

JOURNAL

OF THE INTERNATIONAL COMMISSION OF JURISTS

SUMMER 1963

Editor: VIVIAN BOSE

VOL. IV, No. 2

EDITORIAL

- HANS KLECATSKY REFLECTIONS ON THE RULE OF LAW AND IN PARTICULAR ON THE PRINCIPLE OF ADMINISTRATIVE ACTION
- RENÉ CASSIN REFLECTIONS ON THE RULE OF LAW
- GERHARD LEIBHOLZ JUDICIAL POWER AND THE AUTHORITY OF THE STATE IN THE FEDERAL REPUBLIC OF GERMANY
- G. D'ARBOUSSIER THE PRINCIPLE OF LEGALITY: THE RULE OF LAW - MYTH OR REALITY?
- NORMAN S. MARSH THE RULE OF LAW: NEW DELHI - LAGOS - RIO DE JANEIRO
SOME REFLECTIONS ON A JOURNEY WITH EXCURSIONS TO CHICAGO AND WARSAW
- WHITNEY N. SEYMOUR AND SAUL L. SHERMAN THE EVOLVING CONCEPT OF THE RULE OF LAW - AN AMERICAN VIEW
- J. JIMÉNEZ DE ARÉCHAGA SOME THOUGHTS ON THE RULE OF LAW
- VIKTOR LIEBSCHER AUSTRIA AND THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS
- ANNAROSA PIZZI PROBLEMS INVOLVED IN THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS AND LIBERTIES IN THE PRACTICE OF THE ITALIAN CONSTITUTIONAL COURT
- A. G. DAVIS THE OMBUDSMAN IN NEW ZEALAND (Part II)
- STAFF STUDY A CHRONICLE OF CONSTITUTIONAL CASES: JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF ELECTORAL LAWS

DOCUMENT

Report on a seminar held at Bangalore from July 6-8 1962, under the auspices of the Indian Commission of Jurists and the Mysore State Commission of Jurists.

BOOK REVIEWS

JOURNAL ADVISORY BOARD

- ROBERT R. BOWIE, Professor of International Affairs and former Professor of Law, Harvard University;
- GEORGES BURDEAU, Professor of Law, University of Paris and the Institut d'études politiques de Paris;
- ZELMAN COWEN, Professor of Public Law and Dean of the Faculty of Law, University of Melbourne;
- T. S. FERNANDO, Judge of the Supreme Court of Ceylon;
- C. J. HAMSON, Professor of Comparative Law, University of Cambridge;
- SEBASTIAN SOLER, Professor of Law, Buenos Aires University, former Attorney-General of Argentina;
- KENZO TAKAYANAGI, Professor of Law, University of Tokyo, and Chairman, Commission on the Constitution;
- KONRAD ZWEIGERT, Professor of Comparative Law, University of Hamburg.
-

The International Commission of Jurists is a non-governmental organization which has Consultative Status, Category "B", with the United Nations Economic and Social Council. The Commission seeks to foster understanding of and respect for the Rule of Law. The Members of the Commission are:

JOSEPH T. THORSON (Honorary President)	President of the Exchequer Court of Canada
VIVIAN BOSE (President)	Former Judge of the Supreme Court of India
A. J. M. VAN DAL (Vice-President)	Attorney-at-Law at the Supreme Court of the Netherlands
JOSÉ T. NABUCO (Vice-President)	Member of the Bar of Rio de Janeiro, Brazil
SIR ADETOKUNBO A. ADEMOLA	Chief Justice of Nigeria
ARTURO A. ALAFRIZ	Solicitor-General of the Philippines; former President of the Federation of Bar Associations of the Philippines
GIUSEPPE BETTIOL	Member of the Italian Parliament; Professor of Law at the University of Padua
DUDLEY B. BONSAI	United States District Judge of the Southern District of New York; Past President of the Association of the Bar of the City of New York
PHILIPPE N. BOULOS	Deputy Prime Minister, Government of Lebanon; former Governor of Beirut; former Minister of Justice
U CHAN HTOON	Former Judge of the Supreme Court of the Union of Burma
ELI WHITNEY DEBEVOISE	Attorney-at-Law, New York; former General Counsel, Office of the USA High Commissioner for Germany
SIR OWEN DIXON	Chief Justice of Australia
MANUEL G. ESCOBEDO	Professor of Law, University of Mexico; Attorney-at-Law; former President of the Barra Mexicana
PER T. FEDERSPIEL	Attorney-at-Law, Copenhagen; Former President of the Consultative Assembly of the Council of Europe; Member of the Danish Parliament
THUSEW S. FERNANDO	Judge of the Supreme Court of Ceylon; former Attorney-General and former Solicitor-General of Ceylon
ISAAC FORSTER	First President of the Supreme Court of the Republic of Senegal
FERNANDO FOURNIER	Attorney-at-Law; former President of the Bar Association of Costa Rica; Professor of Law; former Ambassador to the United States and to the Organization of American States
OSVALDO ILLANES BENITEZ	Judge of the Supreme Court of Chile
HANS-HEINRICH JESCHECK	Professor of Law; Director of the Institute of Comparative and International Penal Law of the University of Freiburg/B.
JEAN KRÉHER	Advocate of the Court of Appeal, Paris, France
SIR LESLIE MUNRO	Former Secretary-General of the International Commission of Jurists; former President of the General Assembly of the United Nations; former Ambassador of New Zealand to the United Nations and United States
PAUL-MAURICE ORBAN	Professor of Law at the University of Ghent, Belgium; former Minister; former Senator
STEFAN OSUSKY	Former Minister of Czechoslovakia to Great Britain and France; former Member of the Czechoslovak Government
LORD SHAWCROSS	Former Attorney-General of England
SEBASTIAN SOLER	Attorney-at-Law; Professor of Law; former Attorney-General of Argentina
PURSHOTTAM TRIKAMDAS	Senior Advocate of the Supreme Court of India; sometime Secretary to Mahatma Gandhi
H B. TYABJI	Barrister-at-Law, Karachi, Pakistan; former Judge of the Chief Court of the Sind

President: VIVIAN BOSE
Former Judge of the Supreme Court of India
Administrative Secretary: EDWARD S. KOZERA
Former Lecturer in Government, Columbia University

JOURNAL

OF THE INTERNATIONAL COMMISSION OF JURISTS

SUMMER 1963

Editor: VIVIAN BOSE

VOL. IV, No. 2

EDITORIAL		203
HANS KLECATSKY	REFLECTIONS ON THE RULE OF LAW AND IN PARTICULAR ON THE PRINCIPLE OF ADMINISTRATIVE ACTION	205
RENÉ CASSIN	REFLECTIONS ON THE RULE OF LAW	224
GERHARD LEIBHOLZ	JUDICIAL POWER AND THE AUTHORITY OF THE STATE IN THE FEDERAL REPUBLIC OF GERMANY	243
G. D'ARBOUSSIER	THE PRINCIPLE OF LEGALITY: THE RULE OF LAW - MYTH OR REALITY?	252
NORMAN S. MARSH	THE RULE OF LAW: NEW DELHI - LAGOS - RIO DE JANEIRO. SOME REFLECTIONS ON A JOURNEY WITH EXCURSIONS TO CHICAGO AND WARSAW	257
WHITNEY N. SEYMOUR AND SAUL L. SHERMAN	THE EVOLVING CONCEPT OF THE RULE OF LAW - AN AMERICAN VIEW	269
J. JIMÉNEZ DE ARÉCHAGA	SOME THOUGHTS ON THE RULE OF LAW	275
VIKTOR LIEBSCHER	AUSTRIA AND THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS	282
ANNAROSA PIZZII	PROBLEMS INVOLVED IN THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS AND LIBERTIES IN THE PRACTICE OF THE ITALIAN CONSTITUTIONAL COURT	294
A. G. DAVIS	THE OMBUDSMAN IN NEW ZEALAND (Part II)	316
STAFF STUDY	A CHRONICLE OF CONSTITUTIONAL CASES: JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF ELECTORAL LAWS	323
DOCUMENT		333
Report on a seminar held at Bangalore from July 6-8 1962, under the auspices of the Indian Commission of Jurists and the Mysore State Commission of Jurists.		

INTERNATIONAL COMMISSION OF JURISTS • GENEVA

C. 1280

BOOK REVIEWS

	Law in Eastern Europe (<i>V. M. Kabes</i>)	346
<i>John N. Hazard and Isaac Shapiro</i>	The Soviet Legal System (<i>János Tóth</i>)	350
	Commission on Human Rights: Report of The Eighteenth Session (<i>Jean Ziegler</i>)	354
<i>Manouchehr Ganji</i>	International Protection of Human Rights (<i>J. Z.</i>)	355
<i>Richard Baeumlin</i>	Staat, Recht und Geschichte (<i>J. Z.</i>)	356
<i>Erhard Appell</i>	The European Convention for the Protection of Human Rights and Fundamental Freedoms: its impact on German Penal Law and Penal Procedure (<i>Rudolf Torovsky</i>)	358
<i>T. Olawale Etias</i>	British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies (<i>A. A. de C. Hunter</i>)	359

EDITORIAL

To mark the completion of ten years work on behalf of the Rule of Law the International Commission of Jurists requested a number of distinguished jurists to contribute to this issue of the *Journal* articles giving their reflections on the Rule of Law as recognized and applied to-day. This issue carries seven such contributions.

In his article Mr. Norman S. Marsh says that "it is reasonable for the International Commission of Jurists to feel a modest sense of achievement in respect of the contribution which it has made towards a more general realization of the existence of a politico-legal ideal capable of practical application in countries with varying political and economic systems and differing legal traditions." Be that as it may, the fact is that the "Rule of Law" is now on men's lips all round the globe. It is no longer the mysterious password of a closed circle unmeaning to those outside. Statesmen use it; Prime Ministers, Presidents and Kings tell us of its importance; the Press, Television and Radio carry its message far and wide. It is sinking into the consciousness of the people at large. Countries rising to nationhood claim it as their heritage though not always with a clear perception of its meaning and implications. But they want it all the same.

Were we responsible? Maybe no, maybe yes, perhaps we only helped. It hardly matters for progress is unmistakable.

The Commission has broadened the old concept of the Rule of Law and carried this new concept into wider fields, from the Common Law areas to the Civil Law countries and to Africa and the East. It has brought the Rule of Law down to the common man. In Delhi the emphasis shifted from the political and strictly legal side to the "social, economic and cultural conditions without which no man can rise to his full stature." These concepts have been enshrined in the Constitutions of Ireland and India in chapters on "Directives".

Mr. René Cassin also stresses the universality of the Rule of Law and says "that it answers the aspirations of the peoples of the world . . . particularly those masses still living in under-developed conditions, inadequately fed, illiterate and subject to oppression, fear and poverty." He tells us that it is imperative that the censure of world opinion should make itself heard. That is our only answer when "national sovereignty does not permit any other course." It is essential that Human Rights should be protected by the Rule of Law "if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression." A thought that recent events in many countries serves to underline.

Mr. Viktor Liebscher points out that the main difficulty in implementing the European Convention on Human Rights lies in persuading countries to incorporate its provisions into their local laws. He also touches on matters that will assume greater importance before long: freedom of movement, repatriation and the right to leave a country.

The Bangalore Seminar from India touches problems that face the common man. Why are people in India reluctant to help the police and attend the subordinate courts as witnesses? Because of the way they are treated, because of the want of consideration shown to them, because of the hurt and affront to their dignity. Why do worth-while people keep aloof from politics and refrain from offering themselves for election? What does the party system really mean in India? How deep do the evils of allowing public companies to give donations to party funds and individual politicians for election purposes with no rendering of accounts and no public audit reach? Have the shareholders no right to know where their money goes?

It is proposed that the staff study "A Chronicle of Constitutional Cases" will be the first of a series of contributions on important constitutional law decisions.

The articles in this issue blend idealism with the practical, which is one of the striking features of the Commission's work.

REFLECTIONS ON THE RULE OF LAW AND IN PARTICULAR ON THE PRINCIPLE OF THE LEGALITY OF ADMINISTRATIVE ACTION

The worst of all human tortures is to be tried without Law.
(Albert Camus in *The Fall*)

I

The idea of the Rule of Law State has appeared in various forms in differing legal systems. But all these legal variants have had one common aim: the achievement and the preservation of the *freedom of the individual human being* against the arbitrary assaults of collective power. Man's freedom to become an individual personality and to remain one only exists where he is in possession of an assured legal sphere of action and where he is capable of defending this sphere of law. The law and the institutions set up to preserve it compensate for the difference in strength between the weak individual and the strong collective by creating an area where both individual and collective meet on an equal footing. For the individual there is only one gateway to full realization through which he must pass for his own sake, for the sake of society, and for the sake of something higher. This gateway is the *individual himself*. As Dr. Samuel Johnson aptly put it: "Corporations have no soul to save and no bottom to kick." A society which consists of men unable to establish and to assert themselves as individuals slides further and further down into the inferno of ideological illusions. The Rule of Law State is not something that, once it has been achieved, is assured for all time. Ninety years ago a champion of the Rule of Law State, Rudolf von Gneist, wrote: "The Rule of Law State in the historical and philosophical sense of the term has been built up and formed slowly and laboriously, in constant conflict with the basic tendencies of society, and it is only through such conflict that it can be upheld and regained in the world of today."¹ The thought expressed here is permanently valid. The "struggle for law" (Rudolf von Ihering) is an everlasting one, for "public power, whether in the hands of the individual or of the community, is never at any time or in any place ready to acknowledge any limits".² Like every

¹ Rudolf von Gneist, *Der Rechtsstaat* (Berlin: 1872), p. 6.

² Ortega y Gasset, *Notas del vago estio*, (1925).

human cultural heritage the Rule of Law State is continually being threatened. It can be compared with the fortified towns of the Middle Ages, whose battlements and moats, towers and drawbridges, guaranteed the people living within their walls the security necessary for a dignified social system. And just as the position of these fortified towns and the nature of the perils besetting them constantly necessitated different defensive measures, so too the idea of the Rule of Law State has been expressed in many different ways in accordance with national requirements and traditions. Common to all, however, might well be the experience that countless towns, their fortifications completely unscathed, fell a victim to treachery within their own ranks or to a surprise enemy attack at points not known to be weak. This experience should be a lesson once and for all that the preservation of the Rule of Law State necessarily demands the unity and the loyalty of its legal watchdogs and that, secondly, the defence of the Rule of Law State is something indivisible and that weaknesses in this defence, however trivial they may at first appear to be, can seal the fate of that State.

Seen in this light, the defence zones cannot be grouped in an order of priority which will hold good for all time. *The most important part of the Rule of Law State at any one time is the part currently exposed to the most severe threat.* The Rule of Law State too is only as strong as its weakest member. Certain leading principles indispensable to the existence of this State do, of course, emerge from the experience of countless generations of lawyers of many nationalities. These principles may be summarized as follows:

1. The principle of the *separation of powers* applying not only to the Legislature, the Executive and the Judiciary, but also to all points where total power is concentrated in one place.
2. The principle of the *independence of judges*, both from the Executive and from all other influences outside the law.
3. The principle that all collective power, particularly that of *legislation and administration*, must conform to *the basic rights and freedoms* which protect the individual citizen.
4. The principle of the *legality of administrative action*.
5. *Judicial review of legislation and administration* by independent judges.
6. The existence of a *body of lawyers independent* of collective powers and pledged to the idea of the Rule of Law State.

None of these leading principles can exist in isolation. The fact that they are structurally bound together means that they stand or fall together.

It is useful to exchange experiences. Only in this way can a world-wide system based on law and peace become a reality. *Austria* is a liberal, democratic, federal republic, based on the separation of powers and pledged to permanent neutrality.³ The basic rights and freedoms are protected by the federal Constitution, and in particular by the Basic Law of December 21, 1867, Official Gazette No. 142, dealing with the general rights of the citizen.⁴ Austria is a signatory State of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Bar is independent. It is not the purpose, however, to devote special attention to this, but rather to discuss the expression given in the Austrian legal system to the *principle of the legality of administrative action* – first because the Executive is the most expansionist and problematic of all governmental powers, and this not only in Austria,⁵ and secondly because there is every reason to believe that in Austria a process whereby the Executive is bound by laws has been developed to a very great extent and so may perhaps serve as an extreme example. The controlling of the Executive by laws would be a purely theoretical exercise were there not a body of independent judges to keep a watchful eye on the observance of the laws by the organs of the Executive. And so the history of the development of this principle has from its inception been inextricably bound up with the Administrative Court,⁶ and later with the Constitutional Court,⁷ both in Vienna. Above all it was the administration of justice by the Administrative Court that gave enormous impetus to the principle of the legality of administrative action. It is this dynamic impetus that gives rise to the hope that this very principle of legality enforced by administrative courts can master the problems which the modern State poses for the lawyer.

³ On the structure of the State in general see Ludwig Adamovich-Hans Spanner, *Handbuch des österreichischen Verfassungsrechts* (Vienna: 1957), and Leopold Werner and Hans Klecatsky, *Das österreichische Bundesverfassungsrecht* (Vienna: 1961). On the Executive in particular Ludwig Adamovich, *Handbuch des österreichischen Verwaltungsrechts* (Vienna: 1953/54), Vols. I and II, and Walter Antonioli, *Allgemeines Verwaltungsrecht* (Vienna: 1954).

⁴ On the legal measures guaranteeing the basic rights and freedoms, see Leopold Werner and Hans Klecatsky, *op. cit.*, p. 358 ff.

⁵ On the general tendencies of development see Hans Klecatsky, "Allgemeines österreichisches Verwaltungsrecht," *Juristische Blätter* (Vienna: 1954), pp. 473 ff. and 503 ff.

⁶ The attitude of the Administrative Court is now controlled by Articles 129 to 148 of the Constitution of Austria and by the Administrative Court Law 1952, Official Gazette No. 96.

⁷ The attitude of the Constitutional Court is now controlled by Articles 137 to 148 of the Constitution of Austria and by the Constitutional Court Law 1953, Official Gazette No. 85.

II

History teaches that no problem is completely new.⁸ The eighteenth century saw the dawning of the police state. Whatever had existed in the way of an Executive before then had been controlled by courts concerned to see that the laws were kept and the rights of the individual respected. Administrative action could only be exercised within the framework of the law. Then the *ius politiae*, taken over from the concept of "police" developed in France, was regarded as the monarch's sovereign right to intervene everywhere in the interest of the common welfare. The State was held to be entitled to pronounce on all matters affecting society for the common good. The first half of the nineteenth century saw the splitting up of the legal system into two parts: private law, governed by strict legal standards, and the public sector, subject to the freedom of operation of the *Executive*. The concept of the Rule of Law State sought to restore the submission of the entire Executive to the authority of the law, a principle which had been lost sight of in the police State. The paternalistic type of State of the eighteenth century gave way to the Rule of Law State of the nineteenth century. Friedrich Julius von Stahl formulated the demand for the Rule of Law State in the following words:

The State must be a Rule of Law state, that is the solution and in fact the tendency of development of recent times. It must, through the expression of its laws, exactly prescribe and unswervingly safeguard the paths and the limits of its activity as well as the sphere of action of its citizens, and the State *qua* State should not enforce moral ideas except where such action belongs to its own legal sphere of operation.⁹

Substantive administrative law became a source of "subjective public rights" against the State, its measures becoming legally assessable "decisions" and "enactments". A return to the medieval State, which had limited itself to warding off attacks on the rights of the individual, was no longer possible. It never was historically possible to go back to the past. The new activity of the State had as its aim on the one hand the protection of the subjective rights of the individual and on the other the putting into effect of matters pertaining to the general public interest.

The dualistic structure of the legal system – embracing parts concerned with private law and public law respectively – led to the

⁸ On the historical development of Austrian administrative law cf. in particular Rudolf Hermann Herrnritt, *Grundlehren des Verfassungsrechtes* (Tübingen: 1921), p. 36 ff, and Ernst Hellbling, *Österreichische Verfassungs- und Verwaltungsgeschichte* (Vienna: 1956).

⁹ *Rechts- und Staatslehre* (Tübingen/Leipzig: 5th ed., 1878), Vol. II, p. 137.

establishment of a central Administrative Court¹⁰ on the French model. On October 26, 1876, the Administrative Court pronounced its first judgment. The Rule of Law State was built up by way of administrative justice. Not only was the need for the legality of administrative action established, but also the disputing party's right to a *legal administrative procedure*. This then led to the development of a substantive administrative law and of an administrative procedure, first by way of judgments given by the Administrative Court, and then by legislation inspired by these judgments. As an outstanding example of this, the laws of administrative procedure of 1925 may be instanced,¹¹ which laid down, along with the legal regulating of court procedure, a thorough system of procedure on similar lines for executive authorities.

III

The demand that the Executive be subject to the *laws* was the main postulate of the Rule of Law State. Laws agreed to by the representatives of the people in parliament were and still are the means whereby the *sovereignty of the people* over the Executive is put into effect and the autocratic tendencies of the Executive suppressed. Along with the sovereignty exercised on behalf of the *people* by the law, it also fulfils a *protective function* on behalf of the *individual*. The law, as an abstract norm embracing general principles, guarantees individual freedom, equality, and legal security. For the fact that the activity of the organs of government is tied to general, abstract rules enjoying a certain degree of stability reduces the possibility of arbitrary assaults on the individual. Governmental measures are therefore to a certain extent predictable, can be fitted into the plans of the individual, and are more constant. The equation which can be derived from this is therefore as follows: *the freedom of the individual relies on the extent to which the administration is bound by law*. It is clear that legal rules of a general abstract character issued by the Executive itself – *rules and regulations* – cannot fulfil the function of the law, so too the Executive ceases to be bound by law if it prescribes the rules for its own behaviour. The division of power in democratic parliaments through the existence of parliamentary parties has no role to play in the issuing of rules

¹⁰ Article 15 of the Fundamental State Law of December 21, 1867, Official Gazette No. 144, on the power of judges, and the law concerning the establishment of the Administrative Court of October 22, 1875, Official Gazette No. 36/1876.

¹¹ Introductory Law to the following Laws: General Law of Administrative Procedure, Administrative Penal Law, and Administrative Law of Execution. These laws are valid in amended form, Official Gazette No. 172/1950. See also the Supplementary Introductory Law, Gazette No. 92/1959.

and regulations, which can be issued quicker and with less hindrance; they so have less durability than do laws.

The Federal Constitution of Austria lays down, in Article 18 (1), the *absolute sovereignty of the legislative power over the executive*: "The entire public administration shall be carried on only on the basis of the laws". The Executive also includes the Federal President,¹² the Federal Government¹³ and the government of the provinces.¹⁴ It is only in the light of this basic rule that Article 18 (2) of the Constitution is to be understood: "Every administrative authority may issue rules and regulations within its competence on the basis of the laws". Thanks to the generally uncompromising nature of the judgments passed by the Austrian Constitutional Court, rules and regulations have remained an instrument strictly subservient to the law.

In the general abstract nature of their structure rules and regulations resemble the law. By the words rules and regulations, irrespective of how designated, are to be understood any general legal regulations issued by an administrative authority, in other words a directive addressed to the public at large or to particular sections of the population classified, not individually, but according to group characteristics.¹⁵ Abuse of the general regulations procedure to mask enactments against individuals is therefore ruled out.¹⁶ Since 1923 the Constitutional Court has held to the view that Article 18 (2) only provides for administrative regulations and does not permit regulations that amend, supplement, or take the place of the law. In order, however, that a law may lend itself to being implemented by means of a regulation, *its contents must be sufficiently clearly defined*, i.e., all the essential features of the envisaged regulation must be discernible in the law itself. In this way the Constitutional Court has rejected the principle of "delegated legislation" in favour of the *principle that the law must predetermine the content of the regulation*.¹⁷ Regulations may emanate not only from federal and provincial (*Land*) authorities but also from the organs of local government¹⁸ or from other autonomous bodies.¹⁹ Therefore the Constitutional Court also reviews these regulations to test their legality;²⁰ indeed it also

¹² Constitution of Austria, Article 6.

¹³ *Ibid.*, Article 69.

¹⁴ *Ibid.*, Article 101.

¹⁵ Decisions of the Constitutional Court, Official Law Reports (Slg.) 313, 1685, 2465, 3142.

¹⁶ Decisions of the Constitutional Court, Slg. 1398.

¹⁷ Decisions of the Constitutional Court, Slg. 176, 1648, 1871, 2294.

¹⁸ Decisions of the Constitutional Court, Slg. 1465, 1600, 1993.

¹⁹ Decisions of the Constitutional Court, Slg. 1700, 1798.

²⁰ Constitution of Austria, Article 139.

reviews the general directives issued to subordinate executive officials (conditions of employment, instructions).²¹

The final criterion in establishing that the relevant statutory provisions do not merely permit delegated legislation, but that they represent a constitutionally satisfactory, substantive determining of the regulations to be based on the delegating provision of the parent Act, consists in whether the intention of the law permits a review of the legality of the contents of the regulations enacted by such a regulation.²² Countless provisions in laws, which contained delegated legislation, and countless regulations, which were not covered by constitutional law in the sense described, have been annulled by the Constitutional Court. Indeed, even perfectly legal regulations become automatically inoperative when the law on which they are based is abolished, without their having first of all to be annulled.²³ The delegated legislation dating from the time of the authoritarian regime (1934 to 1938) and the German occupation (1938 to 1945) was annulled on December 19, 1945, by the re-entry into force of Article 18 (2) of the Constitution.²⁴

The power of the Federal President to issue emergency regulations²⁵ is very strictly limited. In fact it has been of no significance up to the present moment. Apart from this only the security police and self-governing local authorities have the power, similarly strictly limited, of issuing autonomous regulations.²⁶ But the directives issued through the operation of the power to pass regulations must equally not offend against existing laws. Excesses are impossible, since these directives are also subject to review by the Constitutional Court.²⁷ This legal situation, which presents a sharp contrast to the tendencies in other countries²⁸ towards a merging of power, is anything but a matter of mere theoretical significance to the Austrian. It is no accident that the dictatorships with which he is familiar destroyed democracy and the Rule of Law State by means of delegated legislation.²⁹

²¹ Decisions of the Constit. Court, Slg. 313, 621, 848, 1053, 1636, 1661, 2660.

²² Decisions of the Constitutional Court, Slg. 1932, 2294.

²³ Decisions of the Constitutional Court, Slg. 2344, 2326.

²⁴ Decisions of the Constitutional Court, 1871.

²⁵ Constitution of Austria, Article 18 (3) to (5).

²⁶ Article 2, Section 4 Sub-Section 2, and Article 2, Section 8 of the Federal Constitutional Law of December 7, 1929, Official Gazette No. 393.

²⁷ Constitution of Austria, Article 139.

²⁸ Cf. the compilation *Die Übertragung rechtsetzender Gewalt im Rechtsstaat* (Frankfurt a. Main: 1952).

²⁹ The Dollfuss-Schuschnigg regime (1934-1938) by means of the Enabling Law for War Economy, Official Gazette No. 307/1917, and the Federal Constitutional Law on Extraordinary Measures of a Constitutional Nature, Gazette No. 255/1934; the National Socialist regime (1938-1945) by means of the German Law for the Relief of National Distress (*Behebung der Not vom Volk und Reich*) of March 24, 1933, German Official Gazette I, p. 141.

