>

### 2. Sentences "ex post facto"

The practice of passing sentences "ex post facto" was revealed by Khrushchev in his speech of February 25, 1956. In one place he stated:

I wish to recall Beria's bestial disposition of the cases of Kedrov, Golubev, and Golubev's adopted mother, Baturina, persons who wished to inform the Central Committee concerning Beria's treacherous activity. They were shot without any trial and the sentence was passed ex-post-facto, after the execution. (p. 43).

In this connection, it should be pointed out here, that, in general, the *Soviet* Criminal Code and Soviet writers refrain from declaring the retroactivity of the Soviet criminal law. Nevertheless, certain

<sup>199</sup> Khrushchev, *op. cit.*, p. 24.

<sup>200</sup> *Prawo i Zycie*, No. 16 (1956), p. 3 and 6.

provisions of the Code and some later individual laws<sup>201</sup> ordain the application of the death penalty to acts committed before the Code of the law took effect.

In the Code itself Sec. 58 provides as follows:

Sec. 58-13. Any act or active struggle against the working class or the revolutionary movement carried on by a person in a responsible or secret post (undercover agent) under the Czarist regime or with any counterrevolutionary government during the period of the civil war, shall be punished by the measure of social defense specified in Sec. 58-2 of the Code (death penalty by shooting).

The last known case of the application of this section was that of Beria, former Chief of Secret Police under Stalin, who was convicted in December 1953, under this section of actively fighting the revolutionary movement, being connected with an agent of one of the Transcaucasian governments during the Civil War.<sup>202</sup>

With respect to the Baltic States, *Estonia*, *Latvia*, and *Lithuania*, which were annexed by the Soviet Union in 1940 and incorporated as constituent republics, the Criminal Code of the RSFSR went into application in these countries with retroactive effect. The principle of *nullum crimen, nulla poena sine lege* was disregarded completely and acts committed prior to the establishment of Soviet regime in the new Soviet republics were made subject to prosecution under Soviet criminal laws. Section 3 of the Edict of the Federal Presidium of November 6, 1940<sup>203</sup> reads:

Sec. 3. Prosecution of offences, committed in Lithuania, Latvia and Estonia prior to the establishment of the Soviet regime there, as well as final disposal and channelling of cases in which investigation is pending and in cases committed for trial, which were instituted by proper bodies in Lithuania, Latvia, and Estonia, shall be treated in accordance with the codes of the RSFSR.

On grounds of these provisions thousands of Estonian, Latvian and Lithuanians were prosecuted and harsh punishments were inflicted. The same edict further provided that criminal judgments rendered prior to the establishment of the Soviet regime, but not yet executed, should be reexamined, in the light of the Soviet criminal law and all pending cases and investigations were to be completed also according to Soviet law.

<sup>201</sup> Among individual laws the following may be mentioned: Resolution of the Central Executive Committee of the USSR of November 21, 1929 (USSR Laws 1929, No. 76, text 732).

<sup>202</sup> *Pravda* and *Izvestiia* of December 24, 1953; also V. Gsovski, *The Concept of a Totalitarian State* (The Hague, 1955), p. 61.

<sup>203</sup> *Vedomosti* 1940, No. 46.

## CIVIL PROCEDURE

### A. Preliminary

Civil procedure of the Soviet type is akin to that in other civil law countries. For a time, some Soviet Russian jurists regarded their code of civil procedure as a direct borrowing from capitalist law. Since 1936, however, this view has been considered erroneous by leading Soviet authorities. They insist that Soviet civil procedure is socialistic in nature because "its source is the dictatorship of the proletariat and its objective is to protect the socialist system of economy and the new socialist social relations which manifest the victory of socialism."<sup>204</sup> An institutional study of the technicalities of Soviet civil procedure, however, discloses a framework similar to that of any European country, and there appear only individual points on which Soviet law is different. Nevertheless, the similarity in details is overbalanced by differences in the fundamental principles of the administration of justice and in the position of the Soviet court. Soviet civil procedure is like a new building erected with old bricks.

### B. General Powers of the Court

#### 1. Historical

In contrast to a criminal court, the European civil court was more like a court of American law; that is, it was an umpire whose initiative in collecting evidence was reduced to a minimum. Two maxims governed most of the European codes of civil procedure. The first was *iudex ne procedat ex officio* (a civil judge should not act on his own initiative); and accordingly, his attitude toward the proceedings was defined by the principle, *da mihi factum dabo tibi jus* (i.e., framing of the facts was left to the litigants while the role of the judge was restricted to the application of the law). Thus the Imperial Russian Code of Civil Procedure of 1864 stated:

A court shall in no case collect evidence or information itself but shall base its decisions exclusively upon the evidence presented by the parties.<sup>205</sup>

The court was, however, authorized to draw the attention of the parties to the dearth of evidence in support of a material circumstance and to offer them an opportunity to fill this gap.<sup>206</sup>

In contrast to this, the old Prussian doctrine of judicial investigation, stated in the Prussian Judicial Ordinance of 1793, has been revided in the Nineteenth and Twentieth Centuries and has found its

<sup>204</sup> *Grazhdanski Protsess, Uchebnik* (Civil Procedure, Textbook), 1938, p. 8.

<sup>205</sup> Secs. 367 and 82.

<sup>206</sup> Sec. 368.

way into the Austrian Code of 1895, the Hungarian Code of 1911, the Polish Code of 1932, and the Yugoslav Code of 1929. Under these codes, a civil court may order the presentation of evidence not offered by the parties, provided the court acquired knowledge of its existence from the record or from the pleadings of the parties, whether written or oral. Presentation of testimony and documents may not be ordered, however, against the protest of both parties.

## 2. Soviet Union

The *Soviet* code now in force assigns an active role to the civil court and grants it unrestricted power to order submission of evidence. The court is not confined to hearing pleadings and examining material submitted by litigants but must, by interrogation of the parties, see that all the essential facts of a case are clarified and supported by evidence.<sup>207</sup> The court decides at its own discretion whether to accept a litigant's renunciation of his rights or of his defense in court.<sup>208</sup> Therefore, the court, for instance, is not bound by the acknowledgment of a debt and the like.

All this shows what hazards a litigant runs in the Soviet civil court of today; as soon as he sets proceedings in motion they are out of his control.

## 3. People's Republics

In this respect, *Albanian*, *Bulgarian*,<sup>209</sup> and *Hungarian* courts enjoy the same general powers as the court of the Soviet Union, while in *Romania* the code expressly states that a judge may, in addition, order the submission of evidence even against the protests of the parties.<sup>210</sup> However, the Romanian code is silent on the question of whether a court has discretion in accepting a litigant's renunciation of his rights.<sup>211</sup>

In *Hungary* the acceptance of such a renunciation of rights which, according to the court's opinion, is contrary to the interests of the litigants, is prohibited even if the litigant insists on the renunciation after being informed of his rights and interests by the court.<sup>212</sup>

In *Czechoslovakia* the renunciation of a claim by a party is effective only if made in time, i.e., before the decision in re has become valid, and if the court has approved it; the approval shall be denied if it is contrary to the law or to public interest. Identical principles also

<sup>207</sup> Sec. 5.

<sup>208</sup> Sec. 2.

<sup>209</sup> Secs. 4, 127, 129.

<sup>210</sup> Secs. 129-130 and 114, para. 2; 8 *Justitia Noua* 1402 (1946).

<sup>211</sup> Secs. 246-247.

<sup>212</sup> Law No. III of 1952, as amended and published in consolidated text by Law No. VI of 1954, Sec. 4.

apply to the acknowledgement by a party of his opponent's claim; moreover, the court must not approve such an acknowledgement in proceedings regarding divorce or nullity of marriage, or a decision as to whether or not a marriage exists.<sup>213</sup>

As to renunciation of rights, the *Yugoslav* code departs completely from the Soviet ground and expressly allows a party to renounce his claim, to admit the claim of the other party, or to make a settlement, provided such an act does not violate mandatory provisions on the management of so-called "social (government) property", as well as other mandatory legislation.<sup>214</sup>

In *Poland* the court is also made responsible for the administration of justice "in accordance with the will and interests of the working people," and for its contribution "to the building up of Socialism."<sup>215</sup> As expounded by the Plenary Session of the Supreme Court this unrestricted power is given to the courts because "the state is interested in discovering the actual socio-economic relations forming the cause of actions." As a consequence, the court may not confine itself to pleadings made by the parties or by the acknowledgement of them by either party, and may ascertain such facts through investigation outside of a formal trial.<sup>216</sup> The acknowledgement by the defendant of the plaintiff's claim is, likewise, not binding upon the court.<sup>217</sup>

### C. Specific Powers of the Court

#### 1. Soviet Union

Besides the general powers to control the proceedings in a civil lawsuit, the *Soviet* court is also vested with a number of specific powers. Thus, the Soviet court may adjudicate in excess of the prayer for relief unless the amount of the claim is determined by contract or by rule of law.<sup>218</sup> Furthermore, it may, on its own motion, order the presentation of evidence not offered by a party<sup>219</sup> or of a document in particular.<sup>220</sup>

The Soviet Code of Civil Procedure does not mention the possibility of the termination of a litigation by settlement. It was not until 1928 that the RSFSR Supreme Court ruled that settlement is allowed

<sup>213</sup> Secs. 74-77, 153, 161, 177, 236.