IV

Of course the administrative acts of a *concrete individual* character – i.e. the “decisions”³⁰ are completely and entirely subject to the law. This is also a consequence of Article 18 (1) of the Constitution. Austrian legal doctrine and Austrian judicial practice are unanimously of the opinion that *every* administrative act needs to be covered by law and not only those acts that intrude on the legal sphere of the individual. This is indicated in the protective function of the law and its expression of the people’s sovereignty, already mentioned above, but it is also expressed in the idea which can be traced back to the doctrine of Hans Kelsen³¹ and Adolf Julius Merkl,³² namely that the actions of men who claim to represent the State can only be “attributed” to the State if there are legal regulations enabling this to be done. Administrative law is thus not only the *conditio sine qua non*, but the *conditio per quam* of the Executive.³³ The Executive, if it is not to fall foul of the law, must therefore be completely pervaded by legal rules. The particular significance of this is that “the Legislature must exert effective control over the Executive in three directions: (1) the Legislature must create the organs appointed to carry out the tasks of the Executive, and define their sphere of activity; (2) the procedure, within the framework of which the administrative organs operate, must be legally regulated; (3) finally, the Legislature must define the activity of the Executive’s organs as far as its content is concerned. It must give in general abstract terms a summary of the presupposed facts and define the legal consequences following from it”³⁴

The Constitutional Court has for example ruled that *new types of administrative authorities and agencies* with special departmentally defined fields of activity can only be created by law. It is only the internal organization of Executive authorities, their division into sections, departments etc., that is a matter for the Executive, which can then run them on the basis of internal administrative measures. Independent of this is the question of how the location of the headquarters of the particular authority is to be determined and precisely where it is to operate. Insofar as the headquarters and the operating region of an authority has been laid down by legislation, then any change in the terms laid down needs a law. Only insofar as no such

³⁰ Constitution of Austria, Articles 130, 131 and 144.

³¹ See the enormous opus of Hans Kelsen, *Reine Rechtslehre* (Vienna: 1st ed., 1934, and 2nd ed., 1960).

³² Cf. for example Merkl, *Allgemeines Verwaltungsrecht*, (Vienna/Berlin: 1927).

³³ Merkl, *ibid.*, p. 160.

³⁴ Ludwig Adamovich, *op. cit.*, Vol. I, p. 15.

conditions have been laid down by law, and the Legislature has left this to be settled by decree, can the headquarters and the location of regional activities, in particular of the lower administrative authorities, be fixed and changed by decree.³⁵ Furthermore the Constitutional Court has pronounced³⁶ that the principle of the legal responsibility of the Executive requires that the *powers* accorded to an authority within the framework of its competence, which is defined by law, must themselves also be defined in detail by law, as too must the means whereby these powers are exercised. Such powers in themselves and the means whereby they are exercised can in no way be derived from the mere fact that an authority has competence to act. The definition by law of the competence, of the procedure to be adopted, and of the content of the administrative act to be carried out on the basis of this competence in accordance with proper procedure, is an absolute postulate of constitutional law.

V

One enclave dating from pre-constitutional times was, however, formed at first by the so-called "discretion" (*Ermessen*). In matters where "discretion" was involved the Administrative Court had to begin with no jurisdiction. The area which, when the postulate of the legality of administrative action had only partially asserted itself, was considered to be one where the Executive could use its discretionary powers, was that area of action, within which the decisive factor determining the conduct of the administrative authorities was not the laws, but solely their will.

It is this very development of the question of discretion that serves as a clear example of the powerful impetus behind the idea of the Rule of Law State and in particular behind the principle that the Executive must conform to the law. The strategists plotting the campaign for the Rule of Law State used the tactic of encirclement. The absolutist State could not be overthrown by a frontal assault. So the generals of constitutionalism advanced on many different sectors, overpowered the absolutist State where it could be overpowered, and encircled its positions which still of course had to be taken. It was through such an encircling operation that the concept of discretion arose.³⁷ But the struggle went on. The attempts of the Executive, not tied by legal restraint, to break out of its encircled

³⁵ Decisions of the Constitutional Court, Slg. 2650, 2909.

³⁶ Decision of the Constitutional Court, Slg. 2740.

³⁷ See Hans Klecatsky's article in *Juristische Blätter*, 1948, p. 465 ff. and p. 493 ff.

discretion were frustrated by the concepts of excess or abuse of discretionary power. Into the encircled area of discretion with its freedom from legal restraint, wedges were driven in the shape of demands for judicial review in the exercise of discretion, both as regards aims and means. From the very beginning the Administrative Court considered itself called upon to narrow down the area within which the Executive could use its discretionary powers. Step by step it extended its control. At first it turned its attention to the *procedural* aspect of the use of discretion, then it tied the exercise of discretion to the "meaning of the law", and then finally it removed the so called "undefined legal concepts" from the field of discretionary operation.³⁸ The Administrative Court pronounced that discretionary judgments must be based on facts determined in accordance with proper legal procedure.³⁹ Even if a contending party has no right to a judgment in the disputed matter, a party, nevertheless, has the right that the facts of the case be established in accordance with a *proper procedure*.⁴⁰ A limit has been set for the use of discretion where it comes into conflict with the sense of the law, i.e. with the expressly declared or at any rate discernible intention of the law.⁴¹ The Constitutional Court is also of this opinion. It holds that "discretion" does not mean "arbitrary action". Even where the law allows the administration free exercise of discretion, such discretion may only be exercised within the meaning of the law. If the administration exercises its discretion other than within the meaning of the law, if it is guilty of an excess of discretionary power, then one can speak of an offence against the law, and this may also be held to be an offence against the Constitution, insofar as it can be shown that the discretionary judgment can be traced back to motives which infringe a right guaranteed by constitutional law.⁴² Finally, as far as the so-called "undefined legal concepts" are concerned, vague notions were understood under this heading, such as, for example, "public interest", "suitableness", "grounds of economic policy" etc., notions which certainly afforded the administration considerable latitude, which rested "not on an authorization freely to take decisions, but on the ill-defined limits

³⁸ See Karl Erhart, "Vom freien Ermessen, unbestimmten Begriffen und dem Verwaltungsgerichtshof," *Juristische Blätter*, 1948, p. 465 ff. and p. 493 ff.

³⁹ Decisions of the Administrative Court of July 4, 1930, Slg. 16, 255A, and of April 29, 1947, Slg. New Series (N.F.) 82 A.

⁴⁰ Decision of the Administrative Court of May 7, 1947, Slg. N.F. 89 A.

⁴¹ Decision of the Administrative Court of February 23, 1950, Slg. N.F. 1265 A.

⁴² Decision of the Constitutional Court, Slg. 2602.

of the term chosen by the legislator". The controlling authority is the Administrative Court.⁴³

But this development did not stop there. Article 130 (2) of the Austrian Constitution reads as follows:

- (1) The Administrative Court shall render judgment upon complaints, by which it is asserted that decrees of administrative authorities are illegal or that administrative authorities have failed in their duty to pass a decision.
- (2) An act cannot be illegal as far as legislation refrains from laying down binding rules for the policy to be adopted by the administrative authority, but leaves it to the discretion of the authority itself to establish such policy in so far as the authority has used this discretion in conformity with the law.

While fully acknowledging the gains already made, people now considered the problem as far as it concerned constitutional law. The leaders of *the new phase of development*⁴⁴ were no longer content to demand that the administration's exercise of discretionary powers be more or less intensively scrutinized in the interests of the legal protection of the party appealing to the Administrative Court or even to the Constitutional Court. They addressed themselves to the legislators with the demand, based on the terms of the Constitution, that they should define more closely and precisely the conditions governing discretion which they had passed and, as well, the legal provisions drawn up under use of the notion "undefined legal concepts", so that in this way the administration might be bound more tightly to the law. This demand followed on the decision of the Constitutional Court, already mentioned above, on the legal powers to pass regulations.⁴⁵ If the Constitutional Court annuls the authority by which legislation is delegated because it infringes Article 18 (2) of the Constitution by conflicting with Article 140, and annuls the regulations based on it as being in conflict with the law,⁴⁶ then it must also annul legal provisions, as being unconstitutional, which

⁴³ Decisions of the Administrative Court of January 14, 1952, Slg. N.F. 2411 A, and of May 23, 1952, Slg. N.F. 587 F.

⁴⁴ Hans Klecatsky, "Allgemeines österreichisches Verwaltungsrecht," *Juristische Blätter*, 1954, p. 473 ff. and p. 503 ff.; "Die Köpenickiade der Privatwirtschaftsverwaltung," *Juristische Blätter*, 1957, p. 333 ff., and "Die Problematik des freien Ermessens," *Wirtschaftspolitische Blätter* (Vienna: 1957), p. 23 ff.; Alfred Kobzina, "Die Ermessensnorm im Licht des Legalitätsprinzips," *Juristische Blätter*, 1956, p. 492 ff., "Zum Ermessensproblem," *Juristische Blätter*, 1956, p. 524, and "Der Staat als Privatwirtschaftssubjekt," *Österreichische Juristen-Zeitung* (Vienna: 1961), p. 421 ff.

⁴⁵ Constitution of Austria, Article 18 (2).

⁴⁶ *Ibid.*, Article 139.

authorize the issuing of *individual* administrative acts (decisions) without determining sufficiently their content in advance – since Article 18 (2) is only an outlet for the principle of the legality of administrative action established in general terms in Article 18 (1) to cover therefore both general *and* individual administrative acts. The concept of “free discretion” used in Article 130 (2) was contrasted with the unconstitutional authorization to exercise arbitrary power – this being a parallel to the pair of concepts: constitutional authorization to pass decrees and unconstitutional delegation of legislative power. Naturally the leaders of this new course of development, in contrast to the old doctrines on discretion, were fully aware that the distinction between “discretion” and “being legally bound” had little *logical* sense, since of course the logical and linguistic abstractness of legislation as such gives the administration some scope when applying legal rules to facts, both as far as the linguistic and the logical sides of the operation are concerned, and that this scope may be broader or narrower, but that – as long as men administer justice – it cannot be completely avoided. However, the outdated distinction between the discretionary field of action and the field of action bound by law played no role at all in the working out of the new interpretation of the principle of legality. Those who held to the old dogma⁴⁷ were therefore quite right when they said that the new idea “tended in principle to constrict more and more the scope given to discretion”. The leaders of the new course of development did not for their part fail to state clearly what they meant by “sufficiently” determining in advance concrete individual administrative acts by law. It follows from Article 18 (1) that the Legislature is obliged to define the conduct of the administration in a manner that can be checked by the Administrative Court and the Constitutional Court.⁴⁸ Thus such legal determining of the conduct of administrative authorities is “sufficient” which makes it possible for both Courts fully to carry out their *protective legal function*. Both Courts are empowered, in the interest of the protective legal function conferred on them, to make known their demands on the Legislature through the judgments they pronounce. *This synthesis between the principle of the legality of administrative action and the courts controlling the upholding of this principle means that the dynamic impetus, which is thereby withdrawn from the Legislature and the Executive, is transferred to the two Courts, the Constitutional Court and the Administrative Court, and thus strengthens the protective element inherent in the legal system.* This

⁴⁷ Cf. in particular Erwin Melichar's articles in *Juristische Blätter* 1956, p. 429 ff. and p. 463 ff., and in *Juristische Blätter*, 1957, p. 41 ff.

⁴⁸ Leopold Werner and Hans Klecatsky, *Das österreichische Bundesverfassungsrecht*, (Vienna: 1961), p. 112.

too can be viewed as a development in the "State based on Law" towards the "State based on the Judiciary",⁴⁹ and furthermore as a development which, far from threatening the achievements of the "State based on Law", on the contrary strengthens them.

New ideas do not establish themselves from one day to the next. Nevertheless the *progress* which has already been made in establishing these new standpoints must give grounds for optimism. The Constitutional Court pronounced on May 21, 1958, that a public authority is not entitled to act according to its free powers of discretion if the provision of the law does not contain any binding regulation of its conduct. It must rather be expressly laid down in the law that the determining and the extent of its conduct is left in the hands of the authority. Article 130 (2) imposes on the legislator the obligation of expressing the "meaning" of laws, which authorize the exercise of discretion, in such a way that it is possible to pass judgment on the question whether, in an individual case, discretion has been exercised within the "meaning of the law". Laws which do not permit such a judgment to be passed are unconstitutional.⁵⁰

This principle was taken up by the Administrative Court which on May 14, 1960, called upon the Constitutional Court to annul as unconstitutional Section 3 (1) of the Foreign Trade Law,⁵¹ because the provision objected to granted the Federal Minister for Trade and Reconstruction the right to issue import and export licences without making it clear what considerations should guide him in an individual case when coming to a decision on an application for the granting of these licences. The Law, the Administrative Court argued, neither expressly nor implicitly made known its "meaning"⁵² in such a way that it was possible for the Administrative Court to carry out a serious investigation into whether an import or export licence had been arbitrarily refused or not. The Constitutional Court did not concur with the Administrative Court on this. In its decision of March 24, 1962,⁵³ it referred the Administrative Court to the fact that the "meaning of the law" lay in the taking into account of "grounds of economic policy", of "the carrying out of agreements made in trade treaties", and of "the balance necessary for

⁴⁹ This development *Vom Gesetzesstaat zum Richterstaat* was pinpointed by René Marcic in his book of the same name (Vienna: 1957) as a dominant characteristic of modern legal development. For the negative side of this development see Hans Klecatsky, "Der Staat von morgen," *Juristische Blätter*, 1959, p. 14 ff., and Fritz Werner, *Das Problem des Richterstaates* (Berlin: 1960).

⁵⁰ Decision of the Constitutional Court, Slg. 3317.

⁵¹ Official Gazette No. 226/1956.

⁵² Constitution of Austria, Article 130(2).

⁵³ Zl.G. 7/60.

maintaining an exchange of goods with different foreign States". The context of the individual provisions of the law made it clear that the import or export of goods covered by the Foreign Trade Law could not be agreed to if "general economic interests" were opposed to it. It is clear that on the basis of such standards it is very difficult to exercise control over the Executive. The Administrative Court therefore, in its decision of May 24, 1962,⁵⁴ forced the Federal Ministry for Trade and Reconstruction to give its grounds for refusing import licences. In doing this the Administrative Court referred to its duty under the Constitution of affording legal protection, a duty which it could not fulfil without such grounds being given.

In another case the Administrative Court, on May 12, 1961, had challenged a provision of the law before the Constitutional Court, because in its opinion it did not make clear under what pre-conditions a person was to be paid a sum of money provided for in this provision. Here too the Constitutional Court did not agree with this objection, but in its decision of March 17, 1962,⁵⁵ it expressly acknowledged — as incidentally did the Federal Government which was concerned in these proceedings as one of the parties — that the laws had to determine the conduct of the administration to the extent that the Administrative Court was in a position to examine how far individual administrative acts conformed to the laws. But the Constitutional Court felt that the provision of the law objected to did in fact contain such determining provisos, albeit not very precisely defined. The Constitutional Court also expressly stated that there was nothing to prevent the Administrative Court from substituting for the interpretation of "undefined legal concepts" provided by the administrative authority an interpretation which it considered to be right.

This is the last stage of development which the principle of the legality of administrative actions, moving ceaselessly forwards, has reached.

VI

The principle of the legality of administrative action was in its original form the product of a particular historical situation. At first it was applied in times when State and society were far less concerned than they are today with the life of the individual. The protective function of the law consisted essentially then in protecting the individual from encroachments on his political and civil

⁵⁴ Zl.G 509/57 and G 510/57.

⁵⁵ Zl.G 5/61.

rights. Today both the State and society acknowledge social obligations towards the individual in economic and cultural matters. The modern "*State as provider*", which has taken the place of the *laissez-faire* State, has in the main entrusted the Executive with the task of ensuring social security and thereby made it the dispenser of social services.⁵⁶ The question therefore arises, whether in such a situation the principle of the legality of administrative action can continue to exist and fulfil its function.

Even if the question of freedom is for the moment ignored it seems that in this mass society of today, cared for as it is by the State, freedom which is a basic element of all concepts of justice can only be made a reality by means of the law. Without the law administration would break up into individual acts without any plan or aim and the general physical and spiritual welfare of the community which is the aim of the modern Welfare State would dissolve into the welfare of some arbitrarily favoured citizens and the misery of some equally arbitrarily handicapped citizens. Here the law has, as against the old type of Rule of Law State, another function along with the functions of exercising sovereignty and providing protection, namely, the *function of distribution*, and over this function of distribution it exercises that new protective function which is a specific feature of the modern type of State: protection not only against the encroachments of the State, but protection in the positive sense of a raising and maintaining of a decent standard of living. This belongs to the new concept of freedom.

Indispensable though the law is, particularly at the present time, there is a new force closely bound up with the modern type of State working *against* it. The State which provides its citizens with services has itself to a considerable extent gone over to creating directly the economic foundations for these services. The State in its more or less decentralized forms maintains, either directly or through independent foundations, institutions or societies, factories, banks, railways, forests, farms, hotels, bathing-establishments, undertaker's establishments, cinemas, theatres etc. The administration with its technically trained staffs of officials is itself actively engaged in business. In order to carry out its economic plans the business side of the administration, like every private citizen engaged in business, needs *freedom to operate*. But freedom for the Executive – as has already been demonstrated – always means less freedom for the individual. Right up to the present day Austrian jurisprudence has remained insensitive to this state of affairs. It thought that it could make do with the legal formulae

⁵⁶ Ernst Forsthoff, *Lehrbuch des Verwaltungsrechts* Vol. II (Munich/Berlin: 1956), Vol. II, p. 304.

of the nineteenth century. Particularly fatal in this respect was the way that it clung to the concept of the so-called "*use of private enterprise*". This concept was employed by the jurisprudence of former years in opposition to the concept of the "*exercise of sovereignty*".

The jurisprudence of former times rendered a great service to the cause of freedom by making this distinction. The exercise of sovereignty, that form of executive action in which the State issued orders and used coercion, was subjected to the control of laws. Inasmuch, however, as the once absolute monarch acted as a private individual, he had the right to be treated like any other private individual. When the monarch as the "holder of private rights" was legally put on the same footing as his "subjects", then nothing was more logical than that he should be accorded the same legal right to dispose of his property as the "subjects" had. The place of the monarch was taken by the administrative officials of modern society. But the formula that the State outside of the "exercise of sovereignty" was to be treated like a private person, so that it could run and manage its affairs with perfect freedom of operation, was still upheld. The result was inevitable: effective power was transferred more and more into the sphere of the administrative "use of private enterprise". Here it could exist unhampered by legal ties, always an agreeable situation as far as power is concerned. In the sphere of "private enterprise" enormous economic power is stored up in the name of the people, power with which the plans of the modern "State as provider" can become an undisputed reality. The practical significance of this is that the administrative agents of public power, outside the "sovereign" sphere, are to a considerable extent released from the control of the law; but it also follows that the individual who has dealings with this sphere of State-owned "private enterprise", or who *wants* or who *has* to have dealings with it, does not enjoy the same legal protection as he does *vis-à-vis* the "exercise of sovereignty".

Although finally the purely *fictional character* of these long since superseded legal dogmas and the enormous threat to law and freedom inherent in them has been recorded,⁵⁷ the formula that "the State avails itself of its power in the exercise of its sovereignty, but renounces it when indulging in private enterprise" is still part of daily legal practice. It is certainly generally acknow-

⁵⁷ Hans Klecatsky, *Allgemeines österreichisches Verwaltungsrecht, op. cit.*; *Die Köpenickiade der Privatwirtschaftsverwaltung, op. cit.*, and *Die Problematik des freien Ermessens, op. cit.*; Felix Ermacora, "Die Lückenlosigkeit des Rechtsschutzes in der Verwaltung und die Effektivität des Rechtsstaates," *Juristische Blätter*, 1956, p. 142 ff.; Alfred Kobzina, *Der Staat als Privatwirtschaftssubjekt, op. cit.*

ledged that the provision of the Austrian Constitution's Article 18 (1) according to which all the administrative activities of the State can only be carried out on the basis of the laws, is also applicable to the administration's "use of private enterprise"; but the legal consequences resulting from this basic rule which have been shown and which apply to the "exercise of sovereignty" are arbitrarily not applied to State "private enterprise".

A special case is formed by the *financial subsidies* paid for out of the "public purse" which to a very large extent underlie the structure of the social system, but which for all that are considered to come under the heading of "private enterprise activities" and whose allocation therefore falls outside the law.⁵⁸ Here too, however, legal theorists have in the last few years approached the problem from a fresh angle, and one can only hope that this will have practical results.⁵⁹

It is certainly no simple matter to bind the business activities of the State by legal rules in such a way that it can manage its business affairs without exercising arbitrary power. It is precisely in the field of commercial law that one finds discretionary provisions, unlimited powers, and elastic clauses.⁶⁰ Yet there are many encouraging examples which point the way to a reasonable regulation of such administrative activity. For the rest, the objections lodged against the legalization of "private enterprise activities" are almost literally the same as those made at the start of the era of the Rule of Law against the legalization of the Executive itself. The author of these pages has therefore no doubt that one day the concept of "private enterprise activities", which has now lost all meaning, will perish just as ingloriously as did once the old administrative absolutism.

VII

One cannot ignore the fact that the principle of the legality of administrative action of the Executive seems assured of a bright future, inasmuch as in the *international field* there can be noted an enormous growth of precisely formulated international law. This fact appears to be one consequence of the consolidation of systems of municipal law taking place everywhere, and on the other hand

⁵⁸ Decision of the Constitutional Court, Slg. 3262.

⁵⁹ See the essays by Hans Weiler, Hans Klecatsky, Felix Ermacora and Fritz Kohl in the *Wirtschaftspolitische Blätter*, 1959, p. 127 ff., and also Ermacora-Klecatsky-Ringhofer-Weiler, *Österreichische Juristen-Zeitung*, 1960, p. 172 ff.

⁶⁰ On this see Hans Klecatsky, *Die Problematik des freien Ermessens*, *op. cit.*

this consolidation is itself a consequence of the consolidation of public international law. Legal systems governed by the principle of the legality of administrative action cannot grant more freedom to their executive organs called upon to conclude treaties or to represent them in any way abroad, than these enjoy internally. This is also made clear in the Austrian legal system. According to Article 50 (1) of the Austrian Constitution both political treaties and treaties which entail the modification of municipal law require ratification by Parliament before they become valid. Parliamentary resolutions ratifying treaties must, according to Article 50 (2), satisfy the legal conditions laid down for constitutional laws.⁶¹ According to Article 9 of the Constitution the generally acknowledged rules of international law are accepted as valid parts of the federal law. In this way the Austrian organs of government are bound by law in their international dealings, quite apart from treaties.

It is clear that, just as is the case within the State as far as the individual is concerned, so too the stability of government action resulting from such legal ties makes it easier for the other members of the family of nations to predict future government action. The fact that one can dependably calculate action in advance is a very fundamental element of law, trust, order, and therefore of peace, not only in municipal law, but also in relations between States. In the endeavours being made to secure this peace one can already discern today the first stages in the genesis of a *World State*,⁶² of a *World Rule of Law State*, governed by the principle of the legality of administrative action. This shows that the latter principle is more than just a theoretical juristic maxim, which is the disparaging term used by people who favour arbitrary conduct.

VIII

The author of these lines would naturally not dream of asserting that the principle of the legality of administrative action is a panacea that would finally solve all problems. It has been said already that it is only in conjunction with other fundamental constitutional principles that this principle can guarantee the preservation of the Rule of Law State. Furthermore, the establishment of all these principles means that *there must always be men prepared to put them into practice here and now*. For principles only have value, insofar as the reality produced by means of them can claim to have value. But reality is entirely a matter of *here and now*; it is something *concrete*.

⁶¹ Constitution of Austria, Article 44 (1).

⁶² See Ernst Jünger, *Der Weltstaat* (Stuttgart: 1960).

The objection is made, with affected naivety by those who favour arbitrary action, and with genuine naivety by those romantic jurists who live in the past, that the principle of the legality of administrative action gives birth to *many laws* and that many laws is a bad thing. Yet these many laws are not the product of the principle that the Executive must be accountable in law. The many laws owe their origin to the fact that the *collective power* has become almost omnipresent in the life of modern man. This is not a consequence of law, but a consequence of the technical age we live in, of the economy, of politics and all other collective powers which determine the life of society. The lawyer who is faced with unjust accusations of this nature finds himself in the same position as the doctor who is accused of treating a multitude of illnesses with a multitude of medicines and who is told that it is healthier to be healthy without medicines. It would indeed be healthier to be healthy without medicines, and it could certainly be better to live without laws in a state of justice, order, freedom, and peace. But just as the doctor fights death, *so too the lawyer will have to take up his stand against injustice until the end of time.*

HANS KLECATSKY *

* Judge of the Administrative Court of Austria.

REFLECTIONS ON THE RULE OF LAW

I

Towards the close of a life dedicated to campaigning for the Rule of Law in all its varied forms: legal education, propaganda, the Government of National Resistance, legislation, international negotiation, the courts, books and articles, I find myself proud to collaborate, in the company of eminent writers from every continent, in the publication that the International Commission of Jurists, in celebration of its tenth anniversary, is devoting to the Rule of Law.

Others more qualified will explore the implications of the idea that the State itself, in its legislation, its government and its administration, is subject to the Rule of Law, in the widest sense of the phrase, that is, written and unwritten law. Some will give an authoritative assessment on the ten years of work published in the *Journal* and *Bulletin*, and carried out at the Congresses of Athens (1955) and New Delhi (1959) and the Conference of Lagos 1961.

For my part, after having verified the solid value of action undertaken for the Rule of Law, it is my modest hope, in the light of hardwon experience to adduce certain additional reasons and to ascertain certain fields, for continuing to campaign with a heightened faith for juster and more fraternal conditions in man's life on earth.

II

To proclaim a great common purpose – repression of the instinct to violence and the elimination of all arbitrary action within different social groups, including States, and in their relations with one another, under the aegis of rules of law to which proper respect is paid, under the protection of a social order conducive both to the dignity and security of man and at the same time to social advance; this is the broad foundation on which jurists, sociologists and practising lawyers from the old and the new nations, with their diversity of political and social institutions, can bring their ideas into closer accord and map out converging lines of action.

The supporters of the Rule of Law have done well until now not to disperse their efforts in a search for over-meticulous definitions, or definitions too charged with the conceptions dominating their own particular environment. They have also rightly avoided the over-simplified concept, whether it be the professional concept of formal law, correct in itself, but profoundly inadequate and sometimes dangerous, or the attitude which exalts the law into a blind

body of rules maintaining the *status quo*, freezing both society and the rights of the individual into a static mould, a dry as dust stagnation. There can be no new stimulus to progress without resort to those fundamental principles which lend themselves so inexhaustibly to fresh application, such as the dignity and freedom of man subject to the law and aspiring to justice, and which command the equality of treatment for all other members of society. The Rule of Law can only be conceived and fully realized where Human Rights are fully recognized and respected.

III

The converse is equally true and the authors of the Universal Declaration of Human Rights, adopted in 1948 by the General Assembly of the United Nations, gave it clear expression in the Preamble to this basic instrument, not incorporated in the Charter, but inspired by the purposes it proclaimed in the latter.

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

They have taken equal care to attach no *exclusive* importance to any one single element in the content of the Rule of Law, even to freedom or personal security on the one hand, the *leit-motiv* of all the Declarations of Right which have prompted the democratic institutions among the Western peoples during the eighteenth and nineteenth centuries (the United States, England, France, etc.), nor, on the other, to principles of equality and social solidarity taking precedence in the Constitutions of the Socialist and People's democracies. Inspired by "practical idealism", to quote J. Maritain, they have tried to establish a minimum standard common to all sections of humanity, and to draw up a balanced and harmonious programme based on the four principles of freedom, equality, non-discrimination and fraternity.

They have seen to it that there has been no neglect of any of the fundamental rights and freedoms which allow man to realize the free development of his personality, dividing them into four groups: personal freedom and security of the person, social relationships and the right to own goods and property, religious, political and civil rights, and economic, social and cultural rights. Nor have they omitted mention of the corresponding duties of the individual and of the community itself in fixing limits which may not be exceeded, either by the individual or by a democratic society.

The authors of the Declaration, in conclusion, conscious that they were not drafting an instrument with binding force, briefly but clearly indicated the principal constructive, deterrent, corrective and

even punitive methods required for realizing the ideal proclaimed by national representatives at the General Assembly of the United Nations. The instruction and education of human beings, regarded as the key to all changes in human mentality, takes pride of place; then follow a series of national and international measures of a progressive nature to be taken by the competent authorities of the different States. They are followed by effective remedies and particularly the remedy before competent national courts accessible to persons suffering injury through the violation of fundamental rights (Article 8). And in conclusion come the sanctions on those responsible for the offences.

IV

Without any need for more detailed discussion, the Declaration of Human Rights therefore reveals itself to the defenders of the Rule of Law as an incomparable ally, and its political and moral dynamism, far from weakening with the years, is displayed more clearly with every passing day.

If indeed the Declaration was originally conceived mainly as a protest of the human conscience against the thousand atrocities and monstrous actions which had preceded, provoked and accompanied the Second World War, and first made its appearance as a vigorous reaction on the part of the organized community of those who had suffered, even indirectly, from that war, it owes its strength in reality to the fact that it answers the enduring needs and aspirations of the peoples of the world, whether those already enjoying a relatively high standard of living, culture and freedom in their countries, or more particularly those human masses still living in under-developed conditions, inadequately fed, illiterate and subject to oppression, fear and poverty.

Despite inevitable imperfections of content and form, the Declaration, passed with acclamation by the representatives of forty-eight countries with eight abstentions and no opposing vote, continues to draw strength from the great spiritual, rationalist and materialist currents leading twentieth century humanity away from the paths of violence, racialism and contempt for mankind. Each time, moreover, an independent State is created or reconstituted and even more when a new member is admitted to the United Nations or to an international specialized agency, the authorities of this State go on record in their Constitution or in other legal instruments (act of secession, demand for admission etc.) as adhering to the principles of the Declaration.

The Declaration in short, by the breadth of its content and the universal character of its field of action in both the territorial and personal sphere, is at once the expression and the most active medium of the Rule of Law.

V

We must now ask ourselves which are the most essential issues needing practical implementation on which the supporters of the Rule of Law should concentrate their most determined efforts.

First on the national level. In the present condition of the world, where many densely populated States suffer from a low level of economic production and the structural inadequacy of their institutions, we must expand the celebrated saying of the French revolutionary, Danton, that "with bread and education, a good administration is the first need of nations".

"Administration" must not only be taken to mean the executive organs, both political and administrative, determined by the competence, integrity and efficiency of their members. Governments and civil servants must become accustomed to working within the framework of impartial rules and respecting them even when they themselves are invested with extensive powers, to submit to public criticism as a function of free speech, to recognize the machinery of appeals through regular administrative channels and recourse to the courts by the individual aggrieved through the abuse of powers inevitably committed by some few civil servants.

In 1949, Mr. Torres-Bodet, the Director-General of UNESCO, considered that one of the first duties of this organization was the wider diffusion of the Declaration and a start to be made in the universal task of education which it postulated.

The Division of Human Rights of the United Nations has organized seminars and meetings of lawyers and statesmen in various parts of the world (the Far East, Latin America, Central Africa, etc.) to study one main problem for a number of days, as for instance the rules of criminal procedure, or preventive remedies, or appeals against excess of power or administrative abuse. Such joint educational ventures have already borne fruit and, as in the Conference of Lagos, revealed outstanding men from all parts of the world. They cannot receive too much encouragement.

But we must go beyond the question of education. The mechanisms for the training of civil servants, and the institutions responsible for safeguarding observance of the Rule of Law and sanctioning its violation should be constitutionally and legislatively integrated into the body politic of new and reconstituted States. The earlier efficient machinery has been set in motion and good habits established, the less the risk of arbitrary and oppressive action against citizens, taxpayers and subject people. In the Constitution for independent Nigeria, for instance, the chapter on Human Rights, guaranteeing rights the definition of which had been largely taken from the 1950 European Convention, was promulgated on October 24, 1959, well before independence was

achieved. And in a similar fashion the Senegalese Constitution set up a Supreme Court on August 29, 1960, which first sat on November 14. This Court pronounces in particular on the constitutional validity of laws and on the legality or otherwise of final decisions of administrative tribunals, and is competent to quash or set aside administrative decisions.

If, on the other hand, the recent conquest of national independence provides a pretext to public authorities to govern independently of all rules of law, it will be extremely difficult to change the pattern of undesirable practices. Decades will be needed to impose upon recalcitrant officials the various systems of review and control so laboriously established in democratic countries: the control of Parliament, the control by the press and public opinion, control through the hierarchy of regular administrative channels or an expert senior official and, *a fortiori*, control and supervision by an independent Judiciary, whether of wide Jurisdiction or specifically administrative.

Old established countries, of course, are not free from the duty of improving their institutions in the light of new needs.

In France, for instance, the original jurisdiction has been transferred, as from January 1, 1954, formerly exercised by the Council of State to administrative courts geographically more accessible to the ordinary citizen. The Council of State has become the final and single court of appeal for the whole of France, without affecting its role as appeal court for the decisions of other administrative courts. By the Tribunals and Inquiries Act, 1958, an important reform was carried through in England designed to assure high administrative review and control over the coordinated functions of a mass of administrative tribunals, and also judicial control by the High Court over the decisions of these bodies. Norway took advantage of the example presented by Sweden, Finland and Denmark to set up a Parliamentary Commissioner for the Civil Administration. Poland has rounded off her system of review and control, modelled on the Soviet Procuracy, by a special system of appeals.

VI

The attention of the defenders of the Rule of Law has in the first place been concentrated on the need to ensure that the structure of each State and the mentality of ruling circles should be orientated towards acceptance of the practical implementation of the principle of legality.

The second task, naturally enough, is to ensure that the structures thus grounded, the organs and institutions thus established, exist not only on paper, but genuinely function as such, either under governmental or administrative encouragement, or on the initiative of a party with its right to appeal.

This is a vitally important task. To begin with it may well be that the authorities of a given State have of their own accord introduced bold and courageous measures. Thanks to a knowledge of comparative law, they may have noted the example of a neighbouring State or civilization in order to introduce a reform benefiting some particular social category. Or – as in the previously cited case of Nigeria – they may have taken from a former colonial power such excellent institutions as *habeas corpus*, or a High Court charged with protecting Human Rights. Even more important is the need for citizens to make effective use of these institutions and not be prevented by *fear of reprisals*.

The intervention of supporters of the principle of legality is of no less importance within the country itself, when measures of a national character have been taken by a State in conjunction with one or more nations situated, for instance, in the same region of the world, or when a universal convention has been concluded under the auspices of the United Nations.

In such cases, the international element is in the whole current of ideas inspiring progressive developments; it is also in the methods adopted to protect those nations prepared to implement progressive principles from being called to pay the price of them alone, and to ensure that any social, cultural or economic “step forward” should be undertaken simultaneously, or nearly so, by the greatest number of States possible belonging to different groups.

It is none the less true that even excluding the various legal methods available for translating concrete provisions contained in an international convention into the municipal law of each signatory State, these provisions at a given moment become rules of law for each of the countries which have signed and ratified or adhered to the convention.

Following the signature of the convention, it must be submitted by each government to the appropriate national body empowered to put it into operation by appropriate procedures. But from the moment it is in force, another fundamental responsibility comes into being, the need to watch over its practical implementation.

It is therefore more than understandable that among the first clauses of the two linked draft international covenants, on civil and political rights on the one hand, and on economic, social and cultural rights on the other, which the United Nations Commission on Human Rights drafted between 1948 and 1954, and which are still under discussion in the successive sessions of the General Assembly, the Commission included general provisions formulating and specifying implementing measures for the obligations undertaken.

A similar technique has been used in more than a hundred specialized conventions, adapted under the auspices of the United

Nations' International Labour Organization. Some of the terms of the Convention against Discrimination in Education passed by the General Conference of UNESCO on December 14, 1960,¹ and already ratified by a number of powers, provide an interesting example.

The conclusions of this paragraph are that it is the task of supporters of the Rule of Law, following a number of successes already to their credit, to reduce possibilities for arbitrary action by recognition of guaranteed rights and freedoms within their respective countries, and to be vigilant in seeing that the various organs of State honour their fundamental obligations and that neither routine nor fear bar the way to the normal exercise of the faculties or rights of the individual.

VII

Let us now pay closer attention to the international aspects of the Rule of Law, with especial emphasis on the problem of the international protection of Human Rights.

Here the difficulties to be surmounted are particularly acute,

¹ ARTICLE 3 of the Convention of December 14, 1960:

In order to eliminate and prevent discrimination within the meaning of this Convention, the States Parties thereto undertake:

- a. To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education;
- b. To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;
- c. Not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries;
- d. Not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group;
- e. To give foreign nationals resident within their territory the same access to education as that given to their own nationals.

ARTICLE 4. The States Parties to this Convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular:

- a. To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all . . .
- b. To ensure that the standards of education are equivalent in all public educational institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent;
- c. To encourage and intensify by appropriate methods the education of persons who have not received any primary education . . .
- d. To provide training for the teaching profession without discrimination.

because in the present position of international substantive law, the principles of independence, national sovereign rights, legal equality and reciprocal treatment between States are still in force. The Charter of the United Nations reaffirmed them, and the celebrated Article 2, paragraph 7 of the Charter forbids foreign intervention in matters which are within the domestic jurisdiction of a State.

When indeed one State, basing itself on the right of its nationals to its diplomatic protection, charges another with having interfered, permitted interference, or dispossessed without compensation one of its nationals, the claims should be settled by direct negotiation or any other means of peaceful settlement, such as resort to conciliation machinery, arbitration or the International Court of Justice.

But when in any country the victim of an excess of power or violation of the Rule of the Law is a national of that same country, it is only to be expected that the answer on the part of that State to any observations proffered by other States will be in effect "mind your own business", with rather more justification than Hitler had in 1933, at the time of his sensational departure from the League of Nations when confronted by a complaint from an individual Jew claiming the protection of a formal convention signed in 1922 for the protection of minorities, whether German or Polish, in Upper Silesia.

At the same time, on human grounds, it is imperative that the censure of world opinion should make itself heard and even that States should take action to put an end to practices unworthy of any civilized society. Well before the legal organization of the community in the form of the League of Nations and the United Nations there had taken place concerted campaigns against slavery, the slave trade and to put an end to massacres not as yet known as genocide. Can it possibly be admitted that the creation of universal institutions could serve to legalize a retrograde step, rather than, on the contrary, providing an impulse to the development of international law in the direction of the better protection of elementary Human Rights, and in particular the development of and respect for the Rule of Law in each and every State?

The latter, indeed, is the course now being pursued. On the international level the fight for the Rule of Law is being conducted along several lines of attack, converging on the same ends, and inspired by the three main themes:

- a) To reduce the area of jurisdiction reserved to individual States;
- b) To institute procedures and create supervisory bodies enabling all member States to participate in the prevention and, where need be, the punishment of violations of the Rule of Law;
- c) To establish the right of individuals, groups of individuals and inter-governmental organizations alleging injury as a result of

violation of the Rule of Law to initiate proceedings and lodge complaints.

Without elaborating further on any of these procedures, the question arises as to which of these fields of action provide most immediate scope for the activities of the supporters of the Rule of Law.

VIII

Among the efforts made to reduce the area of jurisdiction reserved to the individual State are: a) those designed to obtain the most restrictive *interpretation* of Article 2, Paragraph 7 of the Charter, and b) others conducive to the public creation of *new international standards* governing matters either reserved heretofore to the exclusive jurisdiction of each State, or uncertain in their classification.

a) The first method has been and still is in frequent use during the debates of the General Assembly or other organs of the United Nations. It is designed to bring pressure by the community to bear upon any State charged with following a policy in conflict with the Charter and the Universal Declaration of Human Rights; the very grave problem of apartheid in South Africa is consistently ventilated in the United Nations. And there have been others in the past, such as the fate of the Soviet wives prevented from leaving their country to join their foreign husbands.

A factor which has frequently resulted in the encouragement of debates which are no more than pure political propaganda on the part of States much given to invoking Article 2, Paragraph 7 in matters concerning them, is the particular bearing of the Charter on the question of Human Rights; surely promotion and respect for these rights is one of the purposes of the United Nations, in the duties assigned many of its organs (Articles 13, 62, 64, 68), among the objects of cooperation binding on nations, and among the occasions for the intervention of the Security Council in the event of any threat to the peace?

Far from being productive of any useful or progressive results such polemics have frequently given rise to violently conflicting judgments, subject to all the hazards of political circumstance and too often justifying the reproach of "two weights and two measures". It is with regret I express the fear that the supporters of the Rule of Law cannot truly place any dependence on a balanced and harmonious interpretation of Article 2, paragraph 7 emanating from political organs;

b) It is by normative methods, openly creating new international rules of law in matters heretofore reserved to the exclusive jurisdiction of States, that the nations of the world, encouraged by an enlightened public opinion, have achieved their most striking

successes, from those days in the nineteenth century when concerted measures were first taken to abolish slavery and end the slave trade. These were followed by numerous treaties on international private law, various forms of copyright, and international penal law.

From 1919 on, more than a hundred universal labour conventions have been concluded under the auspices of the ILO.

A reference must be made to the first attempt of the United Nations in this field, the imperfect 1948 Convention on the Prevention and Punishment of the Crime of Genocide, now in force, but needing for its completion the establishment of an International Court of Criminal Justice.²

The two linked draft international covenants of Human Rights, drawn up by the 1948-1954 Commission, are still under discussion before the General Assembly, which has not even managed to finalize the substantive Articles of the draft texts. This delay may be due in part to the fact that some supporters of the covenants were anxious to include too much in a single sweep, that others wished to link them with undertakings going far beyond the principle of the Universal Declaration, only to make large reservations at a later date, and that others again, like the United States, gave evidence of their dislike for conventions so unfavourably regarded by the Senate.

Some of the unfortunate consequences of this delay will be remarked further on. Unremitting effort in the interval has none the less succeeded through specialized conventions in creating uniform rules of law in hitherto reserved matters: the civil status and political rights of women, forced labour, the ban on discrimination in employment and terms of service, and a similar and very progressive convention on the campaign against discrimination in education was concluded at UNESCO on December 14, 1960.

Most striking of all, however, is the fact that the member States of the Council of Europe signed a Convention on November 4, 1950, for the Protection of Human Rights and Fundamental Freedoms, the first Section of which, strongly influenced by the original preliminary draft of the United Nations Commission, retains and defines, among the rights and freedoms proclaimed by the Universal Declaration, an initial list of civil and civic rights, the recognition and guarantee of which was henceforth binding on all the signatory States. An additional protocol of March 20, 1952, completed this list. A second protocol, dealing with economic, social and cultural

² Mention must also be made of the provisions of Article 2 of the 1946 Peace Treaties concluded by some of the Allied powers with Bulgaria and Hungary, and Article 3 of the Treaty with Rumania. The failure to implement the latter led to the advisory opinions delivered by the International Court of Justice dated March 30 and July 19, 1950. The machinery for the international protection of Human Rights, which they created, could not be put into effect.

rights, adopted in the Consultative Assembly of the Council of Europe, is now under consideration by the Council of Ministers.

And now at last the work begun at Bogota in 1948, in the form of the Pan-American Declaration, has been resumed in Latin America with the purpose of obtaining the conclusion of a Convention modelled on the European Convention. A similar African Convention has been the object of some preliminary studies.

If in general approval and encouragement should be given to the peaceful and silent revolution internationalizing a whole series of questions reserved until recently to the exclusive jurisdiction of States, and adding the responsibility of the particular international community concerned, whether universal or regional, to the obligations and guarantees assumed by each State party to the normative conventions, it is none the less necessary to point out the risk that, due to the continued lack of any universal covenant on Human Rights, regional pacts will upset the impartiality of the Universal Declaration, and end by defining the rights of European man, American man, African man, Asiatic man, with implications contrary to the aim pursued since 1948. These definitions are no doubt necessary to give support to the engagements already assumed. Supporters of the Rule of Law should consequently devote themselves, on the one hand, to efforts to speed the vote of the General Assembly in favour of universal covenants and, on the other, to prevent the passage of all provisions in regional pacts at variance with the universal character essential to Human Rights and Freedoms.

IX

The institution of special procedures and even of international bodies to ensure respect for the international rules of treaty law – in addition to the usual guarantee afforded by international law – form the second type of constructive effort to promote the Rule of Law.

A form of society comes into being among the signatories to a convention in which each member State is bound to report but is also called upon, where necessary, to take steps to prevent the errors and omissions of the other parties, or to demand their cessation and compensation, even if none of its direct interests or those of its nationals have been affected.

We must distinguish between cases of general preventive supervision and control, on the one hand, and grounds for complaint in particular cases on the other.

a) One of the most practical preventive safeguards is the provision of a periodical report from each State party to conventions (upon a request from the Secretary-General of the United Nations for instance) on “the progress realized and the obstacles encountered” in the implementation of one or more conventions.

The Constitution of the ILO, revised in Philadelphia, presents a valuable model in this connection. Member States are invited to furnish an annual statement on implementing action taken or an explanation on their failure to ratify it. All these reports are submitted to the meticulous examination of the permanent committee of highly qualified experts who present their conclusions to the administrative council of the ILO for examination by the General Conference.

Unfortunately no such provisions are included in the United Nations Charter, except in the case of nations administering non-self-governing territories. To make good such a lack has proved exceedingly difficult. The supplementary convention against certain forms of slavery, signed in 1956, is completely ignored by some of the signatory States. It was only in 1956 that the Commission on Human Rights of the United Nations, after receiving the approval of the Economic and Social Council, managed to arrange for three-yearly reports to be presented from member States on action taken in the protection of Human Rights, drafted in the order of Articles of the Declaration. Sixty-one nations replied to its request in 1961 for the deposit of the second three-yearly report. But the machinery for dealing with these reports is still unworthy of the effort demanded of governments and must be considerably improved.³ An intelligent use of the services of non-governmental organizations should also be made.

A UNESCO committee for dealing with reports from member States is also in existence; it will certainly find itself in need of the same type of technical assistance from which the ILO has profited when it comes to examining the reports contributed under the Convention of December 14, 1960 and the Recommendation of the same date.

b) Quite independently of the regular legal machinery for the pacific settlement of international disputes, the establishment of bodies especially charged with the study of complaints – brought by one member State against the alleged violations of another – has been one of the first considerations of those who give rules of international Law their due importance.

Here again the Constitution of the ILO in instituting procedures for the examination of complaints serves as an example. Quite recently the International Labour Organization and ECOSOC to-

³ The 1962 session of the Human Rights Commission finally produced certain improvements in this respect; they are not yet in force.

The draft covenant on economic, social and cultural rights submitted by the Commission to the Assembly from 1954 onwards also requires signatory States to submit periodical reports on implementing action taken insofar as the reports of the specialized agencies do not furnish adequate information.

gether set up a special body to examine cases of alleged breaches of trade union rights.

The Commission of Human Rights of the United Nations, in the only draft international covenant on the civil and political rights of the individual, envisaged the creation of a permanent body to be known as the "Human Rights Committee", composed of eminent persons serving in a personal capacity, chosen by the International Court at the Hague from a list of candidates submitted by States adhering to the protocol, which would be responsible, in a conciliation and good offices committee, for handling the claims of States adhering to the Convention (and these exclusively) against others. Recourse to the International Court of Justice is also envisaged as a further possibility. But the General Assembly has not yet discussed these proposals. It can already be foreseen that certain delegations will again put forward proposals to set up an Attorney-General or prosecuting agency of the United Nations equally competent to bring the omissions or violations taken cognizance of before the Human Rights Committee. The permanent nature of the Committee will also evoke opposition in certain quarters, and likewise the right of the complainant State to insist on the State against which a complaint has been made presenting itself before some conciliation body.

A conference of experts, indeed, to whom UNESCO had referred in June 1962, a draft protocol for the organization of conciliation and good offices in the event of differences arising between States over the implementation of the Convention of December 14, 1960, has already been faced with two objections, and has to a certain degree met the first of the two: in the draft protocol as drawn up by the experts, the presence on the conciliation committee of one national of each of the nations party to the dispute has been accepted.

But by far the most comprehensive system for the settlement of disputes is to be found in the European Convention on Human Rights of November 4, 1950. In order to command respect for the obligations undertaken thereunder by the high contracting parties the Convention has, in the first place, constituted a European Human Rights Commission, with a membership equal in number to the number of signatory States, elected on a six-yearly term, each member sitting in his personal capacity, in order to establish the facts, give assistance in coming to a settlement which is based on respect for Human Rights, and present a report to the Committee of Ministers, accompanied if need be by an opinion on the question under dispute as to whether any breach of its obligations has been committed by the State in question.

But it went further, in setting up a European Court of Human Rights composed of elected judges, to whom a case may only be

referred after the Commission has duly noted the failure of direct negotiations within a period of three months from the date of the report. The Court may only be moved by one of the States concerned or implicated, or by the Commission itself. Only States and the Commission are entitled to appear before the Court. Its decision is final.

The experience acquired since 1953, when the European Commission began to function, has proved that only very rarely has one nation presented complaints against another; three times in eight years. No case thus raised has ever come before the European Court; on every occasion the complaint has either been withdrawn or a settlement has been reached. But this experience also prompts further observations on the role of persons or groups of individuals, to which we shall now turn.

X

The exclusive right to prefer complaints before international courts which has almost invariably⁴ been reserved to governments parties to regulatory conventions, though of long standing, has been strongly criticized in many legal circles, and with considerably stronger reason by journalists, the interpreters of public opinion. The point stressed is precisely that it is illusory to imagine that any State could regard itself as the disinterested servant of a community of States collectively guaranteeing a right; it cannot divest itself of its character as a political entity, and consequently only takes action if the victim of alleged violation on the part of another State is one of its own nationals, or if a special political reason exists justifying an approach: if, for instance, the victim, though a national of the State which has been accused, forms part of an ethnic or social group connected with the complainant State.

As a matter of principle, moreover, it is difficult to deny the right of the individual to be a subject of international law, with all the attendant rights, such as the capacity to sue, particularly when the personal liability of these same individuals is admitted in the decisions of the court.

It is under the stimulus of such ideas that ever-widening circles and even certain States are declaring themselves in favour of granting aggrieved persons, or even to groups of individuals and non-governmental organizations, direct access to international organizations for the protection of individual rights. Recognition of the "right of

⁴ Immediately after the First World War mixed arbitration tribunals were set up, before which persons claiming loss or injury could act directly as plaintiffs. After the Second World War the Franco-Italian, Anglo-Japanese and other conciliation commissions were also entitled to hear claims from private persons.

petition", interpreted as the "right to make an application to institute proceedings" has been the subject of animated discussion before the United Nations Human Rights Commission. It was only provisionally excluded from the draft covenant on civil and political rights by an equally divided vote. But when discussion on its passage into international law comes up before the United Nations General Assembly, the proposal will be raised again.

For my part I have no hesitation in urging champions of the Rule of Law to give their full support to the proposal to recognize this right of private persons, through a permissive protocol, not only on grounds of doctrine already repeated a thousand times, but for reasons of elementary justice and on the results of the European experiment.

On the one hand the Economic and Social Council, in Resolution 75, has instituted an extremely rigorous procedure for "communications", for letters, for example, from persons or groups of individuals addressed to the Secretary-General of the United Nations giving information of violation of rights and abuses of power, though the Council has proved sympathetic to the extent of keeping the identity of the complainants secret. Seeing that the Human Rights Commission itself, from January 1947 onwards, acquiesced in the rule that no suits of private persons should be considered, it may be said that apart from petitions addressed to the Trusteeship Council or the Committee for Information from Non-Self-Governing Territories, not included here, the great majority of the 30,000 communications addressed to the United Nations since its foundation have been acknowledged, but not examined. The only departure from this rule applies to communications the substance of which (if not the origin) has been transmitted to the State implicated by the complaint. Such communications have been the subject of investigations and on occasions have produced favourable replies on the part of the authorities of the State concerned. This sort of system, which is unworthy of the hopes the oppressed place in the United Nations, is unlikely to be improved unless an organization for sifting communications by means of a universal covenant is created. It will speedily become clear that the greater part of them for a variety of reasons, need no further consideration, and the small number remaining will at least be given a more humane consideration.

I now turn, on the other hand, to the results of the experiment which has been carried out by the Commission and the European Court. The 1950 Convention, in Article 25, enables the Court to entertain a petition against a State from "any person, non-governmental organisation or group of individuals" alleging loss or injury through the action of that State if the latter has officially recognized the jurisdiction of the Court in the matter. Out of more than a thousand petitions received to date from individuals, the European

Commission has declared only some ten or so admissible. It has declared the greater number of them inadmissible on the grounds that they have been preferred before "all municipal remedies have been exhausted according to universally recognised principles of international law". Among the petitions declared inadmissible several were the object of unfavourable reports and were rejected by the Committee of Ministers, and others were settled by negotiation. In the result two cases were taken before the European Court at the instance of the Commission itself. In the one case the Court found against the plaintiff on the merits of the case, and removed the other from the cause list after learning that the Commission and the government concerned were in agreement that the object of the action no longer existed.

With these precedents in mind it seems impossible to refuse to attempt on a universal level, through a permissive protocol open to all States, what has already been attempted on a European level.

XI

On the practical level there are two further points to be considered.

In the first place the great importance which the States that are parties to the European Convention attach to the question of "the exhaustion of municipal remedies" should reassure those who have expressed anxiety on the lack of respect which might be shown the Supreme Courts of different countries, and should encourage supporters of the Rule of Law to redouble their activities in their respective countries for the more effective establishment and operation, with the least possible delay, of procedures for recourse to competent and independent national tribunals (Article 8, Declaration).

In the second, the extreme reluctance displayed by member States of the Council of Europe to bring complaints before the Commission is still more complete when action before the European Court is contemplated. It was the Commission itself which on two occasions took action in bringing suits to the court, acting as might a fully independent prosecuting agency of the European Community. In one of the two instances the Commission referred the case to the European Court despite the fact that it had itself reported unfavourably on the petition of the person concerned, who in himself could neither sue in the Court nor legally appear before it, and on whose behalf the Commission had with an open mind presented the grievances to the Court.

Such an experiment would justify investing the Human Rights Committee, envisaged in the draft covenant submitted to the General Assembly of the United Nations, with functions comparable to those

of the European Commission, if it is disinclined to create *ab initio* a genuine United Nations Attorney-General or prosecuting agency as distinct from the Committee.

Without venturing so far as to demand immediate recognition for the legal right of a person to appear before an international organ or court, even against his own government – and it can easily be appreciated that the time may not yet be considered ripe for such a reform – supporters of the Rule of Law should seize the opportunity to promote real international progress by the creation of the office of Attorney-General or prosecuting agency of the United Nations, or at least a body which can take part in the administration of justice on behalf of the community of man.

Even assuming that such a stage may be reached in a comparatively short time, the responsibility of each member State of the United Nations in matters concerning Human Rights remains undiminished. The international protection of these rights, though fulfilling a need, plays a subsidiary part.

There are two more considerations before terminating this plan of action.

XII

Those who ask if it would not be both possible and desirable to provide procedures, in as many cases as possible, for States and individuals to have the opportunity of direct appeal to an international court in the event of the violation of a rule of law which has been collectively established by a community of powers, are entitled to an answer. Why, they ask, so many municipal channels first and international channels to follow, with all the serious delays they involve? Justice too long delayed is not true justice.

The wish thus expressed has already been partially fulfilled. The International Court of Justice in session at the Hague is competent to entertain any dispute which two States have agreed to bring before it, or which one of the two is unilaterally prepared to submit to the Court if the other has subscribed to the clause admitting the jurisdiction of the Court, in virtue of Article 36 of its Statute, subject to conditions therein laid down. The Court quite recently gave judgment in a dispute which arose between Holland and Sweden on the application and interpretation of one of the Hague Conventions of international private law on the protection of persons under a legal incapacity. But the long drawn out solemnities of such proceedings discourage States assuming an ever-growing number of international treaty obligations from appealing too frequently to so high a court. As for the position of individuals, they may neither initiate proceedings in the Hague Court, nor appear before it. Where a State, having failed to gain satisfaction through diplomatic channels for one of its nationals aggrieved by another State – a State, for instance,

which has floated a national loan and fails to repay it in the stipulated currency – decides to ensure full protection for its nationals, it is the protector State which takes action by summoning the defaulting State before the International Court. The remedies discussed in this study have been instituted, or are considered desirable, in order that the Rule of Law be respected and its violation punished, without reaching post-haste for the summit, or stripping the municipal courts of authority. The international organs must not be overwhelmed with cases presenting small interest in principle; it is the other cases which will suffer in consequence.