<sup>214</sup> Sec. 3 of the Law of December 8, 1956.

<sup>215</sup> The rights and duties of the courts in the light of the resolutions of the III Plenum of the Central Committee of the Polish United Worker's Party, *Nowe Prawo*, No. 2, 1954, p. 5.

<sup>216</sup> Resolution passed by the Plenary Session of the Supreme Court on February 12, 1955, *Panstwo i Prawo*, No. 7-8, 1955, pp. 288-291.

<sup>217</sup> Arts. 216, sec. 2; 218 sec. 1; 238, sec. 1.

<sup>218</sup> Art. 218, sec. 2.

<sup>219</sup> Sec. 179.

<sup>220</sup> Secs. 118, 121.



at any stage of the proceedings, "provided that the settlement does not escape the supervision of the court and is verified by it".

There is no judgment on default under Soviet law, in the sense that the code expressly provides that failure to appear by either party on whom a summons has been served does not prevent a hearing on the merits and the rendition of a decision thereon.<sup>221</sup> But if both parties fail to appear without filing a motion that the case be heard in their absence, various consequences are provided in the codes of the different republics.

Any Soviet superior court may change the venue of a case to another lower court.<sup>222</sup> The RSFSR Supreme Court itself may assume jurisdiction in the case.<sup>223</sup>

## 2. People's Republics

In general, in regard to the specific powers of courts to direct the proceedings in civil cases, all the codes of the people's republics contain provisions similar to those of the Soviet code.

However, the right of the court to adjudicate in excess of the prayer for relief does not seem to be popular in these countries. It is denied to *Czechoslovak*, *Hungarian*<sup>224</sup> and *Yugoslav* courts.<sup>225</sup> In *Poland* the court as a rule, may not adjudicate in excess of the demand of the complaint. One exception to this rule is when the party to the litigation is either the State Treasury or an economic unit subject to government arbitration, and the amount of the claim was not established either in the contract or by special legislation. This exception also applies to claims deriving from the right to maintenance or alimony, labor relations or payment for damages resulting from an illicit act.<sup>226</sup> The *Romanian* and *Bulgarian* codes do not contain any provision giving the court the right to adjudicate *ultra petita* (in excess of the prayer for relief).

Termination of litigation by settlement is a common feature of the civil procedural law of people's republics. In *Albania*, as a rule, an attempt at settlement must always be made by the court.<sup>227</sup> Under the *Bulgarian* code, termination of litigation by settlement is possible but it must be approved by the court and "must not contradict the law and the rules of life of the socialist community."<sup>228</sup> In *Czechoslovakia* the parties may conclude a settlement of their claims either out of court or in proceedings, provided that the nature of the claim admits

<sup>221</sup> Sec. 140.

<sup>222</sup> Sec. 98.

<sup>223</sup> Sec. 32.

<sup>224</sup> Sec. 24.

<sup>225</sup> Pp., Sec. 215.

<sup>226</sup> Sec. 2.

<sup>227</sup> Art. 329.

<sup>228</sup> Sec. 4 of Order No. 2579 of the Ministry of Justice, G.Z. No. 102 of 1946.

the conclusion of the settlement, and that the settlement has been approved by the court as lawful and contrary to public interests.<sup>229</sup> In *Polish* law this is allowed at any stage of the proceedings but the settlement "must be accepted by the court."<sup>230</sup> The same is true under the *Yugoslav* code which provides this possibility, but under the condition that the settlement does not violate mandatory provisions of the law.<sup>231</sup> The *Hungarian* code requires the approval of the court in case of settlement; the court, however, may refuse if it contradicts the law.<sup>232</sup> In *Romania*, settlement is provided by the code with the specific provision that if this is granted there is no right of appeal.

Under the codes of the majority of the people's republics a judgment on default is always possible.<sup>233</sup> *Hungary*, follows the Soviet pattern and allows no judgment by default. However, if both parties or the plaintiff fail to appear on the first date set for the trial the court dismisses the case without prejudice. If the defendant fails to appear the court proceeds on the merits of the case.<sup>234</sup> The *Romanian* Code of Civil Procedure now in force, unlike the Code of 1900, does not contain provisions concerning this procedural rule.

In *Albania* a higher court may always assume jurisdiction from, or assign it to, a lower court. The *Bulgarian* code expressly provides that the assumption of jurisdiction by the higher court is allowed<sup>235</sup> but is silent on the question of the assignment of a case to another lower court. In *Czechoslovakia* the higher court (i.e., the regional courts or the Supreme Court) may delegate the venue in certain cases and this does not effect the jurisdictional level.<sup>236</sup> The Supreme Court may, upon a motion of its president or the attorney general, assign a case to another court of the same jurisdictional level or to a higher court, or assume the jurisdiction of the subordinate appellate court (a regional court) and decide the case under appeal itself. Under the *Polish* law no change of venue, assumption of jurisdiction, or assignment of a case to another lower court is possible. In *Romania* the right to assume jurisdiction over cases being tried by lower courts was created by Art. 9 of Law No. 5 of 1952 and was included in the Code of Civil Procedure by Decree No. 132 of June 19, 1952. However, it was not retained by Law No. 2 of April 6, 1956, which amended the law of 1952. In *Yugoslavia* these questions are regulated somewhat differently. The Yugoslav code permits only a supreme court (of a republic) to

<sup>229</sup> Secs. 109 and 125.

<sup>230</sup> Secs. 40, 75, 76.

<sup>231</sup> Arts. 105 and 453.

<sup>232</sup> Secs. 310.

<sup>233</sup> *Pp.*, Sec. 148.

<sup>234</sup> Bulgaria, Sec. 107; Czechoslovakia, Secs. 77-79; Poland, Arts. 345-354; Yugoslavia, Sec. 321.

<sup>235</sup> *Pp.*, Sec. 136.

<sup>236</sup> Sec. 80.

change the venue "if it is evident that the proceedings would thus be conducted more easily, or if some other important reason exists."<sup>237</sup> Furthermore, the Yugoslav code does not provide for a superior court assuming jurisdiction over a case or assigning it to another court. In all these matters the *Hungarian* code follows the Soviet pattern.

#### D. Powers of the Government Attorney in Civil Cases

##### 1. Soviet Union

In *Soviet* civil lawsuits an active role is assigned to government attorneys (district attorneys), a government attorney may initiate or enter any civil case at any stage of the proceedings "if, in his opinion, this is required for the protection of the interests of the state and the toiling masses."<sup>238</sup> His right to bring suit is especially emphasized.<sup>239</sup> In such instances the government attorney does not become a party to the case but enjoys all the rights of a party. The court may decide that the participation of a government attorney in a case is necessary and such decision is binding upon the government attorney.<sup>240</sup> A case may be brought before the Federal Supreme Court (the USSR Supreme Court) only on the protest of the Attorney General or the president of a Supreme Court.

##### 2. People's Republics

In general, in all people's democracies a government attorney has the same role and position in a civil case as in the Soviet Union. He may initiate civil action or enter any civil case tried by the courts at any stage of the proceedings regardless of the interests of the litigating parties. The participation of a government attorney in a civil lawsuit is usually justified by the codes of these countries under the formula "if this is required for the protection of the interests of the state or the public interests."<sup>241</sup> For instance, a *Polish* government attorney is not bound by any action of the parties and may submit factual statements, make motions and produce such evidence as he deems appropriate. He may also lodge appeals and move for the *ex-officio* reopening of a case in which a court has rendered a final decision.<sup>242</sup> In the *Polish* and *Bulgarian* codes, the *res judicata* effect of a decision in a case initiated by a government attorney extends to the parties not participating in

<sup>237</sup> Sec. 17.

<sup>238</sup> Sec. 62.

<sup>239</sup> Sec. 2.

<sup>240</sup> Sec. 2a.

<sup>241</sup> Sec. 12.