Furthermore there are cases such as that of the three European Communities, where a single court of justice was set up by the Joint Convention of October 7, 1958, with original jurisdiction in cases brought by the States parties to the Convention, by its institutions, (the Council, Commissions, the European Parliament), by enterprises or private persons, or finally by officials of the communities taking action against their organization.

This is no case of an exception to common law, but only the application of the rule that where a society exists, it should be provided with organs enabling it to fulfil the requisite functions of justice. It is similar to the position of federal states, where the federal courts apply a legal system different from the system maintained and defended by the tribunals and courts of the federated States.

XIII

And now for the final question. May not the absence of rules of law, or their violation by the authorities of a State, impair the latter's good relations with other States, or indeed with all States? It is a fact too often observed to be worth repeating. In the course of the twentieth century the cases are only too notorious where a State has begun by violating or suppressing the rules of law safeguarding the most elementary freedoms and life of its own nationals. But it has not stopped there. Reference has already been made to the case of Hitler trampling on the rights of an individual residing in Upper Silesia, rights guaranteed by a former bilateral convention. Inevitably the process led Hitler to violate on an ever-increasing scale first the elementary rights of men residing on the territory of the Third Reich; then, in the name of racial superiority, the rights of men of other nations; then, in the name of *Lebensraum*, the frontiers of neighbouring States, and finally to launch his attack against the whole of humanity.

If mankind is anxious to avoid a repetition of such events, it must understand that no true peace can exist where the rights of man are grievously or continually despised or trampled underfoot in one or many parts of the world. The gradual establishment of the

Rule of Law in all types of regions and nations therefore constitutes, on at least as high a level as the technical assistance given underdeveloped countries or agreements on reduction of armaments, one of the supreme forces in the task of defending peace and raising the moral level of mankind.

XIV

The above reflections on the practical problems arising daily in national and international life risk alienating the reader by their aridity.

If however indignation and enthusiasm are needed to fire the hearts of those who mean to help build a better world for mankind, the apostles of the Rule of Law must not hesitate to gird themselves with the triple bronze of which the poet sang, to face with lucidity each of the arduous obstacles barring the way to the full realization of law. The miner delves painfully in the dark galleries of the earth for coal to warm mankind. And it is in climbing the rugged escarpments that the pioneer blazes the path to the sunlit heights.

RENÉ CASSIN *

* Honorary President of the French *Conseil d'Etat*.

JUDICIAL POWER AND THE AUTHORITY OF THE STATE IN THE FEDERAL REPUBLIC OF GERMANY

I

The principle of the separation of powers is part of the modern Rule of Law State. According to this, in contrast to the system where power is centralized, as in the totalitarian State, the different functions of government are to be carried out by different organs of the State – legislation by the Legislature, the policy-making function by the Executive, the implementation of legislation by the administration, and the administration of justice by the Judiciary. The meaning and purpose of such separation of powers is to create a system of checks and balances between the mutually controlling constitutional bodies, so as to avoid a concentration of power and thus rule out an abuse of power on the part of the authorities as far as possible by means of so organizing the system of government. Only thus is it thought possible to safeguard life and physical inviolability, ensure the civil liberties of the individual against arbitrary invasions by the organs of State – while serving truth, to which the law is ultimately committed.

Within the traditional system of separation of powers in the modern Rule of Law State the implementation of the Rule of Law is now institutionally vested in the Judiciary. This fact should not obscure the special position which the Judiciary occupies in the modern community bound together by the State. The administration of justice belongs to the immemorial functions of society such as the work of the priest and the doctor. These ancient professions existed before the community was organized as a State. In the Old Testament the age of Kings was preceded by a pre-State period of Judges, and where there was no special profession of judges the administration of justice was carried out, for example, by priests and military commanders. The fact that today the freely, democratically constituted political community has incorporated the judicial power as one of the constitutional powers into the structure of the State thus also contains a recognition of the oldest, immutable foundations of human civilization, which are unthinkable without courts and judges.

If today the Rule of Law is also a genuine part of the separation of powers, it must be entrusted to organs of the State

which are specially called upon to administer justice. But this is only possible if the judges called upon to administer justice are materially and personally independent, that is to say they are in a position to arrive at their decisions free from interference and without fear of suffering personally as a result of their judicial activity.

These requirements have been fully met by the 1949 Bonn Basic Law (Constitution of the Federal Republic of Germany). First, Article 20(2) of the Basic Law states: "All state authority . . . shall be exercised . . . by means of separate legislative, executive and judicial organs." Further, it has been laid down in Article 92 of the Basic Law that the judicial authority to be exercised by the courts is vested in the judges. The special profession called upon to exercise judicial functions is called the Judiciary, whose rights and duties are set out in detail in a special law, the Law on the Judiciary of September 8, 1961. This Law, in accordance with the Constitution, has removed the judges from the category of civil servants and has replaced the civil servants' status by the judges' status. In respect of disciplinary matters and conditions of service the judge is under the control of his superiors, but in matters concerning the administration of justice the judge is independent.

In order to ensure the impartiality of the judge and to safeguard the objectivity of the administration of justice, first, the old maxim, that judges are independent and subject only to the law, is again embodied in the Constitution.

This constitutional maxim essential to every Rule of Law State shields the judge against the litigating parties and also against various non-governmental social forces such as, for example, economic associations, political organizations, the press, the church, and finally against the State. Here the protection against the State is particularly important as the State or one of its authorities can itself be a litigating party and in a case like this it is in essence the State which sits in judgment on itself. Nevertheless, judges for the sake of justice have been given the position of impartial third parties. The Legislature and the Executive are constitutionally prohibited from bringing any influence to bear on the material decisions of the courts.

Further it is laid down in a special constitutional provision [Article 20 (3) of the Bonn Basic Law] that the administration of justice is subject to legislation and the law. Here it is assumed that legislative acts are law, but not the only source of law – one need only think of customary law, for example, and above all of the law creatively developed by the judge. The latter category of law evolves especially where the judge has to develop undefined concepts of law or where he is obliged to take into consideration general formulae, such as, for example, good faith, common practice, peace,

safety and order. In constitutional law these undefined concepts and formulae play a special part, so that interpretation by the constitutional law judge demonstrates particularly clearly the creative nature of the judge's activity. In addition, it is the task of the judge in general, and especially that of the constitutional law judge, not to interpret legal norms in a vacuum, but to relate them to the real world which is to be governed by them. Only thus can we understand, for example, how a norm with the same content, the same wording and the same origin and evolution can be interpreted differently in different countries and so fulfil different tasks.

Yet the judge is not the legislator. However much he may be called upon to participate in the evolution of law through creative interpretation of legal standards, he must impose a limitation on himself *vis-à-vis* the legislator and may not usurp legislative functions. Even if he regards a legal ruling as inappropriate, and another one as better, he must in principle accept the legal ruling which has been made, unless he concludes that the legislator has abused his discretion and that the norm is manifestly inappropriate and arbitrary. Then only is the constitutional law judge entitled to repudiate such a legal norm and to declare it unconstitutional.

One might sum up by saying that the purport of the maxim about the judges being subject to the law, is that human arbitrariness, individual judgment, moods and emotions should be excluded as far as possible and that the judge should be placed in a position where he can devote himself to the service of law in complete independence.

Finally, in order to ensure this material independence completely, the Basic Law has also constitutionally safeguarded the personal independence of the judge. Article 97 (2) of the text of the Bonn Basic Law reads:

Judges who are principally, regularly and definitely employed as such may, against their will, be dismissed before the expiry of their term of office, or permanently or temporarily suspended from office or transferred to another office or be placed on the retired list only through the decisions of a court and only on the grounds and in the forms prescribed by legislation . . .

This guarantee of personal independence shields the judge from any personal political pressure on the part of the Executive. In particular, the danger is excluded that political authorities deprive the judge of the power of judgment in a matter which is, in fact, within his competence according to the law. The Federal Constitutional Court has also drawn the conclusion from the guarantee of personal independence that an adjudicating body should not be considered judicial in character if government officials participate in its activity. In order to safeguard the personal independence of

the Judiciary, judges may not simultaneously – according to the new Law on the Judiciary – perform executive functions (for example, that of mayors). For this reason also the judges of the Federal Constitutional Court are barred from being Members of Parliament. Finally, the independence of the judge is also safeguarded by the fact that a judge can be disqualified from sitting on grounds of bias, if he is in any way connected with one of the parties or was previously concerned in the matter under dispute.

II

Today the institutional basis of the judicial power in the Federal Republic of Germany obtains its special features through the following peculiarities.

First, anyone whose basic rights have been infringed by public authority, that is, not only the basic rights but also his legally protected interests, has recourse to the courts. Where the competence of a specific court is not established by law, the ordinary courts can be approached. With the help of this general provision recourse to the courts is open to anyone claiming an infringement of a right by any public authority. This does not mean that this recourse to law necessarily leads to the civil jurisdiction of the ordinary courts. In contrast to Anglo-Saxon law the evolution in the Federal Republic has led, as a consequence of the progressive rationalization of the law, to the development of a special jurisdiction for most branches of law. In addition to the civil and criminal administration of justice we have today in the Federal Republic fully developed administrative courts. There also exists a court for tax disputes, a court for disciplinary disputes concerning civil servants, and labour and social insurance courts; all of the preceding courts are equal in status to the ordinary courts. Therefore the ordinary courts have jurisdiction unless the dispute falls within the jurisdiction of the above-mentioned special courts.

A further characteristic of the organization of the judicial power in the Federal Republic is that it is adapted to the federal structure of our State. However, this has taken place in a manner which clearly differentiates this structure from that of other federal States, such as the United States, for example. In the United States, there are both federal and state courts. But their jurisdiction is sharply divided between the federation and the individual states. Questions which fall within the competence of the individual states are in principle decided only by the courts of individual states through a hierarchy of state courts. Questions which fall within the sole competence of the federal authorities are decided by federal courts,

that is to say, first the Federal District Courts, then the Federal Courts of Appeal and finally the Supreme Court of the United States in Washington.

The situation in the Federal Republic is fundamentally different inasmuch as the Basic Law, following an old tradition, has left the lower courts (*Länder* courts) basically intact and has merely established various federal courts, as the highest courts of appeal. Apart from the Supreme Federal Court, with its seat at Karlsruhe, which is concerned with civil and criminal law as a court of appeal (in matters of law only), we also have in the Federal Republic other federal courts like the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court and the Federal Social Insurance Court. Whereas the subordinate courts – for example, the many courts of first instance and courts of appeal of the *Länder* – always carry out their functions as courts of the *Länder*, the courts of appeal appear on the federal level as federal courts. In essence, they constitute courts of final appeal in their respective fields of special jurisdiction. This, incidentally, does not exclude that in exceptional cases, for self-evident reasons, federal courts are sometimes courts of first instance, for example the Supreme Federal Court in cases of high treason.

These comments already suffice to show that the Basic Law has very largely met the requirements of the Rule of Law State. This extensive protection of rights and liberties is proportionately matched by an increase in the power of the Judiciary. This is because the Basic Law not only gives the injured party the right of action, but at the same time gives the judge the power to settle disputes authoritatively within all the branches of law mentioned before.

Yet this increase in the judicial power, with its function of counterbalancing the other branches of government, is not in itself sufficient to alter the previous traditional character of the Judiciary. While it is true that the Judiciary exercises civil, criminal, administrative, financial and labour jurisdiction by virtue of the political decisions of the framers of the Constitution, it is characteristic of the legislative decisions that their political nature is of a more temporary kind and disappears as soon as the legislation is applied by the courts. The civil, criminal, administrative judge, *et. al.*, does not feel – and quite rightly – that he is encroaching, as it were, on the political sphere in administering justice. He remains non-political. One might say that in exercising his judicial functions he is keeping within the specifically legal sphere which pertains to the judicial power.

III

After the shattering experiences under the National Socialist regime, the desire to perfect the Rule of Law State has led the framers of the Constitution to take one further decisive step. Following upon the Weimar Constitution the Bonn Basic Law has, in addition, introduced a comprehensive power of reviewing the constitutionality of legislation and of administrative acts in the Federation and the *Länder*. Today the Federal Constitutional Court, for example, unlike the Constitutional Court under the Weimar Constitution, is not limited to settling public law disputes between the federation and the *Länder*, or between different *Länder*, or constitutional disputes within *Länder*; the Federal Constitutional Court is also and primarily called upon to settle constitutional disputes within the Federal Republic itself, that is, disputes between the highest constitutional bodies, such as between the Federal Government, the two Houses of Parliament, or the Federal President.

Further, the Federal Constitutional Court has to exercise an "abstract" control over norms, that is, it has to make decisions, in response to applications by those entitled to make them, when doubts and differences of opinion exist about the compatibility of *Land* and federal legislation with the Constitution. The courts also have the right, when they consider a law to be unconstitutional, the validity of which is at issue in the specific decision, to obtain the decision of the Federal Constitutional Court on the constitutionality of such a law (concrete control over norms).

In addition to this the Federal Constitutional Court has a plethora of further responsibilities: it can, for example, as the proceedings against the Socialist *Reich* Party and the Communist Party showed, declare a political party to be unconstitutional when it seeks to impair or abolish the free democratic basic order. The Federal Constitutional Court has also to judge indictments against the Federal President and against judges. It is also the court to which an appeal can be made on those occasions when someone claims that his basic rights have been infringed by a public authority. The appeal may lie against an administrative act, a decision of the government, a judicial decision or against a law. Such appeals are evidently very popular; about 10,000 have so far been submitted to the Federal Constitutional Court.

From this wealth of responsibilities now concentrated in the hands of the Federal Constitutional Court, it emerges that today for the first time in Germany the judicial power, from the constitutional law point of view, has become truly equal in status with the other powers, i.e., it has become a genuine, "unfettered" third power as it has been termed, which can no longer be described as *en quelque façon nul* in Montesquieu's sense.

This certainly does not mean that the Federal Constitutional Court and the *Land* Constitutional courts are no longer genuine courts. The Federal Constitutional Court even represents the summit of judicial power. Its task is to settle disputes submitted to it for review with ultimate legal binding force for State and people. It is the legitimate guardian and guarantor of the Constitution. What is new and decisive is that the legal judgments of the Federal Constitutional Court also project into the political sphere and cause political effects and consequences. This is due to the fact that constitutional law – like international law – is genuine political law, in contrast, for example, to civil and criminal law. In fact adjudication in constitutional matters differs from all other fields of adjudication in that it is always concerned with disputes the content of which is politics itself. Characteristically it is concerned with legal norms which subject politics itself to the law. In contrast to the ordinary judge, the constitutional law judge thus deals with a type of law which cannot be divested of politics. All the difficulties of constitutional adjudication are connected with this peculiarity of constitutional law; this is law which cannot escape its political origin.

This peculiarity also explains why the Federal Constitutional Court participates by its adjudication in the exercise of legislative and executive power. The constitutional courts, through the exercise of their judicial power, are also integrated into the process of policy-making. It is therefore no accident that the Federal Constitutional Court has been described as a constitutional body, thereby conferring on it the same constitutional rank as the other constitutional bodies, such as the two Houses of Parliament, the Federal Government and the Federal President. What is new is that the judicial power of the constitutional court, under the Constitution, is shaped in such a way as to be incorporated into the State's policy-making process.

As a result the judicial power of the Federal Constitutional Court is the most important guarantee that the other constitutional bodies act in conformity with the Constitution. This applies also wherever the judges fail to carry out the duties incumbent on them under constitutional law. In this case also the constitutional law judges are called upon, according to the Basic Law – here one might refer to the indictments against judges – to ensure that judges keep within the framework of the Constitution. No wonder that in this situation and legal position the phrase about a new "government of judges" is increasingly used, especially with regard to the Federal Republic.

IV

It is not my intention here to discuss in detail the pros and cons of this power of constitutional courts. In summing up, however, the following can be said.

After the experiences which we had in Germany under the former National Socialist regime, one is entitled to measure politics against the law wherever this can be done. Certainly, disputed questions of law can simply be settled by an authoritative political decision. Yet it seems to me that it is better in a democracy for legal disputes of a political nature to be settled by an independent body guided by the law, and not by a majority at any given time. Solving legal questions by the exercise of political power does not meet the demands which we make of a Rule of Law State, and so it is hardly an accident that today legal disputes of a political nature are increasingly being settled by an independent supreme court in the American, Asian and European States.

The decisions of the constitutional courts not only safeguard the primacy of the Law as against politics wherever politics can be measured against the law; but beyond this they have a definite integrating effect politically, if it can be put this way. This integrating effect arises because the decisions made by the judges in accordance with law have a pacifying effect in the political sphere.

The Bonn Basic Law, furthermore, belongs to the rigid type of Constitution. It is more difficult to amend the Basic Law than is the case with ordinary legislation. For this reason it is all the more necessary that a body exists which interprets creatively the provisions of the Constitution by taking into account its basic set of values.

Finally, the existence of the jurisdiction of a constitutional court forces all constitutional bodies and authorities to envisage the possibility of a sovereign act of the State being submitted to the judgment of that court, irrespective what form it takes. This possibility forces all those vested with public authority to ensure as far as possible that their actions are constitutional. In this sense one can also speak of a general educative effect implicit in constitutional jurisdiction.

So far as an assessment can be made about the activities of the constitutional courts to date, it must be stressed that these courts have respected the formative trend of the modern State and have not encroached on the specifically legislative sphere. The constitutional courts have repeatedly pointed out that the discretionary decisions of both legislative and executive bodies may not be reviewed in principle. Furthermore, the substantively political considerations of Executive and Legislature must prevail even when they run counter to the political views of the court itself and the disputed measure might seem politically inexpedient.

By giving the constitutional courts extensive judicial power the Basic Law has taken a great risk. For it is evident that the Judiciary, now having become an equal with the other branches of government, does not base its activities on the powers exercised by the Legislature and Executive. In fact, constitutional courts, even when concerned with politics in the form of law, derive their driving force from the Law and thus also from the confidence in their activity shown by the people.

GERHARD LEIBHOLZ *

* Judge of the Federal Constitutional Court, Germany; Professor Extraordinary of Law at the University of Göttingen; Honorary Professor at the College of Europe, Bruges.

THE PRINCIPLE OF LEGALITY

The Rule of Law. Myth or Reality?

Est quaedam vera lex . . . naturae congruens, diffusa in omnes, constans, sempiterna . . .

There is a natural law prevalent amongst all man, universal, unvarying, eternal . . . (Cicero, *De Republica* 3,22,33).

The decision to devote a special number of the *Journal* to the study of the principle of the Rule of Law is an expression of concern. This is the concern of those who are still closely attached to this principle in the face of the deliberate assaults against the human person which have been going on since the beginning of this century. Such attacks have in some cases come from totalitarian political systems, and sometimes as the result of exceptional circumstances arising from the final convulsions connected with the process of decolonization. They have even come about through the simple action of contemporary institutions or of economic factors in States which have declared their adherence to the Universal Declaration of Human Rights.

In France, this uneasiness has been brilliantly expressed by Dean Georges Ripert in a study of contemporary legislation entitled *Le Déclin du Droit*. In this work, he stresses the peril to which the whole of society is exposed by "laws which are no longer the expression of law" and, with Montesquieu, asserts the existence of legal relationships both previous and superior to all positive law.

In proclaiming the existence of an ideal and superior law, the International Commission of Jurists is at one with the Consul Romanus twenty centuries back who, it is generally agreed, had himself derived his ideas from the Greek philosophers.

As regards the sources of the higher principles of law, there is one fundamental difference between the lawyers of today and their forerunners. Whereas Cicero, like the Greek philosophers, recognizes that this law emanates from God or from nature, in modern legal systems the existence of a universal law is no longer connected with the idea of God.

In primitive societies, the rules of law and the precepts of religion are closely connected. There are numerous societies in which the earliest legislation appears as if by divine revelation.

Take, for instance, the oldest collection of laws at present known, the famous Code of Hammurabi, the *diorite stela* of which is at the Louvre. This shows the founder of the Babylonian Empire

(2000 B.C.) in an attitude of prayer before the Sun God Shamash, God of Justice, from whom he is receiving the laws of equity; these are engraved around the stone. The commandments deal with both property and persons.

The Ten Commandments were revealed to Moses during a storm on Mount Sinai, and it is said the laws were written by the finger of God on two tablets of stone (Exodus Chapter 38). Minos, the first King of Crete, was inspired by Jupiter and Lycurgos, the half-legendary legislator of Sparta, by the Delphic Oracle. The first Roman laws stem from the religious edicts of kings or pontiffs. The Koran itself, which contains civil, penal, and social rules, is the divine word of God, transmitted to Mohammed by the Archangel Gabriel.

In France, for a long period, canon law governed the most varied matters, which are today the province of the civil law: marriage, legitimation, moneylending, and annuities and pensions, for example.

By virtue of its very source, the law at those times possessed an authority and a power of restraint, often matched by eternal punishment, which modern systems of law do not. It also enjoyed a permanency often lacking in its modern counterparts.

Once the divine source of law and of royal power had been forsaken, it was for the philosophers of the seventeenth and eighteenth centuries to define the basis and source of the power of legislation and of government acknowledged as the right of citizens.

The bicentenary of the publication by Jean-Jacques Rousseau of his *Social Contract* in May, 1762, is opportune, in that it leads us to think about philosophical bases of modern democracies and reminds us of a truth of which many governments have lost sight. This is that the power to legislate belongs only to the sovereign people, and that those who exercise such power vicariously must take human happiness and the full development of human faculties as their goals.

In our time, it is a commonplace to assert that the speed of technological progress and the extent of the knowledge required by a Head of State to grasp and master the increasingly complex economic problems which confront him and demand quick action are difficult to reconcile with democratic formulation of law. From here, it is only a short and dangerous step to proclaiming the merits of technocracy.

There is no problem which cannot be explained simply enough for its main points to be intelligible to the layman. What was true in the eighteenth century is no less true in the twentieth. The increased complexity of technology is matched by considerable improvement in the level of general education in all fields. This is due both to the raising of the school-leaving age and to the popularization

of knowledge through the press, books, radio and television. A recent study observes that the most complex problems can be solved by electronic brains, thanks to successive binary processes of choice, which control each other.*

The democratic principle that free citizens administer their affairs themselves is the only one compatible with human dignity. At the same time, it is undoubtedly more effective in the general interest than systems stamped with a degrading paternalism.

The recent experience of the newly founded African republics is a striking illustration of this.

Before their accession to independence, legislation was formulated in Paris, Brussels or London by authoritarian administrations, bureaucratic and easily satisfied with their own efforts. Such legislation was wrapped in ultra-conservatism as regards social structures and customs concerned with the life of native peoples. In the economic fields, it was completely blind to the real needs of the indigenous peoples, to which direct exposure to modern civilization had given rise.

In Senegal, independence put an end to the restraints on development. Immediately, a programme of radical change was undertaken in all spheres. In the rural areas, this programme took the form of changes in methods of cultivation, the search for new crops, the extension of areas under cultivation, and the construction of planned villages with modern buildings. Studies are being made and projects prepared for the rapid development of virgin or uncultivated land. Economically, the country is passing from a monopolistic capitalist economy to a mixed one. A large part in this is being played by government cooperation and intervention, whether in the form of State-owned companies or in association with private capital. The basis of production is shifting from the individual craftsman to industrialization. All this is being carried out under a four-year plan worked out by the government after extensive technical studies and then discussed, amended, and voted by the National Assembly, a body elected by universal suffrage.

The distinction between the law and the regulation would not call for any comment, were it not that the latter is generally the work of anonymous offices, and that this important section of the rules governing the life of citizens escapes review by the national representative body.

The strict and unsurmountable constitutional barrier separating the law made by Parliament from the power to make regulations, as adopted by most recent constitutions with the aim of legislative efficiency, may in some respects be a debatable subject. For instance, the civil procedure by which the citizen can obtain recognition

* *L'Etat et le Citoyen* (Paris: Edition de Sueil, 1961), p. 335.

of an infringement of his rights comes within the scope of the regulation, although the Romans had judged it worthy of inclusion in the XII Tables. The details of labour and social security legislation, which affect the citizen's daily life as much as the civil and penal law, make him aware of the body of decree law.

Senegal was quick to find out the disadvantages of this somewhat arbitrary barrier. A constitutional law (No. 61-13 of November 1, 1961) was passed, enabling the government to submit bills of social, economic, or financial importance to a parliamentary vote whereas, under the original division of authority, Parliament could have taken no cognizance of them.

Review by the citizens' authorized representatives is called for by the very basis of the power to legislate in a democratic regime. Such review and, whenever possible, the discussion of projected legislation by the citizens themselves will to some extent make it possible to restore to them respect for the law. This will, in turn, restore the effectiveness lost by the law when its basis of mysticism disappeared.

The law, whatever its nature, is enforceable mainly because it commands the adherence of the large majority of the citizens to whom it applies. To try and enforce it by coercion alone would be to court certain disaster, which would be beyond the strength of the police to prevent, even if armed with extensive powers.

Despite official promulgation, most citizens remain ignorant of law formulated in secret behind office doors, and they often learn of its existence only as the result of being prosecuted, from which their ignorance does not save them.

On the other hand, the sum total of information which elected representatives draw from their electors when the law is being formulated and that which those representatives give in return helps, in the event, to associate citizens fully with the life of the nation, to develop their sense of civic responsibility, and to make them regard the law as a structure to which they have contributed.

The example of Switzerland deserves careful study. That country can, by reason of its small size, give its citizens a direct say more often than other countries. This is done by means of the referendum, which may cover anything ranging from specific points to major issues, such as female suffrage and possession or non-possession of nuclear weapons.

For the reasons I have indicated, Switzerland provides the example of a country applying the principle of democracy in an extremely liberal manner, and of one where the universal principles of the Rule of Law are never encroached upon.

There would be no point in defining the Rule of Law, as did the Delhi Congress and Lagos Conference, if means were not at the same time sought to ensure that it is respected in all countries, i.e.

to reach a state where the law establishing it is unfailingly applied.

In my view, the surest way of reaching this state is to give every individual a feeling of his usefulness in the life of the nation, not only by virtue of his professional activity but also in another way. This is by associating him as intimately as possible, always subject to the size of the country and its population, in the control of the manner in which public affairs are conducted and, indeed in the great decisions which stand out as landmarks in their conduct.

G. D'ARBOUSSIER *

* Ambassador of the Republic of Senegal to France; former Minister of Justice of Senegal.

THE RULE OF LAW: NEW DELHI - LAGOS - RIO DE JANEIRO

SOME REFLECTIONS ON A JOURNEY WITH EXCURSIONS TO CHICAGO AND WARSAW

The Rule of Law – a Sterile Phrase ?

Is useful discussion about the Rule of Law exhausted? Some might be inclined to answer "Yes and No", or more correctly "Yes, but perhaps No". The affirmative answer is obvious and immediate, because in recent years, particularly, but by no means exclusively, under the auspices of the International Commission of Jurists, so much has been written on, or in connection with, the Rule of Law. Indeed, the present writer, when first invited to write this article, felt unable to undertake the task, if only for the reason that he himself had written at length on the subject in the publications of the International Commission of Jurists¹ and directly or indirectly in several other places.² Some repetition or, at best, reformulation of ideas already expressed is therefore inevitable and the indulgence is asked of those who are familiar with the publications mentioned.

A more important and impersonal consideration is that, apart from the classic text on the Rule of Law of Dicey³ and the well-known critique of Dicey by Sir Ivor Jennings,⁴ to say nothing of some interesting comments by recent writers on constitutional and administrative law,⁵ there have been two international conferences,

¹ Primarily in *The Rule of Law in a Free Society: a Report on the International Congress of Jurists, New Delhi, India, 1959*, published by the International Commission of Jurists, Geneva, 1960.

² See in particular Norman S. Marsh, "The Rule of Law as a Supra-national Concept", *Oxford Essays in Jurisprudence* (Oxford University Press, 1960), Ch. 9.

³ A. V. Dicey, *The Law of the Constitution* (10th ed., revised by E. C. S. Wade; London: Macmillan & Co. Ltd., 1959).

⁴ Sir Ivor Jennings, *The Law and the Constitution* (London: University of London Press Ltd., 5th ed., 1959).

⁵ E.g., E. C. S. Wade in the Introduction to the *Law of the Constitution* (10th ed., quoted above), pp. cvii, where he specifically refers to the efforts of the International Commission of Jurists to widen Dicey's concept of the Rule of Law into a broader set of principles capable of application in systems other than those of the Common Law; F. H. Lawson, 7 *Political Studies*, pp. 109-207 in *Dicey Revisited*; R. F. V. Heuston, in *Essays in Constitutional Law* (1961), pp. 30-54, having described Dicey's Doctrine of the Rule of Law as "in truth only a constitutional principle based upon the practice of liberal democracies of the Western world", proceeds to a consideration of "The Rule

apart from those organized by the Commission, which have recently concerned themselves with the Rule of Law.⁶

On the other hand the wealth of comment on the Rule of Law perhaps invites an attempt to summarize its main trends, or at least to ascertain whether such common trends are discernible. Although it is not suggested that these common trends can be assumed without further argument, it would seem justifiable to make two preliminary generalizations. The first is that since the International Commission of Jurists came into being some eleven years ago the concept of the Rule of Law has been "supra-nationalized". It is no longer, as one eminent American writer suggested in 1959,⁷ the case that "law as a bridle upon governmental power is particularly the Anglo-American contribution to political science"; nor is it now true that "any theory in the terms of the Rule of Law must of necessity be based upon Common Law constitutional practice."⁸ It is reasonable for the International Commission of Jurists to feel a modest sense of achievement in respect of the contribution which it has made towards a more general realization of the existence of a politico-legal ideal capable of practicable application in countries with varying political and economic systems and differing legal traditions. But this achievement cannot be the excuse for any impression that, as regards the *definition* of the Rule of Law, the objectives of the International Commission of Jurists have all been attained.⁹ This question of the definition as an international concept of the Rule of Law will be the first topic to be discussed in this article.

The second generalization which emerges from the review of efforts to formulate a supra-national concept of the Rule of Law concerns what in the *Declaration of Delhi* and the *Law of Lagos* was described as the "dynamic" element of the Rule of Law. The intention was undoubtedly to make it clear that the Rule of Law is

of Law today", in which he refers to the importance of two new factors, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, and the *Conclusions* of the New Delhi Congress, in particular the latter's emphasis on the underlying assumptions of the Rule of Law as regards economic and social justice.

⁶ The Chicago Colloquium organized by the International Association of Legal Science in September 1957 on "The Rule of Law as understood in the West", the proceedings of which were published in *Annales de la Faculté de Droit d'Istanbul* (Istanbul: Fakülteler Matbaası, 1959), Vol. IX, No. 12, and the Colloquium under the same auspices at Warsaw in September 1958 on "Le Concept de la Légalité dans les Pays Socialistes" reported in *Zeszyty Problemowe Nauki Polskiej (Cahiers de l'Académie Polonaise des Sciences)* (1961), XXI.

⁷ Schwarz, *Law and the Executive in Britain* (London: 1949), p. 16.

⁸ *Ibid.* But see now the same author's *French Administrative Law and the Common Law World*.

⁹ It goes without saying that work of the Commission in encouraging *observance* of the Rule of Law is never likely to lack practical fields of application.

not tied to any 19th century *laissez-faire* theory of the proper role of the State, particularly in regard to economic, social and cultural matters; but on the contrary that the Rule of Law, far from being opposed to the Welfare State, is an essential instrument of its purposes. This is easily said, but it provokes the reflection that until now relatively little has been done to demonstrate in a concrete and practical manner what contribution the Rule of Law, and more particularly the lawyers as such, can make for example to the raising of living standards in underdeveloped countries.

We must be sure that our definition is sufficiently wide to cover the aspirations of man not only in his political and intellectual aspects but also with regard to the physical basis of his existence as regards health, food, conditions of work, opportunities for leisure and the like. At the same time, in as far as we are lawyers appealing primarily to lawyers, we must recognize our own limitations. We are not omniscient philosopher-kings imposing our ideas on the world. The values which the Rule of Law presupposes and for which it provides a technique of realization are intended to appeal to the fundamental and common aspirations of mankind in general; if we particularize our values in too great detail, if we are too specific and categorical as to the social and economic institutions which we consider appropriate to a free society under the Rule of Law, we stand in danger of usurping the role of politicians and of sacrificing in large measure our universal appeal. This is the second major theme of this article and it will be seen that it has a close connection with the first theme.

The Clarification of Values

The discussions at an international level under the auspices of different bodies, and in particular through the initiative of the International Commission of Jurists, concerning the meaning of the Rule of Law have secured agreement on one very important point: the Rule of Law presupposes *values* as much as it requires certain legal techniques. This had been recognized, before the matter was debated with a view to defining the Rule of Law as a supra-national concept, by various writers thinking more particularly of their own legal systems, or of their own and other systems sharing a common legal tradition. Thus, in 1952 Professor Werner Kägi, in an important and prophetic essay,¹⁰ devoted primarily to "The Development of the Swiss *Rechtsstaat* since 1848", stated clearly that the freedom and worth of the human person is the central value and highest

¹⁰ In *Hundert Jahre Schweizerisches Recht, Zeitschrift für Schweizerisches Recht*, Centenary issue 1852-1952 (Basel)

norm of the *Rechtsstaat*.¹¹ Similarly, from the standpoint of Anglo-American law, Professor Schwarz wrote in 1949: "Our concept (i.e., the Rule of Law) is a normative as much as it is a descriptive term."¹²

On the supra-national plane there was at Chicago in 1957¹³ a general consensus that the "Rule of Law as understood in the West" presupposed certain values although they were not identified in detail or assigned a particular hierarchy of importance. Thus, the General Reporter of the Chicago Colloquium, Professor C. J. Hamson said:

A consideration of the importance to the Rule of Law of institutions outside the area of what has been termed lawyers' law, and of the range and variety of such institutions, leads to a consideration of the forces, drives or desires which cause these institutions to come into being, of the purposes which these institutions are created to satisfy and of the values or ideas embodied in them. The Rule of Law as achieved in the West appears here as the result or product of such forces, ideas or values, and of their crystallization into co-ordinate institutions.

Within this field of high generality one of the questions raised was the connections between the Rule of Law and the recognition of those Human Rights which are declared in, e.g., the Rome Convention of November 4, 1950, or the United Nations Declaration and which customarily are found, stated with greater or less particularity, in written constitutions (e.g., in the German, which attains a high degree of precision). Some participants stated categorically that a Rule of Law was to them inconceivable without the express recognition of such rights and none seemed to deny that, whether or not expressly recognised, the dominance of such rights within the given system was a characteristic of the Rule of Law.¹⁴

Perhaps even more interesting and significant in this connection was the discussion of "Socialist Legality" at Warsaw in 1958 when Western observers were able to participate. We now have the advantage of a very full report of the Warsaw Colloquium which has been published by the Polish Academy of Sciences.¹⁵ Among the contributors there is a general recognition that "Socialist Legality" is not merely a question of formal technique; indeed there is reiterated insistence that "the most important and decisive element of Socialist Legality is the guarantee of the realization of socialism itself."¹⁶

¹¹ *Ibid.*, p. 224.

¹² *Op. cit.* in fn. 7 *supra*, p. 11.

¹³ See fn. 6 *supra*.

¹⁴ See fn. 6 *supra*. *Annales de la Faculté de Droit d'Istanbul*, pp. 14-15.

¹⁵ See fn. 6 *supra*.

¹⁶ See fn. 6 *supra*. *Le Concept de la Légalité dans les Pays Socialistes*, p. 330.

The question then arises whether in this concept of socialism there are values which are similar to those which "Western" lawyers recognize as presupposed in their idea of the Rule of Law. On this point it is possible to find individual contributions to the Warsaw Colloquium which echo in large measure the passage already quoted from Professor Hamson. For example, we find Professor Tchikvadze saying:

Socialist Legality safeguards the political rights and liberties of citizens, it protects their right to work and to a home, as well as other interests and rights affecting the person and goods of citizens, their life, their health and their human dignity. The protection of rights and civic liberties is one of the essential constituents of Socialist Legality.¹⁷

On the other hand, there are statements in the Report of the Colloquium which, while recognizing a place for Human Rights, regard them as ultimately derivative from the principle of socialism.¹⁸ Here, perhaps is a fundamental difference between Communist and "Western" ideas of the Rule of Law. To determine what are the ultimate principles of socialism (in a Communist, rather than in a "Western" Socialist's sense) is however a task beyond the capacity of the present writer and one which is irrelevant to the purpose of this article although the belief may be recorded for what it is worth that even indirect and purely utilitarian recognition of Human Rights can develop through experience of their exercise into something of more fundamental ideological significance.

An East-West comparison as regards the values underlying the Rule of Law may nevertheless serve to emphasize that, at all events as far as the West is concerned, it is not sufficient to list certain individual rights, as for example, they were set out in Clause III(3) of the *Conclusions* of the First Committee at the New Delhi Congress¹⁹ in the form of prohibitions of legislative interference with certain spheres of individual action. The recognition of such values is almost always limited in practice by exceptions, which

¹⁷ *Ibid.*, p. 324.

¹⁸ *Ibid.*, p. 330 where Professor Jaroszynski insists on the realization of socialism itself as the most important and decisive element in Socialist Legality. He goes on to say that Socialist Legality does not deny the protection of individual rights because the latter derive from the principles of socialism and in this respect differs from his compatriot Professor Ehrlich who, according to Professor Jaroszynski, would seem to give a certain priority to individual rights.

¹⁹ The text reads: "Every legislature should, in particular, observe the limitations on its powers referred to below. The failure to refer specifically to other limitations, or to enumerate particular rights is not to be construed as in any sense minimizing their importance.

The Legislature must:

(a) not discriminate in its laws in respect of individuals, classes of persons,

are indeed necessary if one set of values claiming absolute adherence is not to destroy another, or indeed if the unqualified assertion by any one person of a particular right is not to come into insoluble conflict with the claims of another person putting forward a similar unqualified right. This is, of course, elementary but there is less general inquiry into the principle on which limitations on particular individual rights are permissible and necessary. It is submitted that Professor Kägi is right when in the sentence already quoted he puts the worth and dignity of the human person at the centre of the conception of the Rule of Law. It was with this thought in mind that the present writer drafted his conclusions concerning Human Rights for the Working Paper at New Delhi. Thus, it was suggested in that Paper²⁰ that the Legislature should not place restrictions on freedom of speech, freedom of assembly or freedom of association *except in so far as such restrictions are necessary to ensure as a whole the status and dignity of the individual.*

But what do we mean by the status or dignity or worth of the individual? It can only be ascertained in a context of fact and the only guide to determine what it means in that context is the "reason and conscience" with which, according to Article 1 of the Universal Declaration of Human Rights, all human beings are endowed. That is why there is a point beyond which the *general* formulation of values underlying the Rule of Law cannot be usefully continued. It is, it is true, important to isolate the factors which have to be taken into account but they will only begin to assume substance and reality when they are considered by reasonable and conscientious men in relation to the circumstances of a particular society. As is pointed out in the conclusions to this article, this may suggest some relevant considerations as regards the future policy of the International Commission of Jurists.

or minority groups on the ground of race, religion, sex or other such reasons not affording a proper basis for making a distinction between human beings, classes, or minorities;

- (b) not interfere with freedom of religious belief and observance;
- (c) not deny the members of society the right to elected responsible Government;
- (d) not place restrictions on freedom of speech, freedom of assembly or freedom of association;
- (e) abstain from retroactive legislation;
- (f) not impair the exercise of fundamental rights and freedoms of the individual;
- (g) provide procedural machinery ("Procedural Due Process") and safeguards whereby the above-mentioned freedoms are given effect and protected."

²⁰ See *op. cit.*, in fn. 1.

The Choice of Techniques

What we have said about the relativity of all *values* underlying the Rule of Law, other than the fundamental value of the dignity and worth of human personality, is *a fortiori* true of the *techniques* of the Rule of Law. This conclusion was also emphasized at the Chicago Colloquium on "The Rule of Law as Understood in the West" by Professor C. J. Hamson, when he referred to the notion of the *equivalence* of function of different institutions in different systems.²¹ It is perhaps most strikingly emphasised in the contribution of Professor Herlitz of Sweden to the Colloquium. He pointed out that, although in all northern countries there is generally admitted to be a high regard for the Rule of Law, there are considerable differences between these countries on such characteristic techniques of the Rule of Law as (a) judicial review by the courts of statutes, (b) submission of the administration to ordinary courts or to administrative courts. Finland, for example, does not have judicial review of statutes and in Sweden most governmental acts can only be challenged, if at all, in administrative courts, whereas Norway clearly, and Sweden and Denmark at least in theory, recognise the judicial review of statutes, while in the first and last of these three the ordinary courts control administration in much the same way as in England or in the United States.²²

When we turn to the New Delhi, Lagos and Rio de Janeiro Congresses we can also see interesting variations in the emphasis put on a particular technique of the Rule of Law to some extent corresponding to the needs of the area. For example, at New Delhi it was tacitly accepted that preventive detention (i.e., imprisonment without trial by the ordinary courts by decision of the Executive) was inconsistent with the Rule of Law. On the other hand, at Lagos, with the problem of new emerging States especially in mind, it was conceded that preventive detention may be necessary in times of emergency and attention was directed to specifying the safeguards to ensure that such emergency should be for a defined and limited period, that it should be ratified by the Legislature, and that any decision to detain a person should be subject to prompt administrative review with ultimate control by the courts. These recommendations were specifically endorsed by the Rio de Janeiro Congress.

A similar difference of emphasis may be seen in regard to the treatment of the concept of an independent Judiciary at the three Congresses of the International Commission of Jurists now under discussion. At New Delhi, Lagos and Rio de Janeiro there was

²¹ *Op. cit.*, in fn. 14, p. 9.

²² *Ibid.*, pp. 152-4.

general agreement on the essential character of an independent Judiciary subscribing to the Rule of Law but some variety of approach in regard to the best methods of securing such independence. At New Delhi it was suggested somewhat tentatively that whatever body actually makes judicial appointments it is desirable that the Judiciary should itself co-operate or at least be consulted. At Lagos a distinction was made between countries with long established traditions in the matter of judicial appointments and those where the system of such appointments has not yet been fully settled; in the latter, an independent organ such as a Judicial Service Commission or a *Conseil Supérieur de la Magistrature* was considered to be the most appropriate appointing body. At Rio de Janeiro the question of the independence of the Judiciary was not specifically on the agenda but it was very much in the minds of the participants at the Congress, particularly those from South and Central America, and was given pride of place in the *Resolution of Rio*. The latter called upon the International Commission of Jurists to give its attention to:

The conditions in varying countries relating to the independence of the Judiciary, its security of tenure and its freedom from control, direct or indirect, by the Executive.

The importance of relating particular techniques of appointment to local conditions implicit in this Resolution should especially be noted.

The Economic and Social Assumptions of the Rule of Law

At the outset of this article it was suggested that more thought might be given to the economic and social assumptions of the Rule of Law, which were particularly emphasized at New Delhi, where they were characterized as its "dynamic" element. At Lagos, it is true that this element, although by no means repudiated, seemed to be to some extent subordinated in the minds of the participants to the imperative necessity of securing fundamental political rights of a more traditional kind, such as democratic representation in the Legislature, personal liberty and, as a means towards these ends, an independent Judiciary and Bar, but at Rio de Janeiro there was a striking return to the underlying theme of New Delhi, especially in the *Conclusions* of the Third Committee on "The Role of Lawyers in a Changing World". That Committee considered *inter alia* that:

Lawyers should be anxiously concerned with the prevalence of poverty, ignorance and inequality in human society and should take a leading part in promoting measures which will help eradicate those evils,

for while they continue to exist, civil and political rights cannot of themselves ensure the full dignity of man.

We are here concerned with such "rights" as the right to social security, to work, to rest and leisure, and to an adequate standard of living (*vide* Articles 22, 23, 24, and 25 of the Universal Declaration of Human Rights).

This is a field in which clear thinking can easily be inhibited by the fear of appearing unsympathetic to legitimate economic and social aspirations, particularly those of the emerging countries. But to say that economic and social and not merely political justice must lie at the basis of our ideal "free society" (which is a convenient way of summarizing the aim of those who see in the worth and dignity of the individual the ultimate aim and purpose of all human organization) is not to assert that such aspirations can always be reduced to legal propositions of universal and immediate practical validity. Lawyers, *as such*, cannot usurp the role of economist, social scientist and legislator, although it is highly desirable that they should co-operate more closely with them.

The extent to which economic and social ideals such as, for example, those set out in the "Directive Principles of Social Policy" of the Constitution of Ireland or in the "Directive Principles of State Policy" of the Constitution of India can be translated into firm legal rights and duties must necessarily vary as between States according to their wealth and social development.

There are, it is true, some principles which would be generally recognized as of legal significance, actual or potential, in even the least developed State, and which have a close relationship in practice to the economic and social needs of man. The principle of the Fourteenth Amendment of the U.S. Constitution - "No State shall deny to any person within its jurisdiction the equal protection of the laws" - or its equivalent in other Constitutions,²³ can be interpreted in a formal and legalistic way to mean little more than what the law regards as equal must be treated as equal by the courts. But it has a second and more dynamic interpretation according to which the substantive law must itself be consistent with the basic principle of human equality. Thus, although the courts may well hesitate to interfere in what may be regarded as the legislative preserve, they may insist that whatever benefits the laws bestow, these benefits must be equally enjoyed by all citizens. This may in fact lead to the recognition of a general positive right, as to educa-

²³ E.g., Article 3(1) of the Basic Law of the German Federal Republic which requires that "all men shall be equal before the law" or Article 14 of the Indian Constitution which speaks both of "equality before the law" and of "the protection of the laws".

tion for example, although the courts in form only admit to a duty to see that discrimination is avoided. The longstanding battle in the United States regarding racial segregation in schools is an outstanding example of this process.²⁴

One application of what we have called the "dynamic" interpretation of the principle of equality poses a direct challenge to the courts and the profession. If equality before the law has any real meaning surely it must imply at least that as regards access to, and representation in, the courts, financial inequality of the parties involves neither advantage to the rich nor disadvantage to the poor. As a recent survey by the present writer has shown,²⁵ this is far from being the case as far as legal aid and advice are concerned. Much more could clearly be done by courts in many countries, within the powers which are allotted to them, and in particular making use of any requirements of equality before the law in their constitutions, to refuse to convict prisoners who are not, or are inadequately, represented, or to hear civil cases where one side clearly suffers from inability to obtain proper legal advice and representation.

Over the whole field of social and economic legislation the courts and lawyers generally, quite apart from any specific duty to ensure that the principle of equality before the law is observed, have a heavy responsibility to interpret the relevant legislation and subordinate regulations in a way which recognizes that "individualism" is not identical with the 19th century *laissez-faire* philosophy of State policy. Unfortunately, there is still some tendency to contrast the Rule of Law as the apotheosis of political individualism with a collectivist philosophy which, it is argued, alone can provide the needs of modern societies. What is needed is a legal conception of the individual that is related to his entire being, his work, leisure, education and health as well as his political and spiritual rights in society. Dostoevsky in *The Brothers Karamazov* put in the mouth of the Grand Inquisitor an escapable choice between the freedom of the individual and the provision of his daily bread. "Give bread," says the Grand Inquisitor, "and man will worship thee for nothing is more certain than bread." The Rule of Law in the broad sense in which we understand it denies the inevitability of this choice.

It is in the delegation of discretionary power to the Executive that many of the most difficult problems relating to economic and social legislation arise. It was a valuable feature of the Rio de Janeiro Congress that the First and Second Committees were concerned with the ways in which such executive action could be controlled and

²⁴ See Greenawalt, *Journal of the International Commission of Jurists*, Vol. II, No. 1 (Spring-Summer 1959), p. 135.

²⁵ *Journal of the International Commission of Jurists*, Vol. II, No. 2 (Winter 1959, Spring-Summer, 1960), p. 95.

guided, by the Legislature, by the Courts, by devices elaborated within the administration itself. Nevertheless, there are limits to the generalizations of world-wide validity which can be made about the appropriate institutions and procedures which ought to be adopted in carrying out the many functions of the modern State, as will be apparent from the cautious and tentative way in which many of the *Conclusions* of the two Committees are expressed.

If we consider the *Conclusions* of these Committees side by side with the work of the Second Committee at New Delhi which dealt with the Executive and the Rule of Law, we find broadly speaking that the following propositions are involved:

1. As a general background to all exercise of Executive power, there must be a democratically elected Legislature and an independent Judiciary and Bar.
2. The Legislature should respect, either because of Constitutional limitations or in practice, the dignity and worth of the individual.
3. Executive action must be in accord with, or within the sphere of discretion allowed by, the law.
4. Where the Executive enjoys a discretion those who exercise the discretion should as far as possible be removed from the day to day business of the administration.
5. In all cases those individuals who are affected by the decision should have a right to present their case with proper opportunities for its presentation, normally by legal representatives, if they so desire.
6. A decision thus made by the Executive should be based on reasons available to the parties concerned.
7. From a decision of the Executive in exercise of a discretion there should be appeal either directly to an ordinary court or to an independently organized administrative court, at least on points of law, or indirectly through a higher administrative body.

These are valuable general principles but it is doing no injustice to the labours of those who took part in the New Delhi and Rio de Janeiro Congresses to say that they are inevitably flexible and contain many undecided points of interpretation which can only be resolved in the context of a particular legal system in a particular society. It will suffice to mention only the problem which arises in determining the legitimate "interests" of an individual which may entitle him to intervene before an Executive authority or before a court.

Conclusions

Bodies such as the International Commission of Jurists which have been particularly concerned with the formulation of the Rule of Law as a practical supra-national concept may therefore feel that at this stage of the discussion, future progress will depend on the application of the general principles evolved to particular

countries or groups of countries, with similar political backgrounds and social and economic problems. The present writer has no authority for making the suggestion, but would suggest that it would be particularly valuable to commission a team of legal scholars to make separate studies of the application of the Rule of Law in particular countries or areas, not of course as an academic exercise but on the basis of personal contact and close collaboration with lawyers and government officials as well as non-lawyers (especially economists and sociologists) in the different countries concerned. This is not to suggest that the time will not come for a re-affirmation on an international basis of the vital truths and valuable practical lessons which have been achieved at Congresses such as that of New Delhi, Lagos and Rio de Janeiro. Perhaps it is not too optimistic a hope to envisage eventually a synthesis between what emerged from Chicago and Warsaw and the principles proclaimed at the Congresses of the International Commission of Jurists.

NORMAN S. MARSH *

* Director of the British Institute of International and Comparative Law, London; former Secretary-General of the International Commission of Jurists.

THE EVOLVING WORLD CONCEPT OF THE RULE OF LAW - AN AMERICAN VIEW

The remarkable effectiveness of the International Commission of Jurists in its first ten years is eloquent testimony to the universal appeal of the ideal of justice. In a world where recourse to force between nations may mean annihilation, and reliance on force within nations is used to establish or bolster tyranny, thoughtful men can only be encouraged by the enthusiasm with which lawyers of the world have responded to the Commission's efforts to reach global agreement on the elements of the Rule of Law. Where violations have been publicized, lawyers and the public generally have approved the Commission's exposures and criticisms. Indeed, the effectiveness of the Commission's efforts, despite the absence of any enforcement machinery, is a striking illustration of the power of ideas.

Most international organizations of lawyers deal primarily with problems of international law and seek to advance the growth of international institutions for the peaceful resolution of disputes between governments. The International Commission of Jurists has left such efforts to others and has taken a different course, focusing on the Rule of Law as it operates in domestic law, particularly as regards the manner in which governments treat their own citizens. Both approaches to the growth of a lawful world are necessary. No doubt, some day those who are building from the ground up within nations and those who are attempting to bring dreams of a world legal order down to earth will meet on common ground in the middle and the two movements will tend to merge into one, each gaining strength from the other. Surely lawlessness within nations is a major obstacle to the creation of a world in which there is effective machinery for the peaceful resolution of international disputes.

The growing consensus of lawyers brought together by the Commission to explore the basic Human Rights has now given rise, first at the Lagos Regional Conference in 1961 and again at the Rio World Congress in 1962, to proposals for regional courts of Human Rights, modelled perhaps on the European Court of Human Rights. Here we see a practical illustration of the process by which the development of generally accepted standards of justice in domestic law may eventually contribute to the growth of a world order. Particularly in areas of the world where new nations are building new structures of government, regional arrangements for the

protection of basic rights may furnish healthy support for sound growth.

The success of the Commission's efforts over the past ten years no doubt reflects the fact that the basic Human Rights are universal, precisely because the common qualities of humanity transcend differences in legal and social systems. To arrest a man without telling him why, to punish a man without affording him a fair opportunity to answer the charges against him, these are practices which lawyers of all countries can readily agree are wrong and unjust. Yet in too many parts of the world just such practices still prevail. The vital right to be tried by an independent and impartial judge is another universal element of the Rule of Law which is too often disregarded. No principle considered by the various conferences held by the Commission emerges more clearly than the importance of an independent Bench and Bar if basic rights are to be asserted and preserved.

In other respects as well, problems of municipal law are often far more universal than the judge or practitioner immersed in his daily work may realize. We should like to touch upon a few aspects of the United States legal system and of our legal history which may not be familiar to lawyers elsewhere and which bear on the development of a world-wide definition of the Rule of Law.

The Common Law Emphasis on Facts and Practice

The Common Law system, which the United States adapted from the English system after freeing itself from colonial rule, is deeply imbued with the thought that wise legal solutions can be reached only if the most careful attention is given to ascertaining the facts of the situation. Abstract legal theories and principles are regarded with some coolness, as being too likely to mislead or not to enlighten, unless constantly focused upon the realities of the live situation which confronts the lawyer (or judge or legislator). One reflection of this point of view is the familiar fact that the traditional working tool of the Common Law lawyer is the reports of judicial decisions – legal principles stated and applied in concrete situations, rather than abstractly, as in the civil law codes. The Common Law is built in important degree on the view that an honest judge is more likely to reach a sound result in a given case than to be able adequately to explain his decision in terms of general application. This attitude was exemplified by one of our eminent legal scholars when he recently remarked, in extricating himself from a delicate social situation, "That man must be a judge – he reached the right result for the wrong reason". Hence the focus in Common Law legal thinking is on what was decided more than on the theories advanced to explain or justify the decision. This is not to suggest

that legal principle is not a helpful guide. What is involved is a belief that typically the sense of justice runs ahead of man's power to formulate the principles of justice.

We are of course not seeking to convert anyone to the Common Law system, nor do we mean to suggest that civil lawyers are uninterested in questions of fact. It does seem to us, however, that there is a suggestive analogy between the Common Law approach and the work of the International Commission of Jurists in developing a world consensus as to the requisites for the Rule of Law. For the task of the Commission in this endeavour is to cut through differences of theory and of terminology in order to obtain a universally accepted and universally meaningful definition of the Rule of Law. The process is essentially one of looking at the practical problems which arise in many countries and drawing from them principles which reflect the views of thoughtful jurists as to the decisions which should be rendered. This is very much the process Common Law lawyers indulge in as they go about their work at home within the confines of their own legal system. The long experience of our legal system and institutions in applying this technique should be useful in the work of the Commission, just as other systems will have their particular contributions to make.