<sup>242</sup> See for instance, Bulgaria, Sec. 27; Poland, Art. 90.

the case, but in whose interests the government attorney acted.<sup>243</sup> *Romanian* legal writers state that a court may not deny the participation of a government attorney in any case.<sup>244</sup> In *Yugoslavia*, under the Law on the Public Prosecutor of July 22, 1946, the position and role of government attorneys was similar to that in the Soviet Union. However, under the Law of November 24, 1954, a public prosecutor has no right to participate in civil cases except for his privilege to make a motion "for the protection of the law", whenever the law has been violated by a court decision and "the public interest requires it."<sup>245</sup>

## E. Cases exempt from the Jurisdiction of Civil Courts

### 1. Soviet Union

In the *Soviet Union* a large number of disputes involving civil law are exempt from the jurisdiction of the court and are assigned to other agencies. This includes, in the first place, disputes between government enterprises and agencies engaged in business. Such disputes are assigned to the jurisdiction of special agencies bearing the name of "government arbitration", which are discussed elsewhere. Secondly, several categories of civil disputes between or involving private individuals are assigned to the administrative authorities. At various stages of the Soviet regime "the problem of exemption from the jurisdiction of the court or one group or another or disputes over personal private rights has been decided in various ways."<sup>246</sup>

At the present time the following civil disputes are assigned to administrative authorities, with the reservation that the enumeration is not conclusive but merely states the most common disputes in this category. Administrative authorities determine (a) all disputes involving tenure of agricultural land (assignment of tracts of land and withdrawal of right to use land), membership in a collective farm, including expulsion therefrom, and the like; (b) disputes over dismissals of executives of certain categories; (c) the application of disciplinary codes enacted for employees in certain branches of industry; (d) eviction from certain categories of housing and some other disputes over housing;<sup>247</sup> (e) some matters relative to domestic relations (giving names to children whose parents use different names, appeals from acts of guardians, etc.).

<sup>243</sup> Arts. 90-94.

<sup>244</sup> Polish Code, Arts. 365, 367-368; Bulgarian Code, Secs. 223 ff.

<sup>245</sup> 4 *Justitia Noua* 507 (1954) and 6 *Justitia Noua* 952 (1956).

<sup>246</sup> Sec. 389.

<sup>247</sup> Kleinman, editor, *Grazhdanskii protsess* (Civil Procedure), 1940, pp. 90-92; Abramov, *Grazhdanskii Protssess* (Civil Procedure), 1946, p. 46.

## 2. People's Republics

Following the Soviet pattern, all present legal systems of people's democracies exempt certain categories of disputes involving civil law from the jurisdiction of the civil courts. Thus, settlement of property disputes among socialist economic organizations is provided for in all people's democratic republics. Such disputes are assigned to special agencies called government arbitration agencies (in *Yugoslavia* called economic courts).<sup>248</sup> Such agencies were created: in *Albania* by Decree No. 728 of 1949; in *Bulgaria* by the Law of May 31, 1950; in *Czechoslovakia* by Law No. 99 of July 13, 1950 and Cabinet Decree No. 139 of October 17, 1950; in *Poland* by Decree of August 5, 1949; in *Romania* by the Law of June 15, 1949. In *Hungary* such an agency was created by Resolution No. 2850 of 1949. However, Decree No. 51 of 1955 placed disputes between government enterprises under the jurisdiction of the civil courts unless the disputes are concerned with delivery contracts, in which case the boards of arbitration have exclusive jurisdiction. In *Yugoslavia* government arbitration was established as early as 1946 by Laws Nos. 437 and 721, but it was replaced by economic courts created by Section 1 of the Judiciary Act of 1954.

The same is true with respect to other categories of civil disputes, which are exempt from the jurisdiction of the civil courts. In *Poland*, for instance, certain housing cases are assigned to the administrative authorities; in *Bulgaria* a number of labor disputes as well as disputes involving relationships within a collective farm are adjudicated outside the civil courts;<sup>249</sup> in *Romania* the State Control Commission and the Department of Living Space Administration<sup>250</sup> settle disputes arising from relations covered by the jurisdiction of these agencies, etc.

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<sup>248</sup> It is regulated by the Edict of September 19, 1953 which was not promulgated in *Vedomosti* but printed in *Sbornik zakonov SSSR, 1938-1956*, Moscow, 1956, p. 367. It was amended by the Edict, *Vedomosti* 1957, text 294.

<sup>249</sup> Cabinet Resolution No. 151, *IPNS* No. 16, February 22, 1952; Standard Charter of a Collective Farm, *DV* No. 112, May 13, 1950.

<sup>250</sup> Decision No. 811 of the Supreme Tribunal, Civil Division of October 16, 1954.

## NOTES

### WIRE-TAPPING AND EAVESDROPPING: A COMPARATIVE SURVEY\*

#### I

On June 29, 1957 a Committee of Privy Councillors (Lord Birkett, Sir Walter Monckton and Mr. P. C. Gordon Walker) was appointed in the United Kingdom "to consider and report upon the exercise by the Secretary of State of the executive power to intercept communications and, in particular, under what authority, to what extent and for what purposes this power has been exercised and to what use information so obtained has been put; and to recommend whether, how and subject to what safeguards, this power should be exercised and in what circumstances information obtained by such means should be properly used or disclosed." The power to intercept postal communications had been previously considered by a Secret Committee of both houses of Parliament in 1844, but the telegraph had only been invented in that very year and the telephone was not invented until 1876. Indeed, wire-tapping and the many more recent devices for 'eavesdropping' such as microphones, recorders, and short-wave transmitters remained almost unnoticed by the legislature and by the Courts. One reason for this apparent neglect of what might have become a dangerous inroad on privacy is to be found in the Privy Council Committee's finding: "there is and has been, no tapping of telephones by unauthorized persons in this

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\* See *Eavesdropping and Wiretapping Report of the New York State Joint Legislative Committee to Study Illegal Interception of Communications*, State of New York, March 1956, Albany Williams Press, Inc., 1956 (86 pp., price not stated); *Report of the Committee of Privy Councillors appointed to inquire into the Interception of Communications*, London, Her Majesty's Stationary Office, Cmnd 283, October 1957 (43 p., 1s 9d net). The International Commission of Jurists at the request of the Committee of Privy Councillors submitted evidence to the Committee on the law and practice of a number of European countries. In preparation of this evidence the Commission was greatly assisted by Professor Mast (Belgium), Dr. Suontausta (Finland), Maître Créher (France), Professor Schneider (Germany), Professor van Bemmelen (Netherlands), Professor Castberg (Norway), Professors Graven and Pierre Lalive (Switzerland) and Professor Munktell (Sweden). Appreciation must also be expressed to Mr. Philip Amram of the Washington D. C. Bar and to the Law Divisions of the Library of US Congress.

country",<sup>1</sup> that is by private individuals as distinguished from those acting with the permission of the Secretary of State.

This absence of evidence of tapping of telephones by private individuals is also explained in the Report of the Privy Council by the fact that it is technically much more difficult in the United Kingdom, than in the United States.<sup>2</sup>

On the other hand the law on tapping of telephones both by the authorities and by private individuals has been carefully investigated in New York State<sup>3</sup> and regulated by statute some 15 years ago.<sup>4</sup>

However, much difficulty has been encountered with regard to the enforcement of existing laws on wire-tapping. Further and even more serious concern and disquiet has become evident in consequence of the use of 'eavesdropping' devices such as microphones, recorders and short-wave transmitters for the purpose of obtaining evidence.

The reports under review deal respectively with the problems which are of immediate concern to each of these two countries: these are (a) in the United States, and particularly in New York, the necessity for the introduction of laws against eavesdropping and the desire to achieve stricter enforcement of the existing provisions against wire-tapping, and (b) in the United Kingdom the control of the law over wire-tapping by the Executive. Reference to laws of other countries will also be made, because this problem is of general importance in the practical application of the Rule of Law.

## II

The United States law as the most developed system in this branch of the law must be considered in the first place. The Report of the New York State Joint Legislative Committee reviews the provisions of the Common Law as well as the Federal and New York State laws on wire-tapping and eavesdropping. It refers, first, to Blackstone's Commentaries<sup>5</sup> in which the tort of eavesdropping is defined: "Eavesdroppers, or such as listen under walls or windows or the eaves of a house to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance..." Section 721 of the Penal Law of New York State which made eavesdropping a misdemeanour provided that "a person, who secretly loiters about a building, with intent to overhear discourse therein, and to repeat or publish the same to vex or annoy or injure others, is guilty of a misdemeanor." It has been a dead letter because of the many elements

<sup>1</sup> Para. 129, p. 28 of the Privy Council Report.

<sup>2</sup> See Para. 130, p. 29 of the Privy Council Report.

<sup>3</sup> And a number of other States; see Note 10 *infra*.

<sup>4</sup> See p. 321.

<sup>5</sup> Book IV, Chapter 13.

of proof required. With the advent of telegraph and telephone the New York Legislature made it a felony to cause malicious damage to telegraph and telephone lines<sup>6</sup> and since 1881 it has been a crime to obtain knowledge of a message by connivance with a telephone or telegraph employee.<sup>7</sup>

It has never been considered that wire-tapping for the purpose of detection of crime was unlawful. The practice seems to have been well established by the turn of the century, though never formally sanctioned.<sup>8</sup> During Prohibition both Federal and local officers used wire-tapping very extensively and this aroused strong criticism. Eventually, however, the right to wire-tap by the law enforcement officers became constitutionally guaranteed. An amendment to the New York Constitution provided:<sup>9</sup> "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and *ex parte* orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may thus be obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purposes thereof." This amendment was adopted with bi-partisan support and in 1942 the Legislature passed Section 813a of the Code of Criminal Procedure setting forth rules for official wire-tapping under court orders. No other State, however, has passed such legislation for supervising wire-tapping by the Judiciary.

Section 813a deserves careful examination. The application for a wire-tapping order may be made to any justice of the New York Supreme Court or a judge of a county court or of the court of the general sessions. It must be supported by an affidavit of a district attorney, or of the attorney-general, or of a police officer above the rank of sergeant stating (a) that reasonable grounds exist to believe that evidence of crime may be thus obtained, (b) identifying the telephone line, and (c) describing the person or persons whose communications are to be intercepted and the purpose of the interception. The Judge may require oral evidence on oath. The order may be made valid for any period of time not exceeding six months.

Private interception of telephonic communications was prohibited in New York State by Section 522 of Penal Code first introduced in 1892. In 1949 Section 522A extended the law by making it a mis-

<sup>6</sup> Article 134 of the Penal Law on Malicious Mischief, Section 1423, subdivision 6.

<sup>7</sup> Section 552 of the Penal Law of New York State.

<sup>8</sup> In *People v Heberd* 96 Misc. 617, 162 N.Y. Supp. 80, 84, a Police commissioner was charged with "wrongfully obtaining knowledge of telephone conversations" albeit "for the purpose of detecting crime." N.Y. Supreme Court Justice Greenbaum dismissed the charge for what he called "the all sufficient reason" that he had committed no crime.

<sup>9</sup> Article 1, Sec. 12.



demeanour to be in possession of any "device, contrivance, machine or apparatus designed or commonly used for wire-tapping." Private wire-tapping is also prohibited in many other states.<sup>10</sup>

The Federal law against wire-tapping is contained in Section 605 of the Federal Communications Act, which prohibits the interception of any wire message without the authorization of the sender: "no person not being authorized by the sender shall intercept any communication and divulge or publish" its existence or contents. In *Nardone v. United States*<sup>11</sup> the US Supreme Court held that the words "no person" included "Federal agents" who were therefore prohibited from disclosing information obtained by telephone interception and could not therefore use such evidence in a Federal court, although it appears that it is not wire-tapping itself but wire-tapping and disclosure which is prohibited. There is a difference of judicial views as to whether the consent of one of the parties to the telephone conversation is sufficient, especially when one of the parties is a police informer.

A serious difficulty in making the prohibition against wire-tapping effective has been encountered in New York. The investigation of the New York State Joint Legislative Committee disclosed that not only had private wire-tapping been widespread in the State, but that it had become a major business carried on openly by state licensed private investigators. The professional wire-tappers justified their nefarious trade by the decision in *People v Appelbaum*<sup>12</sup> in which it was held that a telephone subscriber may cause his own telephone wire to be tapped "so that his business may not be damaged, his household relations impaired or his marital status disrupted." In that case a Mr. Appelbaum of Brooklyn sued for divorce. His evidence was partly based on recorded 'taps' made on his own home telephone by a Robert C. La Borde, "a well known electronics technician and wire-tapper."<sup>13</sup> In a prosecution against La Borde under Section 1423<sup>14</sup> the Appellate Division of the Supreme Court, Second Department, dismissed the indictment and the Court of Appeals affirmed the decision. It was held that the telephone subscriber has a paramount right to protect his telephone from use by other people against his interests, personal,

<sup>10</sup> E.g., Arizona, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Iowa, Louisiana, Michigan, Montana, Nebraska, Oklahoma, Rhode Island, Utah and Wyoming.

<sup>11</sup> Cf. *United States v Yee Ping Jong*, 26 F. Supp. 69 (D.C. Pa. 1939) and the opinion of Judge Learned Hand in *United States v. Polakoff*, 112 F. 2d 888 (2 Cir. 1940) cert. denied, 311 U.S. 653 (1940).

<sup>12</sup> 277 A.D. 43, Aff'd W/o Opinion, 301, N.Y. 738 (1950).

<sup>13</sup> New York report, p. 15.

<sup>14</sup> See Note 6, p. 321. Article 134 of the New York Penal Law on Malicious Mischief, section 1423, subdivision 6 makes guilty of a felony any person who "shall unlawfully and wilfully cut, break, tap or make connection with any telegraph or telephone line, wire, cable, or instrument, or read or copy in any unauthorized manner any message, communication or report, passing over it, in this state."

household or marital, and therefore Mr. Appelbaum had a right to have his own wire tapped – a right superior to the right of privacy of those using the telephone.

Public disquiet as to the practical effect of the Appelbaum case was aroused by the sensational disclosures following a raid on an apartment in East 55th Street, Manhattan, which was used for wire-tapping on a wholesale basis by the lawyer-wire-tapper, James G. Broady. He was charged on 16 counts of wire-tapping, conspiracy, and possession of wire-tapping equipment. The extent of the wire-tapping business was also disclosed at the Enquiry of the Joint Legislative Committee by evidence concerning the activities of Charles V. Gris, a licensed private investigator. The following case can be given as an example of his activities. A young woman was living in a hotel where she had a private telephone. Gris rented the adjoining apartment and had the telephone tapped. He also installed a contact microphone in the wall between the two apartments to overhear conversations within the young woman's room.

The enterprise of wire-tappers was, however, by no means limited to prying into private lives and obtaining evidence for divorce cases. For example, Broady tapped the telephones of the Chairman of the Pepsi-Cola Corporation, and there were 'taps' on the telephones of the big chemical concerns, Bristol-Myers and E.R. Squibb, Inc., as well as of the Knoedler Art Galleries. Some of the fees paid to Broady are an indication of the scope of the business of wire-tapping; for example, he was paid \$ 60,000 by one of his business clients.

Broady was sentenced on 16 counts of wire-tapping, conspiracy and possession of wire-tapping equipment to two to four years imprisonment.<sup>15</sup> The facts disclosed at his trial were one of the reasons for appointment of the Joint Legislative Committee.<sup>16</sup> The other reason was the publicity connected with the unsolved murder of the financier Serge Rubinstein. It was widely reported during the investigation of this murder, that Rubinstein had made a practice of tapping the telephones of his business rivals. It was also reported, and verified by the Committee, that Rubinstein had placed a microphone and a portable radio transmitter in a young woman's apartment so that the sounds made therein were heard and recorded in a private detective's motor car in the neighbourhood.

As far as private wire-tapping is concerned, the investigation of the Committee led to the following recommendations:

"We propose to redefine the ancient common law offence of eavesdropping in modern terms, so that:

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<sup>15</sup> He was, however, released from Sing Sing prison on March 1, 1956, pending appeal.

<sup>16</sup> In the 64 years that wire-tapping has been a felony in New York only one previous conviction – of one Anthony Senes, 30 years ago – is recorded.

It will be clearly a crime for any private person (including the subscriber to a telephone) to engage in, authorize, or aid in any wire-tapping, or to overhear surreptitiously by instrument any conversation to which he is not a party."

This recommendation would dispose of the difficulties created in the Appelbaum case; further it deals with the present lack of legislation prohibiting eavesdropping by technical means other than wire-tapping.

Telephone interception and other forms of eavesdropping, particularly by technical means, by law enforcement officers have also given concern to the Committee. The procedure prescribed by Section 813a in cases of wire-tapping has already been described<sup>17</sup> but the Committee recommended legislation "to make it a crime for any law enforcement officer to engage in either eavesdropping without the specific authority of a court order."

The difficulties which arose in practical application of Section 813a were that court orders were often obtained on the strength of affidavits which disclosed little or no facts or evidence, which was required by that Section.<sup>18</sup> Under Section 813a the Court has also the power "to examine on oath the applicant or any other person". There is no record whether this power has ever been exercised. The Committee's pronounced uneasiness about this state of affairs was increased owing to evidence of entirely unauthorized wire-tapping by law enforcement officers, i.e., even without the formal authorization from the Court under Section 813a, especially in the "plain clothes divisions" of the police. Furthermore, the oral evidence of Mr. Julius Helfland, formerly Assistant District Attorney of King's County, revealed "that large numbers of plain clothes policemen were installing wire-taps at will, sometimes with Court orders fraudulently obtained, and more often with no orders at all. . . These illegal taps were used not for law enforcement, but for criminal purposes such as extortion." To remedy these difficulties the Committee recommended as follows: (a) the requirement that a prior court order authorizing wire-tapping must be made should provide that the judge *shall satisfy himself* of the reasonable grounds for the granting of an application and, if he examines the applicant or any other witness, the evidence should be on oath and a record kept and preserved of any such examination; (b) in order to make unlawful wire-tapping by the police difficult the law should be amended to impose an obligation on the telephone companies to provide "leased wire service" connecting the line which is to be overheard or recorded with the office or other designated

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<sup>17</sup> See p. 321 *supra*.