The habit of concentrating more on facts than on theories can greatly enhance the ability of lawyers to contribute to the advancement of their communities in many ways, especially when new social patterns are emerging and seeking expression in law. And so in its search for a new formulation of the common ground of the world's lawyers as to basic Human Rights, the Commission is spreading and encouraging techniques of legal thinking with constructive implications reaching far beyond the immediate concerns of the Commission.

The Concept of Due Process in American Law

The expression "the Rule of Law" is not a technical term with a precise meaning in American law. This fact may be a handicap, or it may be an advantage, enabling American lawyers to approach the Commission's work without preconceptions which might differ from the views of lawyers in other countries. In either event we believe that the development of a world concept of the Rule of Law can draw profitably from the historical evolution of our closely analogous constitutional guarantee that no person shall be "deprived of life, liberty, or property, without due process of law". This provision, applied as a restriction on the federal government by the Fifth Amendment to our Constitution in 1791, and as a restriction on our state governments in almost identical language by the Fourteenth Amendment in 1868, has been regarded

as a broad guarantee of basic justice and fairness to be given life and meaning by the courts and the legal profession. The analogy to the global conception of the Rule of Law is evident.

While the due process clause is in literal terms a guarantee of fair procedure (or "process"), it has in varying degrees at various times been applied as a limitation also on the substance of law. To take a simple example, retroactive legislation is in many situations held to violate the "due process" clause, without regard to the procedures by which the law is adopted or enforced. Similarly, in the absence of some rational justification, a law imposing a tax on blonds or on people with brown eyes would no doubt be held contrary to the guarantee of due process. Thus the due process clause has been applied to require fair procedure and to prevent discriminatory conduct by unreasonable classification.

Over the years, the American courts have had difficulty in deciding how far the broad assurance of fairness which the due process clause embodies should be interpreted to extend beyond matters of procedure into matters of substance. In the 1920s, for example, the United States Supreme Court on a number of occasions held social reform legislation, such as laws setting minimum wages and maximum hours, to violate due process. The theory was that government unduly restricted individual freedom by setting limits on hours of work or scales of pay. These decisions have long since been repudiated by the Court. The underlying dilemma is that proper procedure alone is not always enough to ensure even minimal justice or fairness, and yet it is also true that the basic guarantees of justice in the law must not unduly shackle the public conscience in developing new concepts of service by government to citizen.

Significantly, the growth of the International Commission of Jurists' definition of the Rule of Law has encountered the same problem. The Act of Athens in 1955, while dealing largely in procedural protections, affirmed also freedom of speech, press, worship, assembly and association. The Declaration of Delhi in 1959 similarly went beyond matters of procedure to declare that the Rule of Law should be employed to establish social, economic, educational and cultural conditions under which the individual's legitimate aspirations and dignity may be realized. And the Rio Congress of 1962 was largely concerned with the role of law in a rapidly changing society, with all that implies as to substance rather than form.

The Act of Athens is especially interesting from the view-point of an American lawyer. For the civil liberties there incorporated into the framework of the global Rule of Law are in our tradition regarded as essentially procedural in political theory though not in legal theory. Freedom to disagree and to express disagreement with the government, is regarded as the vital political procedure

(or process) which makes possible the correction of error and the embodiment in law of new ideas without recourse to force. This is indeed procedure in the highest sense. It is no doubt for this reason that the American courts have interpreted the due process guarantee as requiring our state governments to respect the basic civil liberties which our federal Constitution in literal terms only guarantees against invasion by the federal government.

We do not mean to suggest that the American experience in interpreting the due process clause is directly applicable as a guide to the future growth of the Rule of Law. Our problem of constitutional interpretation involves the relations between the federal government and the states, as well as the division of functions between the Judiciary and the other branches of government, factors which do not enter into the Commission's work in the same fashion. But the analogy is nevertheless instructive, for it points out the necessity to ensure that the content as well as the form of the law is just, and the unwisdom of attempting to prescribe in any but the most fundamental respects the content of the law.

The Process of Change in American Law

At bottom the danger in attempting to prescribe the content of the law in terms to be applied over long periods or from country to country is that insufficient room will be left for the growth of the law. As a society grows and changes, its laws must grow and change.

The Rule of Law may be defined broadly as the orderly and peaceful alternative to the resolution of social problems by force. Viewed in this fashion, the Rule of Law must obviously provide both protection of existing rights and means for creating new rights or altering old ones when required by new circumstances.

Few people either in our country or elsewhere fully appreciate the extent to which the United States is engaged in a constant process of rapid change. Were we not, we could not hope to maintain our position in the world. This process takes place on many fronts and usually is reflected sooner or later in our laws. The legal profession of our country has accordingly developed a high degree of skill in the techniques of building new social institutions. Our law schools teach the law as an evolving body of doctrine, thanks in part to the fact that the Common Law is by its nature a growing, organic structure, not (even in form) an instrument produced at a given time and place by a few men. We believe that the American experience with the techniques and problems of effecting change through law can profitably be drawn upon by lawyers elsewhere.

Important as the process of change is, however, the essentials of the Rule of Law are unchanging. The striking fact, dramatically

illustrated by the relative ease and avidity with which the Commission's work has progressed in the past ten years, is that the fundamental struggles of the friends of freedom are the same everywhere and always. The struggle is never over. The most basic rights must constantly be won, rewon, protected, renewed and reinterpreted. Thus in the struggle for freedom all lawyers are brothers, and the problems of all are alike. In each country maximum progress depends on the independence of the Bench and Bar, and general progress will depend on the extent to which, with the Commission's assistance, independent judges and lawyers in many countries can and will continue to link arms.

Against this background, we hope that American lawyers and law schools can contribute much to the concept of the Rule of Law which will be of interest to lawyers everywhere. For many nations the crucial question today is whether they can achieve the economic and social development they seek without turning from the path of law to the path of force. The greatest value of the work of the International Commission of Jurists lies in demonstrating that progress under the Rule of Law is not only the better solution but one which can be attained rather readily by those willing to trust and invoke the creative functions of the law. The Rule of Law is a banner under which both free men and men who would be free, alike can rally.

WHITNEY NORTH SEYMOUR *

SAUL L. SHERMAN **

* Attorney-at-Law, New York; Past President, American Bar Association.

** Attorney-at-Law, New York; Executive Secretary, American Fund for Free Jurists, Inc.

SOME THOUGHTS ON THE RULE OF LAW

Defining the Terms

The confused man of our time – a time when nausea is increasingly proclaimed as a substitute for transcendency, technology for science and “pressure” for persuasion – needs at the very least a reliable dictionary, assuming that some lingering scruple impels him to seek clarity as his objective.

“Rule of Law” – a meaningless expression indeed, in the absence of an agreed definition of the word “law”.

If “law” means merely the will of the sovereign, as theoreticians of formalism would have us believe, harking back rather unexpectedly to the vacuous theories of John Austin, and if the “sovereign” is merely he who happens to hold power, regardless of what specific principle he may invoke to legitimize its use, then Rule of Law means simply a situation in which individual actions and social relationships conform strictly to the will of the ruler. By this definition, Rule of Law would be achieved wherever the power wielded by the government was so tremendous, or the spirit of resistance among the governed so weakened, that the wishes of the sovereign were complied with automatically and without protest. How far the Rule of Law was in fact achieved would depend simply on the width of the gap between “what should be”, as laid down in existing standards, and “what actually is”, as reflected in existing social relations, irrespective entirely of the ethical or political content of the standards.

This interpretation of the concept of the Rule of Law is not necessarily inconsistent with a certain theory of value, or a certain scale of ideals. For those who regard “peace” or “order” as an overriding ideal – peace in a purely formal sense, that is, viewed simply as the absence of physical struggles or clashes, and political order viewed simply as the effective suppression of any rebellious tendencies – the achievement of a Rule of Law characterized by perfect harmony between “what is prescribed” and “what actually is” may constitute a desirable goal in itself, quite apart from any considerations as to the specific content of the prescribed rules. A Communist, for instance, can claim that the Rule of Law exists to a far greater extent in the USSR than in the United States on the ground that in the USSR the orders issued by the government are enforced far more effectively than in any democratic State on earth; and he could add that this represents a truly great achievement.

But surely, when the International Commission of Jurists refers to the Rule of Law, it has something else in mind.

Today's specialists have succeeded in dissecting the very concept of law in order to tamper with its dead body – its mere shadow. We, however, proclaim both the moral and the political necessity of preserving it whole, even though this may preclude lumping together, within the framework of a single scientific discipline, devices designed to regulate social intercourse in countries which still respect human dignity, power structures set up behind “curtains” of whatever sort, and disciplinary rules observed and enforced by delinquent gangs.

The concept of “law”, with all that it implies, cannot be simply equated with any body of standards aimed at regulating social intercourse and backed by the authority of the State.

In the past century, and even in this century, many jurists and philosophers, in pointing out the need for distinguishing between the various types of standards which regulate human relations (moral, legal, social, etc.) were content to define “law” as a set of rules aimed at regulating the physical actions of human beings and characterized by the fact that they could be enforced by the State. Many of these definitions make no reference at all to the need for a certain ethical content.

Thus it became possible to speak of “National Socialist law” or of the “laws” established by the anarchists in certain parts of Spain during the civil war, or of “Soviet law”. It is quite clear that, in these various cases, all that is meant is a system of norms governing human conduct and backed by the coercive power of the State.

These systems, however, reflect exclusively a will to power; neither their source nor their strength reside in the consent, freely arrived at and freely expressed, of the community to which they apply; they result purely from the fiat of a group – usually a minority – which imposes its rule by brute force; and their content is not limited by any recognition of the existence of certain rights appertaining to the very essence of the human being and hence inviolable.

Why, then, apply the same term to two entirely different things? There is not a single legal theorist who, from a technical point of view, would not consider it grossly improper to include within the same definition the concepts which in the Western world are designated by the terms “law” and “ethics”. Yet, many accept definitions of “law” which embrace both the twentieth century Anglo-Saxon legal system and that of the National Socialists, even though the gap between the two – in terms of conceptual significance as well as social function, structure, origin and “meaning” – is greater than that separating Western law from Western ethics.

If, therefore, the term "law" is to retain any meaning in our time, I believe that it should be applied solely to a *certain type* of standard backed by the might of the State, and not indiscriminately to *all* standards.

We cannot blind ourselves to the existence, in our day, of "structures of law" and "structures of power". Both imply certain standards which prescribe what human conduct "should be" and be enforced by coercive means; but, at the same time, we must clearly see the fundamental differences between the legal systems corresponding to these two types of structure; and if words are to serve as a medium of communication among men, and not as a source of Babel-like confusion, then the term "law" cannot be applied to such completely dissimilar objects.

Law, then – in the only possible modern meaning of the term – is a product of mankind's cultural evolution; it has nothing to do with the imposition of an unnatural order by the first cave man who happened to be sole possessor of a club, or the will of a dictator who wields power over lives and property because he has been clever enough to substitute a handful of machine guns for the cave man's crude weapons: his dictates bear about the same relationship to "law" as the rules of the Mafia to the Philadelphia Constitution.

We shall therefore use the term "law" only when referring to standards of human conduct adopted with the consent, freely arrived at and freely expressed, of a community constituted as a State – standards which stop at the point where the intrinsic rights of the individual begin, which are enforceable by coercive action and are designed to achieve justice and peace.

When, therefore, we ask whether the Rule of Law is a desirable objective, and how best it can be achieved, we mean "law" as defined above, and not just any set of rules by which any conceivable political system chooses to regulate human behaviour.

The Values Implied

Stated in these terms, it is clear that the Rule of Law cannot be equated with a state of "peace" characterized solely by the absence of strife or struggle and the stifling of opposition.

In our efforts to establish the Rule of Law we are motivated in the first place by our need for *personal freedom*, by a conviction that only insofar as human communities are able to establish a framework of law for regulating social intercourse, and weaving the complex pattern of relations between the individuals and groups of which society is made up into an orderly fabric, can that measure of freedom which each man needs, if he is to lead a truly "human"

existence, be achieved. Past experience, both recent and less recent, shows that all other forms of regulation – and particularly those peculiar to “power structures” – are incompatible with the survival of personal freedom, and that their only result is to reduce the individual to a “sub-human” status.

But, in addition, the Rule of Law as applied to an organized society should not be viewed in purely static terms. Its aim is not merely to keep the peace within a frozen, paralyzed body. It also has a dynamic side, like life itself, accompanying and nurturing the process of constant change which characterizes any living organism. As a factor of change and growth in a human community, law tends to keep the process orderly, non-violent and peaceful, while contributing at the same time to the achievement of greater *justice*. It is natural enough that any social change aimed at improving standards of justice and the distribution of wealth, maximizing the benefits accruing from the existence of the State, and adequately rewarding human effort, should entail a curtailment of privileges or income for certain members of the community and should meet with their more or less violent opposition. While it is a function of the law to promote such structural changes, it cannot always do so in full conformity with its own standards, maintaining perfect peace and order in the process. Even in those countries where law reigns supreme, basic social changes brought about by legal means with a view to achieving greater justice give rise to certain maladjustments involving temporary upsets in a state of perfect “legal peace”. The answer to the problem lies in a reasonable compromise between these various ideals – peace, freedom and justice. The chaotic revolutions of today which pursue social justice (if that is indeed their goal) through the devious paths of violence and tyranny stem from primitive impulses and from the tragically mistaken view that the ideals of peace and freedom can be sacrificed completely to that of justice. Conservative regimes, on the other hand – blind, deaf, inert, indifferent to the aspirations of the underprivileged masses and intent only on buttressing minority privileges by an appropriate legal framework, in the vain hope of making them impregnable – invoke in support of their policies the need for ensuring “peace” even, if need be, at the cost of freedom and justice.

The rule of law can be held to exist only where there is a reasonable degree of general respect for established standards, concomitant with progress towards greater justice under a legal system guaranteeing individual freedom.

At critical moments in the development of human societies it may be extremely difficult to achieve such a perfect balance between peace, justice and freedom. A government needs considerable skill and wisdom to determine in practice which of these three ideals is more important, and requires most urgent attention at a given time.

What we wish to stress, however, is that the law will play its proper role only if it takes due account of all three elements. Man being what he is, it is important that there should not be peace without justice and freedom; justice without peace and freedom; or freedom without peace and justice. And, law being what it is, there can be no "Rule of Law" without peace, justice *and* freedom.

The Neo-Romantic Approach

But the forces standing in the way of the Rule of Law are innumerable, quite apart from human failings, and the fact that some men are violent, intolerant, arbitrary or simply selfish!

Of all these hostile forces, which today threaten legal progress in my own part of the world, I shall mention only one.

Over a century ago, the romantic revolution shook the entire Western world from end to end. The romantic movement, with its subjectivism, tormented lovers and moonlit nights, left its imprint not only on all the literature of the time but on its politics as well, in the form of an emphatic assertion of the value of freedom for men and for nations. Here, in Latin America, as well as in the Europe of 1830 to 1840, this was its true significance. Unquestionably, there was a romantic flavour about the struggles which took place in the newly emancipated republics for the consolidation of the principles of freedom.

Today we are witness to another trend, very similar to last century's romanticism in its motivations, its comparative irrationality and the imperiousness of its claims, which commands a particularly large following among the young and conditions their militant approach to economic and social questions.

But today's neo-romanticists, as passionate and generous as their forbears, seem to ignore freedom as an ideal and to be concerned exclusively with justice.

They represent a powerful movement, which in a greater or lesser degree is influencing politics in all Latin-American countries and which has exhibited considerable dynamism. Its characteristic is an attitude of resentment and protest against the established order and the values which it stands for.

These young people are not overly concerned with the Rule of Law. In their eyes, present legal systems are designed less to establish peace among men and to protect their freedoms than to provide a bulwark for the defence of unfair minority privileges. They see that large masses suffer from chronic under-consumption and are all but excluded from the benefits which modern States provide for their citizens; nor are they willing to trust existing legal

processes to correct injustice and restore dignity to the under-privileged.

They want "something to happen", and to happen fast, even though that "something" may mean the curtailment or even the suppression of basic freedoms, and the breakdown of social peace. Restrictions on freedom of the press do not alarm them unduly, convinced as they are that such freedom is in any case restricted to those enterprises which support oligarchic interests; it never occurs to them that they themselves benefit by it. Nor do they trust parliaments which, in their view, are dominated by the privileged classes; they tend to rely not on democratic procedures, but rather on the action of "pressure groups" – trade unions, student associations, civil servants' organizations, etc. Their aim is to achieve a higher standard of justice, and achieve it rapidly, if necessary at the expense of some other moral value.

Those who observe from afar the ferment created throughout Latin America by the Castro revolution in Cuba are mistaken indeed if they see in it only a sign of expanding world communism. Of course, communism is remarkably adept at using this agitation for its own purposes, and encourages it by all possible means; it is also true that these anti-liberal neo-romanticists, these revolutionary "justicialists"¹ are more sympathetic to world communism than to those groups who favour pursuing social justice through established legal procedures, believing as they do that the destructive methods of communism will be more effective in breaking down the existing economic order. But in spite of any such avowed or tacit alliances between "justicialism" and communism – helped, it is true, by the torpor, selfishness and blindness of the Conservative groups and by the State Department's friendly policies towards those groups prior to the advent of the Kennedy administration – it would be a mistake to consider the two movements as one and the same thing.

There is no denying the tremendous and increasing popularity of this kind of political thinking among the younger generations in this part of the world; and it is absurd to think that the lack of maturity which it reflects can be effectively counteracted by coercion or police methods.

There is no doubt at all that this crude and infantile "justicialism", with its contempt for legality, peace and freedom, raises an extremely difficult educational problem. But whatever educational action is undertaken to revive the moral values on which political

¹ We use the term, not to evoke the politico-social movement which General Perón promoted in Argentina, and the cruel dictatorship which he set up there, but simply to describe a certain single-minded fascination with social justice which seems to overlook other vital issues entirely.

systems in the greater part of the Western world have been built (i.e., peace with justice and freedom) will require years to bear fruit; and these years may well be decisive ones, during which the legal systems of the countries concerned will be exposed to severe trials.

Revolution Through Law

In view of the foregoing considerations, I cannot help feeling that we in America who are engaged in the struggle for law, as Ihering would have said, or in efforts to establish the Rule of Law, the theme proposed for our reflection by the International Commission of Jurists, can no longer confine ourselves to thinking in terms of techniques and devices, of orderly methods and procedures for ensuring ever closer conformity between "what should be", as spelled out in formal legal texts, and "what is", i.e. the facts of human behaviour. We have an urgent obligation to take vigorous action aimed at a speedy, thorough and basic re-casting of existing standards, inspired by a generous ideal of justice and resulting in fundamental changes in the social order.

We are faced with a dilemma: either we carry out a revolution *through* law, or we will have a revolution *against* law. It is no use pretending that any legal system, however unsophisticated its opponents may be, can survive its own generalized discredit among the community whose life it was intended to regulate. The law must meet the dominant aspirations of the community, apart entirely from the fact that in so doing it should, so far as possible respect the fundamental values on which civilized living depends.

In the present circumstances, it is far less important to find suitable means of enforcing the existing body of law than to promote speedy and thoroughgoing changes in its actual content, such as will command the spontaneous support of the younger generations and thereby ensure its survival. And in the meantime, if the minds of the young seem to us dangerously crude and untutored, let us strive to enrich them, or round them off through education, and to make them understand that, in their struggle for justice, they should not forget that only when freedom and peace also are adequately protected is life really worth living.

DR. JUSTINO JIMÉNEZ DE ARÉCHAGA *

* Former Dean of the Faculty of Science and Humanities; Emeritus Professor of Constitutional Law; delegate of Uruguay to the United Nations General Assembly; delegate of Uruguay to the Tenth Inter-American Conference (Caracas); and one of the drafters of the Universal Declaration of Human Rights.

AUSTRIA AND THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

In a full and penetrating article published in Volume IV, No. 1, of the *Journal of the International Commission of Jurists*, Philippe Comte examined the processes by which the European Convention for the Protection of Human Rights and Fundamental Freedoms has, over the 12 years of its existence, become embodied in the municipal law of the 15 Member States of the Council of Europe which have acceded to it.¹ This multilateral European treaty is a pioneering experiment, practically without historical precedent. The intent of its framers was to forestall any dictatorial designs on the part of governments and to establish instead the Rule of Law, at least among European States, by laying down collective safeguards for Human Rights and making the domestic political system of each Member State of the Council of Europe the ultimate concern and responsibility of all Members.² The establishment of the European Human Rights Commission and the European Court of Human Rights, under Article 19 of the Convention, was intended to ensure that specific undertakings towards millions of human beings should not remain an empty promise and that the Member States of the Council of Europe should constitute the one region in the world in which Human Rights and basic freedoms would be effectively protected by an institution rightfully claiming to be a genuine supranational authority.

The main difficulty in the way of the Convention's implementation in the countries party to it lay – as any jurist will readily understand – less in guaranteeing to their citizens the basic freedoms established by the Convention (since most of the Constitutions of European States have contained provisions of this type ever since the end of the nineteenth century) than in the transposition of the Convention's provisions from the international to the national level, i.e., their incorporation in the system of domestic laws. The problem was thus bound to arise of determining precedence as between ordinary laws (particularly those governing penal proce-

¹ Philippe Comte, "The Application of the European Convention on Human Rights in Municipal Law," *Journal of the International Commission of Jurists*, Vol. IV, No. 1 (Summer 1962), pp. 94-133.

² *The European Convention on Human Rights* (Strasbourg: Council of Europe, 1960), p. 9 ff.

ture), constitutional enactments and international treaty obligations. The more elaborate and organic the legal structure giving effect to the principle of the "State governed by law", the greater the problems that arise, owing to natural reluctance to give up well-tried legal texts solely because of formal or textual discrepancies. Sincere thanks are therefore due not only to the author of the article, but also to the editors of the *Journal of the International Commission of Jurists* for publishing, for the first time, a survey of the manner in which this problem of transposition and transformation has been solved by the various signatories to the Convention. The question takes on particular significance now that the conclusion of similar Human Rights Conventions at the Pan-American level and also among the African States – for which the European instrument will naturally serve as a model – is being mooted. And since Comte mentions Austria several times in this connection, a description by an Austrian jurist of what happened in his country may prove of general interest.

I

The European Human Rights Convention (including the supplementary protocol) came into force for Austria on September 3, 1958, after it had already been ratified by 14 States (all of the signatories, with the exception of France). In accordance with Article 25, Austria declared that it accepted the Commission's competence to hear grievances emanating from natural persons, non-governmental organizations and associations of persons, and alleging infringements of their rights under the Convention by one of the high contracting parties. Under Article 46, Austria accepted the compulsory jurisdiction of the European Court of Human Rights in all matters arising out of the interpretation or application of the Convention.

Few events have aroused as much interest in Austrian legal circles as the entry into force of the European Convention. Scarcely had its text been promulgated (in the *Bundesgesetzblatt für die Republik Österreich*, No. 210/1958) than it became the subject of numerous discussions (mainly within the Vienna Society of Jurists), contributions to specialized publications, press articles and so on.³ The debate was concentrated on three main issues, namely,

³ See the comment and discussion in *Juristische Blätter*, 1958, p. 599 ff. and 1959, p. 71 ff.; Felix Ermacora, "Die Menschenrechtskonvention als Bestandteil der österreichischen Rechtsordnung," *ibid.*, 1959, p. 396; Pfeifer, "Die Bedeutung der Europäischen Menschenrechtskonvention für Österreich," *Festschrift, Hugelmann I*, 1959, p. 399 ff.; Hellbling, "Die Menschenrechte und Grundfreiheiten," *Österreichische Juristenzeitung*, 1960, p. 281 ff.; Liebscher, "Die Grundzüge eines Völkerstrafrechts in der österreichischen Rechtsordnung," *Juristische Blätter*, 1959, p. 394 ff.

whether (a) the Convention had become an integral part of the Austrian body of laws; (b) its provisions were self-executing; and (c) it had the status of a constitutional enactment or merely of an ordinary law. The position overwhelmingly taken by students of constitutional, administrative and international law was that, with the Convention's publication in the Official Gazette, it had *ipso facto* become a source of municipal law whose provisions any individual citizen might invoke in proceedings against the Austrian State (Article 13). This view was based on the principle of "incorporation" laid down in Article 49 of the Federal Constitution. It was held, moreover, that, having been ratified by the National Assembly by the qualified majority (two-thirds, with a quorum of one-half of the membership) required under article 44(1) of the Constitution for the adoption of a treaty amending the Constitution, the Convention had achieved within the Austrian legal scheme the status of a constitutional enactment.

Only one isolated author took the view that the European Convention could not by itself constitute a source of positive law.⁴ According to this view, the Convention was addressed only to the standard-setting authorities (i.e., Parliament), not to the law-enforcing agencies (i.e., the courts and the administrative authorities). This was inferred from Articles 1 and 57 of the Convention itself, and also from its preamble, in which the signatory powers had resolved only "to take the first steps for the collective enforcement of . . . the Rights stated . . ." and ". . . to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention." Why, then, should any further comment be necessary, when Article 57 was quite clear as to the question of "self-execution"? Surely the contracting parties, at the time of concluding the Convention, had been fully aware that a self-executing instrument would take precedence over domestic law provisions?

At first, only professional circles took much notice of this heated controversy among scholars, the general Austrian public remaining largely outside the fray; and yet the whole issue was soon to give rise to some very practical political and legal preoccupations. Every individual involved in either judicial or administrative proceedings began to look for arguments not only in existing Austrian domestic law provisions but also in those of the European Convention, which he naturally interpreted wholly to suit his own purposes. The wildest claims were put forward. Time and again,

⁴ Winkler, "Zur Frage der unmittelbaren Anwendung von Staatsverträgen," *Juristische Blätter*, 1961, p. 8 ff.; Winkler, "Der Verfassungsrang von Staatsverträgen," *Österreichische Zeitschrift für öffentliches Recht*, 1960, X, p. 514 ff.; Winkler, "Diskussion in der Wiener Juristischen Gesellschaft," *Juristische Blätter*, 1959, p. 71.

persons indicted for unnatural sexual practices argued that prosecution on the ground of homosexuality was contrary to Article 8 of the Convention – that it involved an invasion of the individual's private and family life. Those who sued newspapers for libel or slander were met with the objection that the defendant had merely exercised his right to "freedom of expression" within the meaning of Article 10 of the Convention. Anyone placed under arrest or detention by the judicial or police authorities, whatever the reason, blandly contended that one of the conditions set out in Article 5(1), paragraphs (a) to (f), which alone could justify deprivation of personal freedom, were fulfilled. Thus a point was reached where the responsible judicial bodies could no longer ignore the problem and were forced to take a stand.

II

Even in Austria the Constitutional Court opinion of June 27, 1960, quoted by Comte, aroused surprise.⁵ The Court decided, contrary to the prevailing view, that Article 6 of the Convention was not self-enforcing but merely placed an obligation on the law-giving bodies "to bring existing laws into harmony with the Convention, wherever discrepancies exist" and to refrain in future from adopting legal prescriptions contrary to the Convention. The Court held – to quote its own words – that "the vagueness of the concepts defined in Article 6, when compared with the detailed and elaborate provisions of the laws governing civil and penal procedure, leads beyond doubt to the conclusion that Article 6 merely establishes a framework of basic principles which the legislator is bound to implement and observe, but which in themselves are not self-executing and do not yet have the force of law." It follows that in the opinion of the court the publication of the Convention in the Official Gazette has not altered the existing body of laws.

This opinion was arrived at on the occasion of proceedings instituted with a view to the restitution of certain assets under the first law giving effect to the Austrian State Treaty. The subject of the complaint was that, in accordance with the second Restitution Act, the matter had been decided by the Provincial Revenue Office, i.e., an administrative body, despite the fact that the complaint was concerned with "civil rights and obligations" within the meaning of Article 6 of the Convention and therefore could be appropriately dealt with only by an "independent and impartial tribunal established by law". The Constitutional Court pointed out in passing that in Austria the European Convention did not have

⁵ Court decision No. B 469/59, published in *Juristische Blätter*, 1961, p. 352 ff.

the status of a constitutional enactment, but merely that of an ordinary law.