<sup>18</sup> I.e., "that there is reasonable ground to believe that evidence of crime may be thus obtained" etc.

location of such officer. The proposal has the merit "that there need no longer be any doubt that a crime is being committed if someone albeit a policeman is found tapping a wire in a back alley or basement or possessing wire-tapping equipment."

Finally, the Committee proposed to "outlaw as evidence any matter illegally overheard by eavesdropping or wire-tapping."

Since the publication of the report the Joint Legislative Committee has encountered difficulties in passing the legislation promoted by them. It has, however, made a major contribution in laying down the safeguards in its view necessary to protect the right to privacy. Of these, the following call for general approval: (a) All authorized wire-tapping and other technical eavesdropping should be made a criminal offence; (b) the use of these devices for criminal investigation must be permitted, subject to proper safeguards, and normally a court order should be required; (c) evidence obtained illegally by telephone intercepts and other devices should be made inadmissible.

### III

On the Continent of Europe Constitutions of many countries guarantee the right to privacy and secrecy of telephone communications; in other countries the secrecy is provided for in special legislation. However, judicial and investigating authorities generally have the power to undertake or request wire-tapping for use in criminal proceedings. For example, the *Italian* Constitution guarantees the secrecy of "any form of communication."<sup>19</sup> The interference with secrecy is, however, permitted if it is "an act of judicial authority duly motivated and according to guarantees established by law". Section 226 of the Code of Criminal Procedure of 1930 gives, however, to officers of the judicial police an apparently unfettered right to intercept communications. The judge has a similar power of interception<sup>20</sup>, issuing a warrant to an officer of the judicial police. In *Austria* secrecy of telecommunications is guaranteed by the Federal Law of July 13, 1949, but criminal courts and public prosecutors, as well as security authorities, are exempted if criminal proceedings are pending.

Secrecy of telephone communications is guaranteed by the *West German* Constitution.<sup>21</sup> An exception to this rule is contained in a Law of January 14, 1928,<sup>22</sup> which however appears to provide more specific guarantees limiting the rights of interception for the detection of

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<sup>19</sup> Article 15. Further, Section 617 of the Penal Code makes interruption of and interference with telephonic or telegraphic communications or conversations punishable.

<sup>20</sup> Section 339 of the Code of Criminal Procedure.

<sup>21</sup> Article 10.

<sup>22</sup> Section 12.

crime: the judge may request information concerning telecommunications if (i) the communication is addressed to the accused, or (ii) if there are facts from which it may be concluded that communication originated with the accused, and (iii) the information is of importance for the investigation. On the other hand the power of the public prosecutor to request such information is limited to major offences and can only be exercised when there is a danger of delay.

The laws of *Scandinavian* countries give even stricter procedural safeguards, although *Denmark* alone has a constitutional guarantee that "breach of the secrecy of the mails, of telegraph and telephone messages may take place only under a court order."<sup>23</sup> In both *Denmark* and *Sweden* a Court Order is necessary to entitle any official to intercept a telephone conversation. In *Denmark* such order cannot be made unless there is a demonstrable reason to assume that messages are transmitted over the telephone from or to someone who is suspected of one of specified crimes which are punishable with a term of imprisonment exceeding 8 years.<sup>24</sup> The crimes in which the court may order wire-tapping are: treason, espionage, illegal intelligence operations, offences against the independence and security of the state, against the Head of the State, armed revolt and some other similar crimes mainly of political nature. On the other hand even the most serious ordinary crimes, such as murder or ordinary housebreaking, are not included. In *Sweden*, intercepting can be authorized by a Court Order only if "someone is suspected of a crime for which no *milder* punishment than imprisonment with hard labour for two years may be imposed..." and it appears to the Court to be of special importance for the prosecutor to obtain knowledge of a telephone conversation. The permission may only be granted for a specified period not exceeding one week.<sup>25</sup> The Law of March, 21, 1952 deals, further, with certain political crimes and other crimes not necessarily of political character, such as arson, where permission to wire-tap may be given without regard to the length of the minimum sentence "if it is found particularly important for investigation" of the crime.

In both *Denmark* and *Sweden* interception without an order of the Court is permitted in exceptional cases of urgency; but even in such event the public prosecutor or the official in charge of the pre-trial investigation must authorize it. Further, an order of the Court must be applied for immediately and in *Denmark*, if the order is not made within 24 hours, the interception must be terminated. In both countries the suspect must be the subscriber of the telephone which

<sup>23</sup> Constitution of *Denmark* of June 5, 1953, Section 72.

<sup>24</sup> Section 750a of the Code of Judicial Procedure of April 11, 1916: Proclamation No. 265 of September 15, 1953, as amended by Law No. 202 of June 11, 1954.

<sup>25</sup> Code of Judicial Procedure of July 19, 1942, Part II, Proceedings in General II. Proceedings in Criminal Cases, Chapter 27: Seizure, Sections 12 and 16.

is tapped, or at least the telephone must be one which is likely to be used by him.

In *Norway* the safeguards are not quite as elaborate as in the two other Scandinavian countries, but the King has the power to make regulations concerning control over telephone conversations<sup>26</sup> only "if this is considered necessary in the interest of the security of the State." No such regulations have so far been made and there is in fact no evidence that the Norwegian authorities use telephone interception and they have apparently at present no power whatever to do so. Indeed, the Permanent Committee for the Revision of the Penal Code in their Report dated May 29, 1956 have recommended an amendment to the Penal Code (Para. 145a) which will make unauthorized telephone interception and recording of 'wire-taps' a punishable offence. The law of Scandinavian countries differs from that of *Holland* or *Finland* where there are no specific rules with regard to authorized wire-tapping and no attempt has been made by the legislature to define the circumstances in which wire-tapping can be lawfully used.

The principles as to the admissibility of evidence in Civil Law countries are generally considered to be less strict than in common law countries. Nevertheless, although the "inner conviction of the judge" is the ruling conception of evidence in Civil Law jurisdictions, it is from those very countries, such as France and Switzerland, that the view has been most strongly expressed that evidence obtained by wire-tapping or similar technical devices should be rejected or its use limited. In dealing with the laws of France and Switzerland regarding the admissibility of evidence obtained by wire-tapping it will also be convenient to make a preliminary reference to the general background of law relating to wire-tapping.

In *Switzerland* the Federal Constitution of May 29, 1874 lays down in Article 36, Paragraph 4 that "the inviolability of the secrecy of letters and telegrams is guaranteed" and this provision is considered to be applicable to telephone communications. In case of a serious breach of the law the Court and a competent police authority have the right upon written request to the postal authorities to obtain information regarding telephonic communications. But by the Federal Law on Criminal Procedure of June 15, 1934<sup>27</sup> "the judge must not resort to coercion, threats or promises, untruthful insinuations, nor any captious questions" and "he is prohibited in particular from using such expedients with a view to bringing about a confession". Similar provisions are contained in Cantonal Codes of Procedure. The application of this principle in relation to wire-tapping and eaves-dropping was considered by the High Court of Berne on March 1,

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<sup>26</sup> Law concerning the Control over Mail, Telegraph, and Telephone Messages of June 24, 1915, Section 1.

<sup>27</sup> Article 41.

1949 which quashed a decision of the District Court on the ground that the Judge left two accused persons together in his room in which he had installed a microphone. It was held, *inter alia*, that the Judge resorted to a "captious expedient" and the evidence was inadmissible. The High Court said that by the acceptance of such evidence "one would run the risk that methods similar to those practised in totalitarian States would become established. Such methods are unworthy of a State founded on principles of justice: "From Secret Spying... there is but one step to the use of alcohol, suggestion, nocturnal questioning and other methods of psychical coercion..."

In *France*, Article 187 of the Penal Code prohibits the disclosure of communications transmitted through radio-electrical appliances. The *Code d'Instruction Criminelle*, gives, however, the powers to the *Police Judiciaire*,<sup>28</sup> to the Procurator of the Republic<sup>29</sup> and to the *Juge d'Instruction*<sup>30</sup> of seizure and search, which are considered to extend to the postal, telephone and telegraphic services.<sup>31</sup> These powers were, further, strengthened by the Code of Criminal Procedure of December 31, 1957 (now in force) which in Article 81 gave the right to the *Juge d'Instruction* to take "all steps for the collection of information which he deems useful for the ascertainment of truth."<sup>32</sup> It is to be observed that the powers of the police are by no means unrestricted: a request by them to the postal authorities for an interception must be deposited within 24 hours to the Procurator of the Republic; a requisition by the *Juge d'Instruction* must be made by an ordinance, naming the member of the *police judiciaire* who is to carry out the interception.

As has been indicated, however, the importance of the French jurisprudence for the purposes of this review is in its critical attitude towards the use of telephone intercepts in evidence. It is significant to recollect that during the French Revolution the *Tribunal de Cassation* in the *Affaire La Brunière* of July 11, 1792 quashed a prosecution based on a letter of the accused which was forcibly taken away from a messenger to whom it had been entrusted. To-day there is no question as to the legality of the use of wire-taps by the police, or the Procurator of the Republic, or the *Juge d'Instruction*, for the purpose of investigation.

The French jurists find it, however, difficult to reconcile with the principles of French procedure the use of 'wire-taps' recorded secretly

<sup>28</sup> Article 8, 9 and 10.

<sup>29</sup> Article 35.

<sup>30</sup> Article 87, 88 and 89.

<sup>31</sup> See J. D. Ricard, *Droit et jurisprudence en matière de postes, télégraphes, téléphones*, 4 vols., Paris, Sirey, 1931-37, Vol. I, pp. 164/165.

<sup>32</sup> See Article 82 as to the powers of the Procurator of the Republic to request the investigating magistrate "to perform all acts which appear to him useful for ascertainment of truth".

without the knowledge of the accused. It is thought that evidence is thus obtained contrary to the French procedure as to preliminary investigation, assuring to the accused the right to the assistance of Counsel, and to cross-examination. Thus, the *Cour de Cassation* on June 12, 1952<sup>33</sup> declared null and void the *procès-verbal* in a case in which a Commissioner of Police listened in to answers of an official suspected of breach of trust.

Doubt also arised as to the propriety of use of recorded interceptions at a trial. A judgment of the Court of Toulouse of November 7, 1957<sup>34</sup> expressed the view that such evidence is highly unreliable because of the danger of alterations of the text of the record, for example by reproducing only part of a conversation. In a civil matter, the Court of Dijon on June 29, 1955<sup>35</sup> treated the recording as "written" proof but ordered that it should be played in the presence of the parties who would be able to contradict its contents.<sup>36</sup>

In another case<sup>37</sup> it was held that the recording of a telephone conversation is obtained by "surprise" and that the knowledge of the offence and the identification of the accused is obtained contrary to the rules of criminal procedure. While it does not appear that the propriety of the use of telephone interceptions in either preliminary investigation or at the trial has been finally determined in France, the doubts expressed in the cases which have been cited are of considerable significance.

#### IV

The findings and recommendations of the Report of the Committee of the Privy Councillors in the United Kingdom, already referred to, must be considered with due regard to the laws of other countries of Europe, especially of Scandinavia, and the United States. These suggest the following conclusions: (1) the control of a Court over telephone interception for detection of crime is generally accepted as necessary; (2) it must not be assumed that interception should be permitted in respect of detection of all crimes and only more serious crimes should be normally subject to the wire-tapping procedure; (3) the question of admissibility of evidence even lawfully obtained by wire-tapping procedure deserves special consideration.

In the light of these conclusions the Report of the Committee of Privy Councillors is not in all respects convincing. The facts which

<sup>33</sup> Sirey, 1954, I. 69.

<sup>34</sup> Sirey, 1957, page 233.

<sup>35</sup> Dalloz, 1955, 583.

<sup>36</sup> Normally a civil claim for over 5,000 francs requires written evidence and oral testimony is not admitted: see Article 1341 of the *Code Civil*.

<sup>37</sup> Dalloz, 1955, page 573.



gave rise to the appointment of the Committee were somewhat unusual. In October 1956 reports appeared in certain newspapers of a case tried at the Old Bailey, where it was alleged that a barrister had obstructed the police when they were acting in the course of duty. The Attorney-General brought to the notice of the Bar Council the alleged professional misconduct of the barrister, a Mr. Marrinan. Thereupon the Secretary of the Bar Council wrote for information to the Assistant Commissioner of Police. On November 26, 1956 the Assistant Commissioner was authorized by the Home Secretary to show to the Chairman of the Bar Council<sup>38</sup> the transcript of conversations between Marrinan and one Billy Hill, a convicted criminal, obtained through tapping of Hill's telephone. Subsequently, the Chairman of the Bar Council obtained the permission of the Home Secretary to show the transcript to the Professional Conduct Committee of the Council. The investigation thus instituted led eventually (after the publication of the Report) to the disbarment of Marrinan. The Marrinan case brought to public notice the practice of wire-tapping by the police and the fact that it was only controlled by the Home Secretary and in no way supervised by the Courts.

The Committee first reviewed the origin of the authority of the Executive to intercept communications. The law on this subject had already been inquired into by Secret Committees of the Houses of Parliament set up in 1844 after the great agitation in the country caused by the conduct of the Secretary of State, Sir James Graham, who had issued a warrant to open the letters of Joseph Mazzini and had communicated some of their contents to the Neapolitan Government. The 1844 Committees inquired into the historical antecedents of the right claimed by the Crown to intercept communications. It appeared that the Crown at a very early period found it necessary to appoint runners, called the Posts, to convey its letters. A Master of Posts was appointed<sup>39</sup> and the practice began of allowing private persons to avail themselves of the King's Posts. From the earliest period the Executive exercised its power of opening letters "to discover and prevent any dangerous and wicked designs against the Commonwealth".<sup>40</sup> There is no doubt that in England the power of the Executive to intercept letters and postal packets and to disclose their contents has been used through many centuries; it has never been suggested with any authority that the exercise of the power was unlawful. The Proclamation of 1663 required a warrant of a Principal Secretary of State to authorize the opening of a letter. In 1937 it was decided by the Home Secretary and the Postmaster General as a

<sup>38</sup> Sir Hartley Shawcross, Q.C.

<sup>39</sup> The first of these on record held office in 1516.

<sup>40</sup> Ordinance for the Establishment of a regular Post Office, 1657. See also the Proclamation of May 25, 1663 which forbade the opening of any letters or packets by anybody, except by the immediate warrant of the Principal Secretary of State.

matter of policy that an express warrant of the Secretary of State should also be obtained to intercept telephone communications. The right of the Executive to intercept telephonic communications which has been exercised from time to time since the introduction of the telephone may in the view of the Committee be derived from one of two sources: from a prerogative right of the Crown<sup>41</sup> to intercept communications, or from a common law right of the Crown to protect the realm against the misuse of postal facilities by ill-disposed persons. The Committee did not think it necessary to investigate the distinction, if any, between these two sources, but vested its finding on the fact that "the power (was) plainly recognized by the Post Office Statutes as existing before the enactment of the Statutes,<sup>42</sup> by whatever name the power is described." The Committee summarized its findings on the power of the Executive in the following way:

"a) The power to intercept letters has been exercised from the earliest times, and has been recognized in successive Acts of Parliament.

b) This power extends to telegrams.

c) It is difficult to resist the view that if there is a lawful power to intercept communications in the form of letters and telegrams, then it is wide enough to cover telephone communications as well."

The finding of the Committee on the source of the power of the Executive, however logical and accurate, seems far less important than its final recommendations that the Executive should retain this power completely unfettered by the control of the Courts. The Committee's recommendation on this decisive element of its inquiry has been arrived at after careful consideration of the use and extent of the power of interception. This power appears to have been principally used by the Police and Customs. In 1951 principles were laid down by the Home Office that the procedure of interception was "an inherently objectionable one", that "the power to stop letters and intercept telephone calls must be used with great caution" and that it must be regarded as "an exceptional method". In particular, three conditions were laid down both for the Police and for the Customs that must be satisfied before a warrant could be issued. These were:

a) The offence must be really serious.

b) Normal methods of investigation must have been tried and failed, or must, from the nature of things, be unlikely to succeed if tried.

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<sup>41</sup> The Royal Prerogative has been defined as comprehending all the special liberties, privileges, powers and royalties allowed by common law. This prerogative can be, and indeed has been, limited by Statute.

<sup>42</sup> The most recent example is Section 58(1) of the Post Office Act, 1953.

c) There must be a good reason to think that an interception would result in a conviction.

The number of interceptions authorized by the Secretary of State has not been considerable: the highest number of 'telephone taps' in any one year was 241 in 1955. The yearly average for the years 1937-1956 was 130, but the increase in this form of investigation of crime is illustrated by the fact that, while in 1937-1939 the yearly average was 22 intercepts, in 1953-1955 the average was 222. The Committee was satisfied, however, that the effectiveness of interceptions has been considerable: in 1957 every interception but one led to an arrest. The Committee found "that interception is highly selective and that it is used only where there is good reason to believe that a serious offence or security interest is involved..." and that "interception of communications has proved very effective in the detection of major crimes, customs frauds on a large scale and serious dangers to the security of the State... All the officers and officials concerned are scrupulous and conscientious in the use and exercise of the power to intercept communications."<sup>43</sup>

How should the power to intercept communications be used in the future? The Secret Committee of the House of Commons in its Report of 1844 spoke of "the strong moral feeling which exists against the practice of opening letters, with its accompaniments of mystery and concealment..." and Sir James Graham, the Home Secretary, admitted in a debate in the House of Commons in 1845 that the practice of opening letters was "odious, invidious and obnoxious". The Committee of Privy Councillors were in no doubt that telephone interception is regarded with general disfavour. "In considering the questions contained in our terms of reference... we have reminded ourselves at all times that the liberty of the subject was involved, and that there was considerable opposition to any use of methods of intercepting communications for any purpose, public or private."<sup>44</sup>

On the other hand, the Committee appreciated that the freedom of the individual is quite valueless if he can be made the victim of the lawbreaker. Every civilized society must have power to protect itself from wrongdoers. It must have powers to arrest, search and imprison those who break the laws. If these powers are properly and wisely exercised, it may be thought that they are in themselves aids to the maintenance of the true freedom of the individual. The power of telephone interception has never been regarded as a general power, and there is no inherent threat in it to the liberty of the subject, if it is "carefully restricted to special and well-defined circumstances and purposes, and hedged about with clearly formulated rules and subject to very special safeguards".