This point of view was expressed even more clearly in the same Court's opinion of October 14, 1961.⁶ In this case a businessman had been indicted for tax fraud and placed under arrest by order of a revenue office. This procedure is permitted under certain circumstances by the Austrian Revenue Act of 1958. The complainant, however, argued that it was in any case contrary to Article 5 of the Convention, as it did not fall within the exhaustive enumeration of cases under which deprivation of personal freedom is permissible. The Constitutional Court did not even attempt to determine this question, but pointed out instead – this for the second time – that the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms were not automatically enforceable by Austrian courts and administrative bodies, and that they did not have the effect of repealing any existing provisions of municipal law. Thus Article 5(1) (c) of the Convention was not self-executing because it left entirely open the question of the authority before which the arrested person could be arraigned, the exact meaning of “within a reasonable time” and the conditions under which posting of bond might be required. With respect to the precedence to be accorded the Convention in municipal law, the Court, in its opinion, explicitly recognized that ratification of the Convention – a State treaty – had indeed been decided by the National Assembly (the First Chamber of the Austrian Parliament) by a majority of two-thirds with a quorum of one-half the members, as prescribed in Article 49(1) of the Federal Constitution with respect to constitutional enactments. It added, however, that in the decision to ratify the Convention (Article 50 of the Constitution) as published in the Official Gazette, the latter had not been explicitly designated as an instrument amending the Constitution, and that such designation would have been necessary in order to confer upon it the status of a constitutional enactment. The Convention therefore had the status only of an ordinary law.

But, although the Constitutional Court made its position quite clear regarding the place of the Convention in the hierarchy of laws, it did not declare the whole of it to be non-self-executing, but only Articles 5 and 6.⁷ Since, however, these are precisely those of its provisions which have the greatest practical significance, and since the Court did not hold in any other opinion that other

⁶ Court decision No. G 2/61, published in *Juristische Blätter*, 1962, p. 145 ff.

⁷ Thereby clearly answering the question raised by Comte, *op. cit.*, pp. 114-115, as to whether the Austrian Constitutional Court had assigned to the Convention the rank of an ordinary law, or placed it above such laws.

provisions of the Convention were self-executing, its general position towards the Convention, *pro foro interno et externo*, may be described as frankly negative. It is safe enough to assert that the reasons for this lay less in the Court's opposition in principle to the concept of fundamental rights and the integrationist view⁸ than in the fact that the novel and often vague or ambiguous concepts set out in the Convention contrasted with the existence in Austria of a sound, well-established basic system of law. The Laws of 1862 respecting the protection of individual liberties and inviolability of the home and the Basic Law of 1867 concerning the general rights of the citizen are hallowed constitutional enactments and far more than mere paper guarantees. Even in the days of the Monarchy, but particularly since 1918, legal documents and laws which infringed the basic rights of citizens have constantly been subject to thorough judicial review on grounds of unconstitutionality (Article 144 of the Constitution). Hans Kelsen, the framer of the present Federal Constitution, considers this principle of judicial review from the constitutional standpoint as "the favourite among his brain children."⁹ Tradition and experience have resulted in Austria occupying an enviable position among the family of nations in this respect. Was it conceivable that the work of a whole century should be abandoned in favour of new and vaguer formulations of the same principles? As long as the European Convention was not treated as a constitutional enactment, it could not repeal existing provisions of Austrian law; but neither could the municipal courts give any decisions in application of any of its individual provisions. As we have already pointed out, a major problem posed by regional Human Rights instruments embracing entire continents would appear to lie in the reluctance – perhaps not even conscious – of States which have already achieved an above-average standard in the protection and definition of Human Rights to adjust themselves to an untried norm tailored to the needs of the mass of Member States, including of course the developing countries. The Court's decisions may have been determined in part by an awareness of the vivifying influence which the so-called "Vienna School" of political and legal theory, under Kelsen's leadership, exerted on legal science in Europe well before the adoption of the European Convention.

⁸ Ermacora, "Die Menschenrechte und der Formalismus," *Juristische Blätter*, 1962, p. 120, points out that the Constitutional Court has never expressed such a view, even though it would have had occasion to do so in connection with the application of State treaties. Even the Austrian State treaty of 1955 (*Bundesgesetzblatt*, No. 152) which constitutes the foundation of the Austrian political order today, contains no reference to its status as a constitutional enactment.

⁹ *Juristische Blätter*, 1962, p. 303.

III

Reactions to the Constitutional Court's rulings in Austria itself were far from favourable; the Court's position was considered neither clear nor unassailable.¹⁰ It was objected,¹¹ on the grounds of Articles 1, 9 and 145 of the Austrian Federal Constitution, that the latter had always been based on the principle of monism, entailing the primacy of international over municipal law, and that none of the leading Austrian constitutional law scholars had ever taken any view other than that State treaties were enforceable immediately, directly and without any need for "incorporation."¹² But that is not really the question at issue. The matter has already been the subject of far too much theoretical discussion and learned doctrinal experimentation. That a Convention which has been ratified, incorporated in the laws of the country, published in the regular fashion and thereby become an integral part of municipal law can nevertheless be treated by the courts, to which it is after all addressed, as if it did not exist – this is something which not only the man in the street, but even the less sophisticated jurists, could not understand! Legal prescriptions are, after all, meant to be implemented immediately, unless either the provisions respecting their administration or their explicit wording stipulate otherwise. The right time for anxious inquiries as to how the Convention would fit into the scheme of national legislation would have been when the treaty was concluded, and in any case before its ratification.¹³

Austrian courts in their wisdom had, in fact, already shown what would be a correct approach to the problem. Under Article 27(2) of the Austrian State treaty of 1955 published in *Bundesgesetzblatt*, No. 152, the Federal People's Republic of Yugoslavia had been granted the right to attach, block or liquidate Austrian assets, rights and interests within Yugoslav territorial jurisdiction at the time of the treaty's entry into force. The Austrian Government undertook to provide compensation for Austrian nationals whose assets would be affected by this provision. No sooner had the treaty come into force than the Austrian Government was confronted with thousands of claims for compensation from citizens affected by the clause in question. These claims were at first disallowed on the ground that no law had yet been passed giving effect to the treaty

¹⁰ Comte, on the other hand, *op. cit.*, p. 119, sees no basic contradiction here.

¹¹ Marcic, "Die Menschenrechte und der Formalismus," *Juristische Blätter*, 1962, p. 306. Ermacora took issue with this ruling even more sharply in an article published in *Juristische Blätter*, 1962, p. 118, under the same title.

¹² Adamovich, *Die Prüfung der Gesetze und Verordnungen durch den österreichischen Verfassungsgerichtshof* (Vienna: 1923), p. 159; Kelsen, *Kommentar*, p. 86.

¹³ Marcic *op. cit.*, p. 308.

provision. However, by a decision of February 4, 1960 the Supreme Court ruled that Article 27(2) of the State treaty established a *self-executing* obligation, and should be viewed as a positive law provision of which citizens might avail themselves in submitting claims.¹⁴ The State treaty, it was held, provided a basis for claiming compensation, and no implementing Act was needed. Thus the highest civil and penal judicial body in Austria ruled explicitly that the State should not hold back with one hand what it had given with the other. Legislative decisions which are not unconstitutional must be carried out, and any reservations based on doctrinal grounds which restrict or retard their effects are contrary to the traditions of Austrian jurisprudence.

Even more likely to arouse misgivings, however, are the practical implications of the Constitutional Court's ruling for Austria's relationships with the community of States represented in the Council of Europe. Comte points out that each of these States is faced with the problem of incorporating the European Convention so that it will become a part of its municipal law, and must solve the problem in its own way. In this process, the question of the Convention's precedence and the self-executing nature of its clauses is bound to give rise to conflicts here and there. Perhaps, however, he has not come to realize fully that the developments in Austria which he has analyzed so carefully have resulted in a situation where, for all practical purposes, neither the detailed provisions of the Convention nor its basic ideological content have found a place in the Austrian legal order. In this latter regard, as will be briefly explained further on, the basic issue is that of achieving the goals of the European Community. Since the European Convention has been relegated to the role of Cinderella within the Austrian legal framework, the question which has come to the fore is whether Austria is complying with the obligations which it entered into in acceding to the Convention. Werner Kägi, the Swiss international law Professor of Public Law at the University of Zürich, refers to the generally recognized principle of international law according to which *pacta sunt servanda* in the following terms: "Only respect for contractual obligations – all the way from private law contracts to international treaties – can safeguard the dignity of the human person as well as the honour and freedom of nations and thus ensure a truly peaceful order based on the law of nations . . . This necessary relationship acquires fresh significance at a time when efforts are being made to establish a better-integrated body of international law, for trust . . . remains the basis for a community of nations ruled

¹⁴ Decision of the Supreme Court No. 3 Ob 118/58, published in *Juristische Blätter*, 1961, p. 27 ff.

by law: *Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas.*"¹⁵ Verdross, the well-known Austrian authority on international law, makes it quite clear that, unlike the Universal Declaration of Human Rights adopted in 1948 by the United Nations, which involves only a "moral" obligation, the European Convention not only confers certain rights upon the individual, but places a formal international law obligation on the State.¹⁶ The same view is held by Austrian jurists, who consider that, particularly on a question of European importance, an equivocal attitude likely to bring our country into disrepute is something to be avoided.

IV

Today, the dilemma can only be solved along the lines on which the Austrian Federal Government has in fact embarked by introducing a Bill in the National Assembly, on September 23, 1959, which would enact the necessary provisions to comply with the obligations which Austria accepted when it ratified the European Convention. Under this proposed Bill a whole series of provisions from the European Convention would be embodied textually in the Federal Constitution or the Basic Law of 1867.¹⁷ The Bill has not yet been debated in Parliament. This long-delayed action will be one of the most urgent tasks facing the National Assembly newly-elected in 1962. An objection to the Bill has been made from various quarters, namely, that it constitutes a "wholly unexpected endorsement, particularly in Austria, of the dualistic principle."¹⁸ However, as already pointed out, the time for doctrinal controversy has long since passed: what matters now is that the situation should at last be made clear.

The need for action is particularly urgent now that Austrian citizens and, generally speaking, all individuals subject to Austrian domestic jurisdiction, for whom the provisions of the Convention are after all primarily intended, are no longer content to remain silent but have, within the past few years, expressed their feelings most strongly and spoken of receiving their "due", namely the rights and freedoms proclaimed in *Bundesgesetzblatt* No. 210 of 1958. They have ceased to concern themselves merely with the question whether a civil lawsuit has been well decided, whether an offence is properly punishable or whether the correct procedure

¹⁵ Strupp-Schlochauer, *Wörterbuch des Völkerrechts II*, p. 715.

¹⁶ Verdross, *Völkerrecht* (Vienna: 1959), p. 498 ff.

¹⁷ No. 60, Appendices to the Stenographic Record of the proceedings of the Austrian National Assembly, Ninth Legislation.

¹⁸ Karel Vasak, "Was bedeutet die Aussage 'ein Staatsvertrag sei self-executing?'" *Juristische Blätter*, 1961, p. 621 ff.; Comte, *op. cit.*, p. 120.

in a penal case has been punctiliously applied in accordance with the Austrian Code of Penal Procedure; they have now begun to insist on the literal, textual observance of the terms of the Convention. The fact that, following the decisions of the Constitutional Court, such efforts drew only embarrassed smiles from the judicial authorities has increasingly poisoned relations between the courts and those seeking justice. Gradually a large part of the people came to look upon the European Convention as an unfulfilled dream, a sort of myth which, should it ever come true, would ensure successful prosecution of all court cases and full protection for the individual against any coercive State action. The policy of half-measures and the tactic of promises not fully kept had given rise to increasing dissatisfaction with Austrian justice, even though the latter had done everything within its power to safeguard each individual's lawful rights.

Article 13 of the Convention provides that anyone alleging that his rights thereunder have been violated shall have an effective remedy before a national authority. However, no complaint of this nature could ever be brought before an Austrian court, since the ordinary courts were precluded by the Constitutional Court's decision from testing any case by the provisions of the Convention. As a result, the European Human Rights Commission at Strasbourg was deluged with complaints emanating from Austria. In some cases the Commission entertained the complaints, ruling them admissible. This was made possible mainly by the basic difference between continental and Anglo-Saxon law provisions defining the status of the public prosecutor in penal procedure.¹⁹ In England and Wales there is practically no such thing as a professional public prosecutor: the function is delegated to a lawyer who acts as "Counsel for the Crown" and conducts his case like any other. On the Continent, on the other hand, State prosecutors usually have a clearly defined mandate which gives them the status of an authority obliged to be objective. Section 3 of the Austrian Code of Penal Procedure enjoins the State prosecutor "to take equally careful account of the circumstances militating for and against the defendant". Sections 282 and 283 of the Code of Penal Procedure empower the State prosecutor to lodge an objection to an incorrect or unduly harsh judgment, *in the defendant's interest*. Section 33 provides that even enforceable decisions of penal courts

¹⁹ The *Journal of the International Commission of Jurists* has published much valuable information on this matter; see in particular William W. Boulton, "The Legal Profession and the Law; The Bar in England and Wales," Vol. I, No. 1 (Autumn 1957), pp. 106-127 and Sir Carleton Allen, "The Layman and the Law in England," Vol. II, No. 1 (Winter 1959/Spring-Summer 1960), pp. 55-80.

involving legal violations which work to the defendant's disadvantage may be reported by the prosecutor to the Chief Prosecutor in the Supreme Court who is competent to have them quashed. Under this system the State prosecutor has the right in virtue of Section 35 of the Code of Penal Procedure to attend certain court deliberations – in the absence, of course, of counsel for the defence. This is also the case in several West European countries (France, Belgium and also some of the Swiss cantons). The Commission in Strasbourg had certain doubts as to whether this practice was compatible with the principle of procedural equality, which it considered to be an essential implication of Article 6 of the European Convention (concerning the right to a public hearing at reasonable expense). Austria should, therefore, notwithstanding – or perhaps because of – the fact that the Constitutional Court had denied that the Convention was part of Austrian positive law, agree to a searching and protracted analysis of its legal provisions, viewed from the standpoint of their conformity with the Convention, by such supranational bodies as the European Commission or the European Court of Human Rights.

V

What is the lesson to be drawn from all this? There are various ways for a State to adjust its legal provisions to those of the European Convention; but adjust them it must. In discussing the problem of incorporation into municipal law, formal legalistic considerations should not be allowed to overshadow the major objective – namely *the creation of a common Western system of basic legal standards*. It must be agreed, with Jescheck, that it would not be consistent with the purposes of the Convention to interpret its provisions in such a fastidious and overscrupulous way as to “undermine the foundations of well-trying municipal law enactments.”²⁰ And yet this very thing is constantly being attempted; hence the reluctance of the guardians of constitutionality to allow the dictates of a supranational community to invade the domain of municipal law, where their consequences cannot always be clearly foreseen. No one knows better than the Austrian judicial authorities that “the very flexibility of the provisions of Section I of the Convention certainly provides easy material for the tortuous reasoning of appellants and criminals eager to exploit every trick of procedure.”²¹

²⁰ Jescheck, “Die Europäische Konvention zum Schutz der Menschenrechte und Grundfreiheiten,” *Neue juristische Wochenschrift*, 1954, p. 784.

²¹ Comte, *op. cit.*, p. 128.

In this connection, it may be pointed out that in the very earliest stages of the process which led to the adoption of the European Convention two diametrically opposite schools of thought confronted each other.²² There were those who wanted a comprehensive enumeration of general principles which each party to the treaty would be required to apply *in accordance with its national laws* and jurisprudence. Each State would be free to lay down standards for the exercise and protection of the various rights and freedoms within its own jurisdiction. The other view held that *precise definition* of the rights to be protected – making provision, where necessary, for permissible exceptions – was an essential prerequisite to the conclusion of a Convention. Such definitions should be embodied in formal laws, whose clear wording would leave no doubt as to the nature and extent of the obligations assumed by the parties. The Convention should therefore spell out, down to the last detail, the content and scope of the rights and freedoms guaranteed to the individual.

The views of the jurists on the drafting committee varied considerably. Objections to the second formula were raised on the ground that it would immeasurably complicate the framing of a workable Convention, and lead to unavoidable clashes with municipal law provisions. It should not be forgotten that the membership of the Council of Europe, though small by comparison with the United Nations, comprised three different legal systems – the Anglo-Saxon, the Scandinavian, and that of continental European States, based mainly on the Napoleonic Code – whose fundamental elements often differed considerably. It would therefore be preferable to leave it for each party to determine how far modifications were required in its own statutes.

Nevertheless, in 1950, in the political committee of the newly-founded Council of Europe it was the second view, by and large, which prevailed – that which favoured imposing rigid obligations on States without regard for their municipal law systems. The resulting difficulties, which had been foreseen at the beginning of this new chapter in European legal history, are far from having been overcome. That this grandiose idea of European legal integration shall not prove unworkable in practice will depend on the intelligence, initiative and readiness to co-operate in a spirit of good will displayed by jurists in all European countries.

VIKTOR LIEBSCHER *

²² The European Convention on Human Rights, *op. cit.*, p. 25 ff.

* Doctor of Law; Chief Prosecutor, Supreme Court of Austria.

PROBLEMS INVOLVED IN THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS AND LIBERTIES IN THE PRACTICE OF THE ITALIAN CONSTITUTIONAL COURT*

La liberté, ce bien qui fait jouir des autres biens.
(Montesquieu)

CONTENTS

I.	The right to individual liberty and the protection of the public interest. "Proportionality" of State intervention in the protection of public interest. Those entitled to the right to liberty and limitations on the exercise of this right	294
II.	The new balance in the relationship between citizens and the authorities introduced by the Constitution of Italy	296
III.	The approach of the Constitutional Court to the primordial constitutional liberties:	
	A. Freedom of Opinion	297
	B. Personal Liberty	300
	C. Freedom of Movement	304
	D. Freedom of Assembly	305
	E. Equality before the Law	309
IV.	Conclusion	314

I

All modern legal systems guarantee and protect certain fundamental Human Rights which constitute an inalienable heritage and one that may not be foregone; the first of these is freedom.

There is however an essential limit to this freedom of the individual; that is, the public interest, which also requires protection. This is to say that the action of the individual cannot be deployed absolutely in all directions but must be contained within the limits imposed by community life and regulated in view of the interests of all. The very fact of belonging to a society ordered by

* This paper, written by Dr. Annarosa Pizzi, of the University of Pisa, won first prize in a competition conducted by *Associazione Giuristi*, the Italian Section of the Commission. The article reproduced here is a translation from the original in Italian.

law must imply, for the individual, some restrictions which take the form of explicit definition of his rights and regulation of the activity which he may pursue.¹

In other words, since the individual lives in the State and intends to carry on his activity in it and obtain recognition of his rights, he must give up a part of that natural liberty which, although seen to be absolute, if it is considered in the abstract, would in practice result in the exercise of arbitrary free will and hence in anarchy.²

However, the liberty which he renounces for the sake of peaceful cohabitation is conferred on him again as a citizen in other forms, in a kind of "socialization" of liberty; by refraining from claiming unlimited personal freedom, he obtains an objective and concrete freedom which is guaranteed by the body of laws.

In the final analysis, limitations on the sphere of free action of the individual find their justification in the need of the State to pursue and foster its own ends. With this aim in view, the norms of public law are always dictated with a view to the needs of the public interest; their scrupulous observance is also absolutely necessary when they confer privileges and recognize subjective rights. Even public subjective rights are recognized and granted for reasons of collective interest, and the right to freedom in particular, because the State must rely on free initiative for the evolution of those social forces which are outside its sphere of action.³

The legislative prescriptions limiting the freedom of citizens determine case by case the incidence of the public interest on any given aspect of individual liberty: a situation of extreme delicacy, since it opens the way for authority to prevail over freedom and the public interest to be promoted even to the detriment of the rights of the individual.

It is therefore imperative for the lawmakers, while protecting the interest of the public, to sacrifice the rights and liberties of

¹ In this connection Bonaudi observes in *Dei limiti della libertà individuale* (Perugia: 1930), p. 17, that it is not the place of the jurist but rather that of the politician or the philosopher to discuss the question of whether and how far the framework of laws should sanction or restrict the freedom of the individual; the jurist is concerned rather with applying a negative criterion to the determination of that freedom, his task being to ascertain to what extent the sphere of State authority limits it.

² Cf. Franchini, *Le autorizzazioni amministrative costitutive di rapporti giuridici fra l'amministrazione e i privati* (Administrative authorizations as the origin of juridical relationships between administrative bodies and private persons) (Milan: 1957), p. 16 ff. See also in connection with the limitations imposed on the individual by the Constitution, Barile, *Il soggetto privato nella Costituzione italiana* (Padua: 1953), p. 76 ff.

³ Thus expressly Cammeo, "La volontà individuale e i rapporti di diritto pubblico," in *Giurisprudenza italiana* [hereafter, *Giur. it.*], 1900, IV, p. 1.

private persons only to the extent that this is strictly necessary; that is to say, they must solve the problem of permitting citizens to make use of their liberty without damaging the public interest, through interventions and measures that are "proportionate to the need" of protecting the public from the danger that might result from unrestrained activity on the part of individuals.

These "proportionate" restrictions do not imperil the liberty of those wishing to exercise any kind of activity within the community. On the contrary, that liberty is expressly based on rights recognized by the body of laws and as such entitled to protection against all encroachments. It is only the possibility that the manner of their exercise may cause prejudice, directly or indirectly, to the public interest which induces the State to impose such restrictions. The State's sole motive is to ascertain that certain interests of the community are respected, or that a guarantee exists that will be respected.

The possibility of damage to the community resulting from the uncontrolled exercise of individual rights is thus forestalled by the fact that the capacity to act must be circumscribed by the legal order.⁴

II

The Constitution of the Republic of Italy, expression and product of a politico-legal thought that is linked to a particular moment of the country's history, has established a new balance in the relationship between public authorities and citizens.

It is now a fundamental principle of the State to recognize first and foremost that everyone has the right to develop freely his personality and above all liberty in all its aspects.⁵

In this connection, we may say that there has been a veritable reversal of the former position, for while the terms of the relationship remain unchanged, as do in substance the consequences deriving therefrom, it is now the rights of the individual, solemnly affirmed and safeguarded, which indicate the path to be followed in the action taken by public authorities. That is to say, any conflict between individual rights and public authorities appears, under the present Constitution, to be settled by attributing to the individual a broader sphere of action while on the other hand intervention by the State is more confined.

⁴ See Franchini, *op. cit.*, p. 21 ff.

⁵ The Constitution uses various forms of wording ("Freedom is inviolable," "every citizen *may* circulate," "citizens *are entitled* to assemble," [author's emphasis] etc.) which in court practice are expressed in the broadest sense and sometimes even indiscriminately by the words "rights" or "liberty".

The innovations introduced by the Constitution have established directly, in certain cases, what must be the specific motives for which the rights and liberties of citizens may be circumscribed. Hence, without denying the continued existence of limitations to individual liberties (and indeed expressly confirming them), the Constitution has modified and decreased the grounds on which they may be applied. By defining frequently the grounds for restrictive action, it has made provision for the settlement of possible conflicts between the rights of individuals and the exercise of public power (so that the latter cannot relapse into arbitrariness).

But once the right to freedom was thus affirmed, a situation of incompatibility arose between the new principles expressed in the Constitution and those embodied in a legal order based on different concepts of constitutionality and which were no longer appropriate to the present framework of laws.

III

The anomaly of this situation called for action on the part of the Constitutional Court which is increasingly zealous in solving problems of conflict between the Constitution and the law of the land.

The Court's approach to the right to freedom is that legal provisions which sanction a given right do not prevent its regulation. It is clear that to control the manner of exercising a right does not signify its denial or invalidation; the individual's pursuit of his ends must be harmonized with that of others. And even if as an indirect result of such control the rights itself were to be somewhat circumscribed, we must not forget that the concept of limitation is inherent in that of right. And moreover, within the framework of laws, the various juridical spheres must of necessity recognize their mutual delimitation in order to permit an ordered coexistence.

Let us now examine the concrete problems which arise in connection with the sovereign liberties guaranteed to citizens by the Constitution, and the manner in which the Court has solved them.

A. *Freedom of Opinion*

Article 21 of the Constitution ⁶ recognizes the right of all to express their opinions freely by word, writing and all other means. This constitutional precept and in general all those regarding the

⁶ This Article commences: "All persons have the right to express their own opinions freely by the spoken or written word and any other means of dissemination".

right to liberty seem to be contravened by Section 156 of the Public Safety Act (as amended) which prohibits all forms of fund-raising and collecting, whether through the press, or by door-to-door visits, or any other means, without the permission of the *Questore* [chief of police in a province]. The Court decided that this provision had been enacted for the express purpose of delimiting and hence regulating the orderly exercise of certain rights. As such, even though not strictly corresponding to the democratic principles contained in the Constitution, it was not actually contrary to any constitutional provision. The freedom of the individual, although safeguarded in its various forms, cannot be exercised except within certain limits and subject to certain conditions determined by the need to guarantee freedom of action to all.⁷

In the same way, the Court considered that there was no discrepancy between the principle embodied in Article 21 of the Constitution and Section 654 of the Penal Code,⁸ which provides that seditious utterances or similar acts are punishable by detention.

According to the Court, the circumstances foreseen by this Article (seditious utterances and acts) always imply incitement to the subversion of public institutions and danger to public safety and order. In stipulating the right to free expression of opinion, the Constitution cannot have consented to activities which disturb the peace, and such activities remain excluded from the notion and practical expression of the right recognized by Article 21 of the Constitution.⁹

⁷ Such is the sense of Constitutional Court decision No. 2 of January 26, 1957, *Giurisprudenza costituzionale* [hereafter, *Giur. cost.*] 1957, p. 5. Also concerned with Article 21 of the Constitution are the following decisions: No. 31 of January 26, 1957, (*Giur. cost.* 1957, p. 420), concerned with the constitutionality of Sections 5 and 16 of Act No. 47 of February 8, 1948 (registration of newspapers and periodicals with the court clerk); No. 33 of January 26, 1957 (*Giur. Cost.*, 1957, p. 429) concerned with the constitutionality of Section 121 of the Public Safety Act (registration of persons engaged in ambulant trades with the police); and No. 115 of July 8, 1957, (*Giur. cost.*, 1957, p. 1053) concerned with the constitutionality of Section 10, Paragraph 2 of Act No. 47 of February 8, 1948 (obligation of informing the police of the publication of single-issue mural newspapers.)

For a doctrinal viewpoint regarding opinions in general, see: Battaglini, "Valore e portata dell'art. 21 della Costituzione," *Foro padano*, 1950, IV, p. 67; Barile, *Il soggetto privato nella Costituzione italiana* (Padua: 1953), p. 75 ff.; Fois, *Principi costituzionali e libera manifestazione del pensiero* (Milan: 1957); Carnelutti, "proposito di libertà del pensiero," *Foro italiano*, 1957, IV, p. 143. Esposito, *La libertà di manifestazione del pensiero nell'ordinamento italiano* (Milan: 1958).

⁸ The text of Section 654 reads: "Whosoever, in an assembly other than a private one, or in a public place or one open or exposed to the public, shall make seditious utterances or commit other seditious acts, shall be liable to detention up to one year, provided that no more serious offence is involved."

⁹ See Constitutional Court decisions No. 120 of July 8, 1957 (*Giur. cost.*, 1957, p. 1086), and No. 121 of July 8, 1957 (*Giur. cost.*, p. 1092), according to

This decision gave rise to many questions.¹⁰ First of all, to what kind of "danger to public safety and order" was it intended to refer? There are two hypotheses: the possibility in the abstract that the public order may be disturbed and the concrete probability that it will be. Now from the affirmation that "seditious" meetings and demonstrations are those which imply danger to public safety, it is not clear whether the first or the second of these two hypotheses is contemplated. The distinction should be made, for if the danger of disturbance is seen only as a possibility, then that danger cannot be considered as necessarily ensuing from seditious meetings and demonstrations, that is, the danger to public safety exists only as a presumption. If this is the sense of Section 654 of the Penal Code, then the offence referred to remains "an offence of opinion" and the prohibition is in conflict with the principle of free expression of thought.