<sup>43</sup> Page 27 of the Report.

<sup>44</sup> Page 30 of the Report.

In the Committee's opinion the best possible safeguard lies in the final responsibility of the Secretary of State, and it considered that no additional security or advantage is to be gained by requiring the application to the Secretary of State to be made on oath. The Committee recommended, however: (a) that warrants should be issued for a defined period and (b) they should specify the name and address or telephone number of the person who is the subject of the warrant.

The tapping of telephone by unauthorized persons did not occupy much of the attention of the Committee but it found that it would be for technical reasons much more difficult in the United Kingdom than in the United States of America. However, there is no certainty that unauthorized tapping of telephones does not occur and it might even be done without the commission of trespass upon private or Crown property. "It is for Parliament to consider whether legislation should be introduced to make the unauthorized tapping of a telephone line an offence."

The Committee did not consider the question of admissibility of evidence lawfully obtained through telephone interception, because this question would be decided when it arises by a Court before whom the evidence is tendered. The general principle of English law, it may be explained, is to admit all evidence, however obtained, which is "relevant", according to the English laws of evidence, subject to the discretion of the judge to disallow evidence which would unfairly prejudice the accused.<sup>45</sup>

Mr. P. C. Gordon Walker, a member of the Committee, delivered a separate opinion in which may be summarized as follows:

1) The interception of communications should not in the future be regarded as an admissible method of detection even in cases of serious crimes, unless there is a "most extreme and urgent reason". (2) In security cases it should be allowed for two purposes only: (a) direct counterespionage and protection of high secrets of State, (b) the prevention of the employment of Fascists and Communists in connection with work, the nature of which is vital to the State. (3) No warrant to authorize the interception of communications should be issued by the Secretary of State save on a sworn information or affidavit. (4) No material obtained by interception of communications should be used as evidence in any Court, as it is necessarily obtained by furtive means and normally consists only of selected extracts from the communications that have been intercepted.

The Committee of Privy Councillors acknowledged that it has been urged in some quarters <sup>46</sup> that the authority for interception

<sup>45</sup> See *Kuruma Son of Karim v Reg.* (1955) 1 ALL. E.R. 236 and *Harris v. D.P.P.* (1952) 1044.

<sup>46</sup> See e.g. the Article by Geoffrey W. Davey "Wire-tapping", *Law Journal*, Vol. 107, p. 564, September 6, 1957.

should not be left in the hands of the Secretary of State, and that warrants should be issued only on a sworn information before magistrates or a High Court Judge. In their opinion "if a number of magistrates or judges had the power to issue such warrants, the control of the use to which methods of interception can be put would be weaker than under the present system. It might well prove easier in practice to obtain warrants. Moreover it would be harder to keep and collate records."<sup>47</sup> This view is partly explained by a finding of the Secret Committee of the House of Lords of 1844 which the Privy Council Committee thought applicable to present conditions, to the effect that the responsibility should rest with the Secretary of State and his Assistants as "the individuals who are mainly charged with the Preservation of Peace and the Prevention of Crime".

It is not doubted that the Secretaries of State in the United Kingdom have taken and continue to take scrupulous care to ensure the proper exercise of their power. It may, however, be said that the English Judiciary is regarded by some as of singularly high integrity and competence and is likely to discharge such a duty with at least equal conscientiousness and judgment. It is also difficult to agree with the assumption that they would issue warrants more lightly. No doubt it would not be appropriate to entrust the issue of warrants to intercept telephones to magistrates, most of whom are laymen, and in any event too numerous to deal with security matters, but there appears to be no practical difficulty in an *ex-parte* application being made to a Judge of the Supreme Court in Chambers. These proceedings are in any event, as matter of practice, held *in camera*. Some attention might be paid in this connection to the experience of other countries, particularly of the Scandinavian countries and of the State of New York. It must be added that the difficulties apprehended by the Committee of Privy Councillors as to keeping and collating records could hardly be insuperable.

The less satisfactory albeit very rare examples of the exercise of discretion by the Secretaries of States should also not be overlooked. In 1953 in a Disciplinary Inquiry before the Metropolitan Police Discipline Board into charges of corruption against two Police Officers, the Home Secretary issued a warrant authorizing the interception of messages, which with his permission were subsequently used with his permission not in court but in the disciplinary proceedings. The Privy Council Committee "entertained doubt whether the decision to use the intercepts in the policy inquiry was in fact justifiable." Further, the Committee held that the disclosure of intercepts in the Marrinan case to the Bar Council "was a mistaken decision". Stronger strictures might well have been applied in respect of permis-

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<sup>47</sup> Page 20 of the Report.

sion to use wire-taps before these domestic tribunals, and it is extremely doubtful whether such permission would have been applied for or granted if the appropriate authority was a High Court Judge.

There is one feature of the Committee's report which suggest a possible mitigation of the dangers implicit in the practice of intercepting communications and might profitably be studied in other countries. "In our view," the Committee state, "public concern may be in some degree allayed by knowledge of the actual extent of the interception of letters and telephone messages which has been exercised on a much smaller scale than many people seem to have thought." The figures published by the Committee on the whole have justified this conclusion and, although it is easy to understand the reluctance of the Committee to make any such disclosures in the future, it may be doubted whether the aid given to lawbreakers by a periodical survey of interceptions outweighs the obvious advantages of public knowledge.

The Privy Council Committee specifically stated that it had examined the practice and procedure of a number of foreign and Commonwealth countries and Colonial Territories, although its published report and recommendations are confined to the United Kingdom. Apart from the United States, it is broadly true in the countries which have inherited the common law tradition that the legal position regarding interception of communications is similar to that in the United Kingdom. The influence of the Committee's report is therefore likely to be considerable, and it is important to emphasize that its recommendations pre-suppose a high degree of restraint and responsibility on the part of the Executive, which has so far been true of the United Kingdom.

GEORGE DOBRY

## BOOK REVIEWS

*Regierungsakte im Rechtsstaat; rechtsvergleichende Beiträge zu einer Untersuchung des Verhältnisses von Politik und Recht* (Acts of State in a State under the Rule of Law; Contributions in Comparative Law to an Examination of the Relations Between Politics and Law). By HELMUT RUMPF, Dr. jur., M. A. (Harvard), Privatdozent in the University of Heidelberg. (Bonn: Ludwig Röhrscheid Verlag. 1955, 160 pp.)

This short book, itself an expanded version of a dissertation presented before the Law Faculty of the University of Heidelberg in 1950, is of considerable interest, not only on account of the substantive information which it contains but also, and even more, by reason of the inductive method followed by the author. As the sub-title explains, it is concerned with the difficult no man's land between politics and law but, not content with an arm-chair and theoretical discussion of the claims of the contending forces, Dr. Rumpf invites us to make an on-the-spot inspection of one critical sector of the frontier. He is particularly concerned with *actes de gouvernement* under the French, and Acts of State under the English legal system, but he devotes a brief excursus to the influence of French theory and practice on Italian, Rumanian and Spanish law; and in his foreword he holds out some hope of a further instalment dealing with American and German law. The circumstances in which the book has been written and its admitted incomplete character may account for the fact that it is more valuable as a convenient source of reference on a somewhat obscure part of French and English law than for the elaboration of "concepts definite and clear enough an analysis to be made of the individual phenomena of the Law-Politics complex". Indeed, it may be doubted whether it is useful or possible to define either law or politics in this way. On the other hand there is much to be learned from an examination of the actual practice of the French and English courts, when dealing with a claim made by the government in their respective countries to withhold from such courts' jurisdiction particular acts carried out by or on behalf of the government. The author has particularly in mind the possibility of developing by way of comparative study of the practice of other democratic countries committed to the Rule of Law a theory of Acts of State which may be of value in the development of constitutional law within the Federal Republic of Germany.

Dr. Rumpf traces the history of *actes de gouvernement* in French

law from their widely conceived scope in the nineteenth century to the restricted list admitted by the *Conseil d'Etat* today. He discusses some of the different fields in which the *Conseil d'Etat* refuses to intervene as for example in matters concerning the relations between the Government and Parliament and in "diplomatic acts" and admits, with various French authors, that the tendency is for the list of *actes de gouvernement* to contract. On the other hand he is unwilling to accept the view that, strictly speaking, *actes de gouvernement* are not uncontrolled, but only illustrations of a discretion permitted to the government within certain limits laid down by the *Conseil d'Etat*. He emphasizes indeed that the distinction between discretionary acts and *actes de gouvernement* is in the last analysis sociological rather than legal, but it is nevertheless to be taken into account by the *Conseil d'Etat*, in a way which, in the author's opinion shows the "instinct" of the *Conseil d'Etat* for the nature of politics.

Dr. Rumpf's treatment of English law consists of a well-informed and up-to-date introduction to the constitutional framework and a more detailed treatment of the prerogative in general, acts of State (in the narrow sense of measures taken by the Executive against foreigners or foreign property abroad) and war-time emergency powers. His conclusion, with which many English lawyers would agree (see for example Hamson, *Executive Discretion and Judicial Control*, reviewed in a previous number of this *Journal*, No. 1, p. 146) is that the standard of behaviour within the sphere of action which is reserved to the Executive is in some respects more efficiently guarded by the *Conseil d'Etat* than by the English courts, although he gives due weight to such developments as legislative correction (by the Crown Proceedings Act, 1947) of the doctrine that "The King can do no wrong". He would now doubtless wish to add the changes made regarding control over administrative tribunals following the Franks Committee Report (see *Bulletin No. 7* of the International Commission of Jurists, October 1957).

There is a broader aspect of Dr. Rumpf's enquiry which deserves to be emphasized. Underlying his thesis is the assumption that there is an ultimate difference of kind rather than degree between law and politics, the one being concerned with rules and norms, the other with a struggle for power which, within its allotted sphere, cannot be conducted by reference to principle. Yet the material which he produces from French and English sources goes rather to show that, at all events with the national jurisdiction, there is increasing recognition of the desirability of measuring the acts of the Executive against generally accepted standards of conduct. It is significant that the most jealously guarded "interests of State" remaining to a large extent outside judicial control are concerned directly or indirectly with the conduct of foreign affairs. Perhaps the English term "Rule of Law" is more apt than the German conception of the "Rechtsstaat" to draw



attention to the parallel process in the international field to recast political struggles in a mould of justice.

NORMAN S. MARSH

*La Liberté d'Opinion et d'Information, contrôle juridictionnel et contrôle administratif.* By ROGER PINTO, Professor at the Faculty of Law of Lille. Published under the auspices of the Centre National de la Recherche Scientifique. (Editions Domat Montchrétien. 1957. 278 pp.)

*Textos de Doctrina y Política de la Información.* By GABRIËL ARIAS-SALGADO. Publications of the Secretariat of the Ministry of Information of Spain. (Madrid: Prensa Gráfica, 4th edition. 1956. 413 pp.)

Freedom of expression was guaranteed in France by the *Déclaration des Droits de l'Homme* of 1789 but, as Professor Pinto points out, it was not definitely established before the Third Republic. The law of July 29, 1881 virtually limited the restrictions on freedom of opinion, *as such*, to the offence of "seditions, calls and songs" which in any event became a dead-letter. But with the advent of the anarchists' outrages at the end of the nineteenth century a trend less favourable to freedom of expression became evident. In 1893 the offence of commendation (*apologie*) of certain crimes, such as murder, arson and theft, was reintroduced. In 1912, the Court of Cassation held that the offence covered not merely justification of the crime but also of the offender. In 1951 justification of war crimes and collaboration offences became punishable. After 1893 there was a comparatively long period in which no serious inroads were made on freedom of expression, but in 1938-40 Decree-Laws introduced new offences covering propaganda for secession and "wilful participation in an enterprise of demoralization of the Army or of the Nation, having as its object the causing of harm to national defence". The punishment for the latter [Article 76(3) of the Criminal Code] was death. There is some controversy as to whether Article 76(3) is applicable in time of peace. Professor Pinto is of the opinion that it only applies in time of war and it is true that a law of March 11, 1950, [Article 76(d) of the Criminal Code] dealing with peace-time offences and punishable only by imprisonment, covers much the same ground as Article 76(3), although it makes no mention of demoralization of the Army. Professor Pinto draws attention to the fact that by a series of laws between 1935 and 1944 jurisdiction over press offences was removed from the

Assize Courts sitting with a jury to the *Tribunaux Correctionnels* and further that by the Decree Law of July 29, 1939 Military Tribunals try all crimes and delicts against the external security of the State. The jurisdiction of Military Tribunals thus covers offences under Article 76 of the Penal Code, and Professor Pinto emphasizes the dangers which may be involved in this power, particularly owing to the fact that Military Tribunals do not deliver reasoned judgments, with a consequent weakening in practice of any supervisory control exercised by the *Cour de Cassation*. This is particularly important when offences are concerned, which involve such vague conceptions as "demoralization".

In this review primary attention has been directed to the more important restitutions on the simple expression of opinion in the political field not necessarily directly involving a contravention of the law in other respects. Professor Pinto's book is however comprehensive and covers other restrictions, more or less paralleled in most countries, such as incitement to crimes or disaffection in the armed forces, defamatory or insulting statements and limitations in the interest of public morality. Of some considerable interest is the law of 1881, Article 27 amended by the Ordinance of May 6, 1944, which punishes the wilful circulation of false news. Professor Pinto points out this legislation finds no equivalent in many other countries, including the United States and the United Kingdom, and is doubtful of its efficacy. He has a somewhat higher opinion of the value in theory of an interesting provision of the French law, not unknown in other countries outside the common law, which gives individuals a right to insert a reply to attacks made on them in a particular newspaper, although it would appear that the present procedure gives opportunities for evasion and delay.

Professor Pinto makes an important and fundamental distinction between restrictions on liberty of opinion, which can only be enforced by proceedings in the courts (*contrôle juridictionnel*) and administrative procedures (*contrôle administratif*) which may permit the suppression of opinions before they are published or, if published, may authorize the seizure or destruction of the publications, without regard to any remedies which may or may not be available in the administrative courts. The mere lodging of a complaint in the administrative courts does not, as Professor Pinto emphasizes, *de facto* nullify the seizure until judgement is delivered, which may be long delayed. In France, the administrative authorities have the power to seize publications, and to prohibit their sale or distribution, provided such measures are limited as to time and place and are in the interests of public order. Stricter still is the provision of Article 14 of the Law of 1881, redrafted by the Decree-Law of May 6, 1939, which authorizes the Council of Ministers to prohibit the distribution or sale of foreign and "foreign inspired" publications. The power is exercised in practice

by the Minister of Interior and the *Conseil d'Etat* has very limited control over the exercise of his right.

Apart from the cinema, there is normally no censorship in time of peace in France. The Law of April 3, 1955, however, brought about a drastic change, which has become of great topical interest. This law deals with times of "acute emergency" and authorizes the administrative authorities to take all measures necessary to ensure the control of the press, as well as of the radio, cinema and theatre. Its application to Algeria has made possible the censorship of the Algerian Press and a similar control of the Press of Metropolitan France has become possible with the declaration of a state of emergency in that area by the French Parliament on May 16, 1958.

Freedom of expression is a central right from which almost all the other civil liberties in a democratic society draw their inspiration. Restrictions on this freedom, which will always be necessary, must be known to and justified before public opinion. Professor Pinto has given the best modern account of the law and practice relating to freedom of opinion in France and his reasoned criticism and comparisons with other countries, in particular with the United Kingdom and the United States, will be widely appreciated, especially in the present times.

It is instructive and revealing to compare Professor Pinto's work with the collection of speeches of the Spanish Minister of Information, Gabriel Arias-Salgado. The law of France starts from the basic assumption that opinion is free and subjects this freedom to various restrictions, mainly in times of emergency, which on particular fronts may give rise to controversy or concern. The present law of Spain on the other hand, in as far as freedom of opinion is concerned, is based on Article 12 of the *Fueros de los Españoles*, which permits freedom of opinion only in so far as it does not interfere with "the fundamental principles of the State". Apart altogether from the fact that the *Fueros* can be, and have in fact been, suspended from time to time, the qualification implicit in Article 12 has given scope for the censorship of all non-periodical publications and equally effective control over the Press by governmental supervision of the policy and personnel of newspapers. Señor Arias-Salgado's argument is in essence that, in Spain at all events owing to its allegedly unique history and traditions, personal freedoms, including freedom of expression, must of necessity be subordinated to the interests of the State. This view has to some extent been challenged by the Roman Catholic Church, particularly under the leadership of the Bishop of Malaga, who has stated that the right of freedom of opinion is a human right superior to the claims of the State. But the ideas of the Spanish Minister of Information do in fact at the present time underlie the law and practice regarding freedom of speech in Spain. His all too familiar plea for the repression of freedom of speech finds an ironic parallel in a recent editorial in

*Jen Min Teh Pao*, the official organ of the Communist Party of China: "our writers and artists are entirely free to create artistic forms and styles and to give free rein to their talents, but no one may use this freedom for undertaking anti-Party and anti-socialist activities."

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