In the second hypothesis, namely, that the manifestation constitutes an "incitement to the subversion of public institutions" and contains the probability of the disturbance of the peace, then there is no further doubt as to the constitutionality of the provision, since the "danger" referred to would exist effectively and could be concretely evaluated. However, even in this case, it might be observed that the State has at its disposal, for the safeguard of the peace, other means less dangerous for constitutional freedoms (e.g., Sections 650 and 660 of the Penal Code).¹¹

As regards the extension of the guarantee contained in Article 21 of the Constitution to the free expression of opinion, the Court has observed that no provision of the Constitution permits a distinction between the expression of opinion, which must remain free, and the divulgence of that opinion once declared; however, laws which permit the public to determine, case by case, the conditions to be met by specific means of expression, encroach upon the area of freedom consecrated by Article 21 and are therefore un-

which there is no discrepancy between Article 21 of the Constitution and Section 68 of the Public Safety Act, as amended, which does not imply or authorize any judgment on or action consequent to opinions expressed in theatrical or cinematographical representations but concerns exclusively the policing of such spectacles.

¹⁰ Fois, "Manifestazioni sediziose e libertà costituzionale," (*Giur. cost.*, 1957, p. 1086).

¹¹ Section 650 of the Penal Code reads: "Whosoever fails to observe a provision lawfully taken by the public authorities for reasons of justice, public safety or order, or hygiene, is liable, if no more serious offence is involved, to detention for a period of up to three months or to a fine of up to 16,000 lire."

Section 660 of the Penal Code reads: "Whosoever, in a public place or one open to the public, or by means of the telephone, out of insolence or other blameful motives, disturbs, annoys or harms any other person, is liable to arrest for six months or to a fine of up to 40,000 lire."

constitutional to the extent that they confer unlimited discretion on those authorities. In this category is to be found Section 113 of the Public Safety Act, Paragraphs 1, 2, 3, 4, 6 and 7 of which have been declared unconstitutional.¹² This provision, by prescribing a permit for the distribution or dissemination of writings or drawings, seems to make the right, which Article 21 of the Constitution recognizes as belonging to all, dependent on a licence granted by the police authority; in fact, it attributes to that authority unlimited discretionary powers since, regardless of the specific aim of preventing criminal actions, the concession or refusal of the permit may signify in practice that the expression of opinion can be prevented or allowed in each single case.¹³

B. Personal Liberty

Thus Article 13 of the Constitution reads: "Personal liberty is inviolable. No form of detention, inspection, or personal search

¹² This Section reads: "Save for the provisions governing the periodical press and ecclesiastical publications, it is prohibited to distribute or circulate writings or drawings in a public place or one open to the public, without a permit from the local police authority.

It is furthermore prohibited, without the aforesaid permit, to affix writings or drawings or use luminous or acoustic means of communication to the public or to place inscriptions, including inscriptions on stone, in any public place or place open to the public.

The foregoing prohibitions shall not apply to writings or drawings emanating from public authorities and administrative bodies to writings and drawing concerning electoral matters, during election periods, or to those concerning the sale or lease of rural or urban properties, or sales by auction. The said permit is required for the exhibition of newspapers or extracts or abstracts thereof.

The granting of the licence contemplated in this Section is not subordinated to the conditions mentioned under Section 11, save always that the local police authority may refuse it to persons whom it considers may make incorrect use thereof. It may not be granted to persons not in possession of an identity card.

All notices, manifestos, newspaper or extracts or abstracts thereof affixed without said permit shall be removed by the police."

¹³ See in this connection Constitutional Court decision No. 1 of June 14, 1956 (*Giur. cost.*, 1956, p. 1). As regards doctrine, see Guarino, "Section 113 P.S.A. as part of the press laws," *Rassegna di diritto pubblico*, 1950, II, p. 381; and, concerning the freedom of the press, Zanobini, *Corso cit.*, Vol. V, p. 110 ff.; also Constitutional Court decision No. 59 of July 13, 1960 (*Giur. cost.* 1960, p. 759) which declares lawful the [State] monopoly of television broadcasting; for doctrinal comments on this matter see Treves, "Radio-televisione e libera manifestazione del pensiero," *Il Politico*, 1958, p. 484 ff.; Sandulli, "Mancato permesso di trasmissione televisiva e competenza a giudicare," *Giust. civ.*, 1958, I, p. 785 ff.; Fois, "Libertà di diffusione del pensiero e monopolio radiotelevisivo," (*Giur. cost.*, 1960, p. 1127); Tesauro, "Note sulla disciplina costituzionale della televisione," *Rassegna di diritto pubblico*, 1960 p. 307; Pierandrei, "Radio, televisione e Costituzione," *Studi in onore di A. C. Jemolo*, (Milan: 1961).

or any other restriction of personal liberty is permitted except by a duly authorized act of the judicial authorities . . .”

Personal liberty, as interpreted by the Constitutional Court, should not be taken to mean an unlimited right to personal freedom but rather a right not to be subjected to the antithetical power of coercion of the State, except in given circumstances and subject to the proper forms.

The grave problem of ensuring the balance between the two fundamental hierarchies of rights – that of the State to take action for the prevention of crime and that of the inviolability of the human personality – is thus seen to be solved by the recognition of the traditional right of *habeas corpus*. Personal liberty, therefore, appears as a subjective right and perfect to the extent that the Constitution withholds from the public authorities the power of personal coercion. Hence a man can never be deprived of his liberty, in whole or in part, except by express provision of law and by virtue of an act of the court with reasons expressly stated.

Article 13, moreover, when proclaiming the inviolability of personal liberty, refers to the bodily freedom of the individual in the strict sense, as is apparent from the second paragraph: “. . . detention, inspection, personal search . . .”¹⁴

It follows from the foregoing that the provisions relating to *rimpatrio con foglio di via obbligatorio* (repatriation by prescribed route and by order of the police) and the subsequent warning, which are contained in Section 157, Paragraphs 1, 2 and 3 of the Public Safety Act,¹⁵ do not in themselves constitute a restriction of personal liberty; but this is not to be taken as a guarantee of indiscriminate and unlimited freedom of conduct of the individual.

Also see Constitutional Court decision No. 38, June 24, 1961 (*Giur. cost.*, 1961, p. 682), according to which the provisions of Sections 111 of the Public Safety Act and 662 of the Penal Code do not violate Article 21 of the Constitution, Paragraphs 1 and 2, by subordinating to authorization the exercise of printing and allied trades.

¹⁴ Doctrinal comment on the notion of personal liberty and limitations thereto are found in: Galeotti, *La Libertà personale* (Milan: 1953), and in Vassalli G., “La libertà personale nel sistema delle libertà costituzionali,” *Scritti giuridici in memoria di Calamandrei* (Padua: 1958), Vol. V.

¹⁵ This Section reads: “Whosoever, being outside the boundaries of his own town or village, awakens suspicion by his conduct and, at the request of police officers or agents, cannot or will not give an account of himself by exhibiting his identity card or producing other factual evidence, shall be brought before the police authority. The latter, upon finding the said suspicion to be founded, may order him to return to his town or village (with the *foglio di via obbligatorio*) or, depending upon the circumstances, transfer him there under escort [author’s emphasis].

This provision also applies to persons who represent a danger to public order and safety or public morals.

It is however contrary to Article 13 of the Constitution to order the transfer of the repatriated person under police escort, because this proceeding violates the liberty of the person as guaranteed by the Constitution. However, this proceeding remains lawful if it is the result of action by the courts (Section 157, last Paragraph and Section 163, third Paragraph of the Public Safety Act.)¹⁶

A considerable degree of restrictiveness must be recognized in the provisions relating to admonition – Sections 164 to 176 of the Public Safety Act.¹⁷ These provisions can be criticized, the more so because this measure is attributed to an administrative body (a commission presided over by the Prefect).

Admonition is in fact a sort of degradation of the individual *vis-à-vis* the law, into which certain persons who belong to social categories considered by the law to be dangerous are placed as a result of a pronouncement of a public authority, under special

The police authority may prohibit persons repatriated in this way from returning to the town or village from which they are expelled without its express prior authorization. Whoever fails to comply with this prohibition is liable to detention for a period of from one to six months. After completing the sentence, he is to be taken back to his own town or village."

¹⁶ In this connection, see Constitutional court decisions No. 2 of June 23, 1956 (*Giur. cost.*, 1956, p. 561), and No. 10 of July 7, 1956, (*Giur. cost.*, 1956, p. 610) for the constitutionality of transfer under police escort as provided for under Section 163, Paragraph 3, of the Public Safety Act insofar as it results from a court and, even more validly, from a sentence already completed.

Doctrinal comments on this subject are found in: Barile, "Costituzione e misure di pubblica sicurezza restrittive della libertà personale," *Foro Padano*, 1951, IV, p. 175 and in Geraci, "Limiti della sopravvivenza del foglio di via obbligatorio," *Archivio penale*, 1955, II, p. 648. And furthermore the constitutional court decisions No. 27 of May 5, 1959 (*Giur. cost.*, 1959, p. 355); No. 12 of March 23, 1960 (*Giur. cost.*, 1960, p. 113), on the concept of personal liberty; No. 2 of January 1, 1957 (*Giur. cost.*, 1957, p. 5), on the constitutionality of Section 156 of the Public Safety Act and Sections 285 and 286 of the regulations made thereunder (permit for fund collecting) in connection with Articles 17, 19 and 21 of the Constitution; No. 49 of July 15, 1959 (*Giur. cost.*, 1959, p. 178), according to which there is no discrepancy between Article 13 of the Constitution, and Section 652 first Paragraph, of the Penal Code (fine imposed on those who neglect their duty of social solidarity to lend their assistance in certain dangerous circumstances).

¹⁷ The following are subject to admonition, upon denunciation by the "questore" to the Prefect: habitual vagrants, persons without visible means of support, persons designated by public opinion as being particularly dangerous and people of bad reputation.

The admonition is valid for two years and is pronounced by a commission composed of the Prefect, the Prosecutor of the Republic, a judge, the questore, etc.

Persons who have been admonished must find work and elect a fixed domicile within a given period of time; they must also comply with any prescriptions the Commission considers necessary, having regard to their social and family circumstances and to the particular needs of social or political protection.

police supervision and a series of duties imposed on them. Furthermore, the fact that it is an administrative body which takes this measure renders the discrepancy with Article 13 of the Constitution even more marked; the legal guarantee introduced by the Constitution represents the means by which the very right of personal freedom declared inviolable therein, acquires juridical substance.¹⁸

As regards Section 2 of Act No. 1423 dated December 27, 1956, which abolished repatriation under police escort, leaving repatriation by prescribed route and by order of the police valid, the Constitutional Court did not find any conflict with the criteria described above;¹⁹ in fact, an individual who has received a repatriation order cannot be forcibly conducted to the place of repatriation unless sentenced by a court. There is therefore a limitation on freedom of movement but personal freedom as such remains intact.

According to what the court declares, therefore, Article 13 of the Constitution covers only those provisions which involve physical coercion of the subject. Such coercion is present in special supervision but not in compulsory repatriation. However, this distinction is somewhat perplexing, especially if we attribute to "personal liberty" a broader significance than that contained in the notion of physical integrity; i.e., if we take it as the expression of the individual's right to dispose of his person at all times and in all directions.²⁰ In this case, we do not see how the measure of special supervision can be differentiated from that of the repatriation by prescribed route and both are present in the hypothesis contemplated in Article 13 of the Constitution; whereas if a restrictive significance is attributed to personal freedom (as the Court has done), the result would be that neither form of administrative action is incompatible with the principle expressed therein.²¹

It should be observed, however, that, if this line of reasoning were pursued to its extreme conclusion, the result would be that all the Articles following Article 13 which deal with the various manifestations of liberty would be considered as specifications thereof. This would not appear to be in harmony with the intentions of the constituent body and the Court itself has declared that the aim of this Article of the Constitution was certainly to protect

¹⁸ In this connection, see constitutional court decision No. 11 of July 3, 1956 (*Giur. cost.*, 1956, p. 612).

¹⁹ See Constitutional court decision No. 45 of June 30, 1960 (*Giur. cost.*, 1960, p. 683).

²⁰ See Marmo, "Due aspetti di contrasto fra Costituzione e legge di P.S.," *Foro Italiano*, 1950, IV, p. 97; Barile, "Costituzione e misure di pubblica sicurezza restrittive della liberta personale," *Foro padano*, 1951, IV, p. 175.

²¹ Thus Mortati, "Rimpatrio obbligatorio e Costituzione," in *Giur. cost.*, 1960, p. 683.

liberty in all its forms but that it would be incorrect to base each and every limitation to liberty on Article 13.²²

C. *Freedom of Movement*

In recognizing freedom of movement, Article 16 of the Constitution excepts general legal restrictions arising out of considerations of public health and safety and outlaws those restrictions which are determined by political motivation. Every citizen is free to leave the territory of the State and to return to it, provided he complies with the requirements of the law. Section 158 of the Public Safety Act²³ provides that whoever leaves or attempts to leave the country without a passport is liable to detention. Obviously this is a precautionary measure by which the State seeks to guarantee the ordered evolution of the activity of citizens and, equally obviously, the "requirements of the law" mentioned in Article 16 of the Constitution may very well include that of procuring a passport in order to leave the national territory. There is therefore no departure from the constitutional precept, since the aim of the law-makers was to control the manner in which this particular right is exercised.²⁴

No such conclusion can be drawn, however, in connection with Section 158. Paragraph 1, which punishes, with two to four years' penal servitude, persons who leave the country for political reasons. This provision was introduced *ex novo* in the Public Safety Act of 1926, as amended, and repeated in that of 1931, when it was specifically aimed at political expatriates. Now that the constitutional framework has been altered and rights to various freedoms reaffirmed, the provision appears incompatible with many constitutional principles, first and foremost that of the equality of all citizens (Article 3 of the Constitution).

²² See decision No. 45, *cit. supra*.

²³ Section 158 reads: "Whosoever, not being furnished with a passport or other document equivalent to a passport by virtue of international agreements leaves or attempts to leave the country, when motivated wholly or in part by political reasons, is punished with two to four years' penal servitude and a fine of not less than 20,000 lire. In all other cases, whoever leaves or attempts to leave the country without a passport is punished with detention for a period of from three months to one year and a fine of from 2,000 to 6,000 lire."

²⁴ In this connection, see Constitutional Court decisions Nos. 26 and 34 of January 26, 1957 (*Giur. cost.*, 1957 at pages 393 and 433 respectively) according to which there is no discrepancy between Article 16 of the Constitution and Section 4 of Act No. 1278 dated July 24, 1930, which makes it a penal offence to engage for personal gain in the procurement of employment contracts abroad. This Act does not limit the right of citizens to emigrate but is intended to prevent speculation on the part of persons who seek to take advantage of the condition of material want of prospective emigrants or their particular psychological condition.

The Court has dwelt more particularly upon the contradiction between the above Section and the provisions of Article 16 of the Constitution which prohibits the restriction of movement for political reasons, and has also stressed the fact that it is in conflict with the fundamental principle of political freedom which pervades the Constitution and is specifically expressed in the Article already mentioned. In fact, to vary the penalty for an offence according to whether the latter is motivated by political reasons or not would be equivalent to establishing discriminatory treatment of citizens before the law based on their political opinions.²⁵

It should be noted here that other aspects of the problem remain unsolved. Even after the repeal of the provision relating to leaving the country on political grounds, the act of leaving the country without a passport remains a punishable offence under Paragraph 2 of the same Section 158²⁶ and the aggravating circumstances mentioned in Section 61 of the Penal Code remain applicable.²⁷

D. Freedom of Assembly

Article 17 of the Constitution recognizes the right of assembly of citizens, subject to the obligation to notify the authorities in the case of assemblies in a public place; however, the authorities may prohibit these "only on grounds of proven necessity for the sake of public safety".

Consequently, there are those who find a discrepancy between Section 18 of the Public Safety Act²⁸ and this provision of the

²⁵ See Constitutional Court decision No. 19 of March 18, 1959 (*Giur. cost.*, 1959, p. 307) and for doctrinal comment, Battaglini, "Espatrio abusivo e costituzione," *Foro padano*, 1949, IV, p. 209; Battaglini, "Costituzione e legge di P.S. in relazione all'espatrio," *Giustizia penale* 1950, II, 1070; Battaglini, "La Costituzione e l'espatrio senza passaporto," *Foro padano*, 1951, IV, p. 69; Nuvolone, *Le leggi penali e la Costituzione* (Milan: 1953), p. 133; Cossiga, "Note sulla libertà di espatrio," *Rassegna di Diritto Pubblico*, I, p. 43; Crisafulli, "Libertà personale, Costituzione e passaporti," *Archivio penale*, 1955, pp. 3-4; Mazziotti, *Il diritto al lavoro* (Milan: 1956), p. 136 ff.

²⁶ Even current draft legislation proposed by the government or members of Parliament for the amendment of the Public Safety Act considers expatriation in general without a passport as a punishable offence.

²⁷ A question which has been much discussed from the doctrinal viewpoint is the constitutionality of Section 9 of Royal Decree No. 36 of January 31, 1901, which authorizes the Ministry for Foreign Affairs, after agreement with the Ministry for Internal Affairs, to suspend temporarily the issue of passports "for a given destination, for reasons of public order or when the life, liberty or property of the persons wishing to go abroad is exposed to serious danger."

²⁸ This Section reads: "The promoters of a meeting in a public place or one open to the public must give prior notification to the Questore at least three days before the date set for the meeting. Failure to do so is punishable with detention for a period of up to six months and a fine of from 1,000 to 4,000 lire. The same penalties apply to persons who speak at such meetings."

Constitution, observing that the constitutional norm does not mention any penalty applicable to the promoters of the meeting who fail to give the required notification, contrary to the said Section 18, whether in respect of meetings in a public place or those held in a place open to the public.

This query has been found void of juridical foundation by the Constitutional Court in many cases.²⁹ It is in fact not unusual that a constitutional precept should not cover the full scope of matters regulated by legislation, subsidiary or otherwise. Nor could such a solution be justified by pointing to the absence of an express prohibition to hold meetings without prior notification, since the latter is indispensable if public safety is to be protected by preventive and discretionary action on the part of the police, who otherwise would be reduced to the role of spectators. Hence Article 17 of the Constitution – as is moreover clear from the preparatory drafting work – confirms the already existing control in relation to meetings held in public places. Consequently, the penal sanction provided for under Section 18 of the Public Safety Act, in the part referring to meetings in a public place, follows naturally upon the constitutional provision and completes it, since it is inconceivable that the constitutional precept, if it is to be observed, should not be accompanied by some form of sanction.³⁰

There is therefore a close relation between the lack of notification and the right to organize the meeting. The notification is intended to enable the police authority to evaluate the factors relating to public safety and order which may justify a possible prohibition and, at the same time, take the necessary precautions (and take them early enough) to ensure that the meeting is conducted in an orderly manner. Failure to notify the police authority would prevent the latter from exercising the functions which devolve upon it under Article 17 of the Constitution itself.

Such notification is moreover a form of guarantee for the exercise of the rights of assembly (denied only on proven grounds of public safety or order), since a prohibition is possible only in those cases in which the formality of notification has been neglected.

²⁹ See Constitutional Court decisions No. 9, of July 3, 1956 (*Giur. cost.*, 1956, p. 607) and No. 54 of July 11, 1961 (*Giur. cost.*, 1961, p. 1057).

³⁰ But the sanction provided is inapplicable, as is clear from the very wording of Article 17, Paragraph 2 of the Constitution relating to meetings held in a place open to the public. The obligation of prior notification remains limited to meetings in a public place, so that Section 18 of the Public Safety Act where reference is made to meetings held in a place open to the public is in open conflict with Article 17 of the Constitution. In this connection see Constitutional Court decisions No. 27 of April 8, 1957 (*Giur. cost.*, 1958, p. 115); and decisions Nos. 85, 87, 88, 90 and 91 of June 22, 1957 (*Giur. cost.*, 1957, at pages 947, 949, 950, 952 and 953, respectively).

In other words, since only meetings of which the authority has been notified are protected by constitutional approval, in all other cases the legislator is free to institute measures and sanctions directed at enforcing the aforesaid obligation. Just as the legislator invests the police authority with the power (not an obligation) to prohibit meetings (of which it has been notified) which constitute a danger to public safety and order, so he considers *a priori* (on the sole basis of the omission of notification) that a meeting held without notification may be considered dangerous in itself, except to the extent that the police authority may deem it otherwise on the basis of other evidence.³¹

Still in connection with Article 17 of the Constitution, another aspect examined by the Court was that referred to in Section 25 of the Public Safety Act³² which involves the obligation of notification to the police authority of religious functions, ceremonies and practices in places open to the public.

It was necessary to establish first of all whether Section 25 could be considered as remaining valid after Article 17 of the Constitution came into force, in view of the principle that a provision of a general nature does not revoke previous provisions of a specific nature.

In the second place, since Article 19 of the Constitution provides that "all persons have the right freely to profess their own religious faith, in any individual or collective form, provided the rites used are not contrary to public morality", it was necessary to decide whether the obligation to notify (subject of Section 25) should be taken as serving to ascertain in what single cases religious functions or practices might give rise to a prohibition by the police

³¹ In this connection, see Chiappa, "Sulla omissione del preavviso di riunione in luogo pubblico," (*Giur. cost.*, 1961, p. 1059). Sandulli in "In tema di responsabilita dei pubblici funzionari e di divieto dell'esercizio del diritto di riunione," *Foro padano*, 1953, p. 94, considers that the provision relating to notification does not specify what kind of meeting may be subject to the preventive action of the police authority but is intended to limit the sphere of such action. Battaglini in "Ancora sui rapporti tra Costituzione e legge di pubblica sicurezza", *Foro padano*, 1950, IV, p. 10, does not admit the constitutionality of the power of preventing meetings from being held in a public place solely on the grounds that no prior notification was given. See also Stendardi, "Liberta di riunione: diritto soggettivo od interesse legittimo," *Foro padano*, 1953, IV, p. 95 and Fois, "Disciplina delle riunioni in luogo aperto al pubblico," *Foro italiano*, 1953, I, p. 1351 ff.

³² Section 25 reads: "Whosoever promotes or directs religious functions, ceremonies or practices outside of those places reserved for the cult, or ecclesiastical or civil processions in the streets, must first notify the Questore at least three days beforehand. Transgressors are punished with detention for a period of up to three months and a fine up to 500 lire."

authority on grounds of their containing rites contrary to public morality.

The answer to the first question, according to the Constitutional Court, is as follows: The principle of freedom of assembly – as guaranteed by the Constitution – is inspired by such important needs in human society that it must be given the broadest application and must be made truly effective. Therefore special regulations must be excluded. It is beyond doubt that Articles 8 and 19 of the Constitution fully sanction freedom of worship.

However, when the cult is performed by a number of persons the latter Articles cited must be read in conjunction with Article 17, in the sense that meetings of a religious nature must bow to the necessities of general discipline as regards the freedom to hold the meetings themselves and the limitations which they must suffer in the higher interest of the life of the community.

As regards the second query, its solution is linked with the consideration that, in our framework of laws, there is no rule under which every limitation to a constitutional freedom must of necessity carry with it the power of preventive supervision on the part of the police authority. Breaches of the limitation sanctioned by Article 19 of the Constitution may be a wrongful act in the juridical sense and even a penal offence, in which case a penalty will be provided. But in all other assumptions, the preventive activity of the police, if and to the extent that it circumscribes the sphere of free action of the citizen, in relation to his possible future behaviour, may be exercised only in the cases and in the manner expressly indicated by law.

Consequently, Article 25 of the Public Safety Act was held to be in contrast with Article 17 of the Constitution, in that part which imposes the obligation of notification even for meetings which are not public.³³

³³ Such was Constitutional Court decision No. 45 of March 18, 1957 (*Giur. cost.*, 1957, p. 579), with a note by Gismondi who observes that the argument presented to the Court might seem tenable to the extent that it is admitted that the constitutional treatment of cults is a domain apart and comprises specially favourable measures, with a view to preserving the cults from interference on the part of the Executive, and that consequently it is exempted from the strict application of general constitutional principles, including the one enounced in the last Paragraph of Article 21. If, however, the standpoint of the Court is considered, it must be recognized that for practically the same reason religious assemblies and ceremonies cannot be excluded from the scope of even the general regulations (last Paragraph of Article 21) through which appropriate provision is made, by virtue of the ordinary laws and in a fully legitimate manner, for preventing and suppressing all manifestations that could hypothetically, be contrary to public morality. See also decision No. 59 of November 21, 1958 (*Giur. cost.*, 1958, p. 885), concerning the unconstitutionality of Sections 1 and 2 of the Royal Decree No. 289

E. Equality before the Law

Article 3 of the Constitution,³⁴ not content with stating the principle of equality in the abstract (Paragraph 1), also introduces a principle of factual parity (Paragraph 2) by directing the State as legislator to remove those obstacles of economic or social character which limit in fact the equality (and the liberty) of individuals.³⁵

Many legislative provisions have been felt to be in conflict with Article 3, though in general only with the first Paragraph thereof up till now, and consequently the Court has had to give a great many rulings concerning this norm. However, its judgment has not always been found entirely satisfactory, or at any rate not exhaustive, because, having already stated the principle that the legislative body may promulgate different measures to meet situations that it considers different, the Court³⁶ has always insisted on the fact that to enter into a study of how far the diversity of the measures taken corresponds to the diversity of the situations examined would imply political evaluation of a sort excluded from its proper sphere of action.³⁷

dated February 2, 1930, as being in conflict with Articles 8 and 19 of the Constitution, together with observations by Esposito.

³⁴ Article 3 reads: "All citizens have equal social rank and are equal before the law without distinction of sex, race, language, religion, political opinion or social and personal conditions.

It is the task of the Republic to remove obstacles of an economic or social nature which, by materially restricting the freedom and equality of citizens, impede the complete development of the human personality and the effective participation of all workers in the political, economic, and social organization of the country."

³⁵ Lavagna considers in *Basi per uno studio delle figure giuridiche soggettive contenute nella Costituzione italiana* (Padua: 1953), p. 17 ff. that this constitutional provision merely commends the citizen to the State, urging the latter to enact the measures necessary to protect his position; but once those measures have been taken, that position is guaranteed.

To embody the concept of equality in a framework of laws is a difficult task for the theorists: see Orlando, *Principi di diritto costituzionale generale* (Florence: 1909), p. 271; Groppali, *Teoria generale dello Stato* (Milan: 1945), p. 188 ff.; Virga, *Libertà, op. cit.*, p. 203 ff.; Santi Romano, *Principi di diritto costituzionale generale* (Milan: 1946), p. 104; Crosa, *Lo Stato democratico* (Turin: 1946), p. 31; Biscaretti in *Stato democratico* (Milan: 1946), p. 674, establishes the relationship between equality and liberty; Ranalletti, *Istituzioni di diritto pubblico* (Milan: 1955), p. 145 ff.; According to Mortati in *Istituzioni di diritto pubblico* (Padua: 1960), p. 781 ff.; the principle of equality would appear as an aspect of the fundamental position of the citizen which provides the legislator with a guide and interpretative aid for the regulation of the various rights of citizens.

³⁶ See the decisions reproduced below.

³⁷ In this connection a serious problem and one which has much pre-occupied the theorists arises: whether the discretionary activity of Parliament should be subjected to higher control. See Mortati, "Sull'eccesso di potere legislativo", *Giur. it.*, 1955, I, p. 1417; Olivieri, "L'esame del merito nel

In view of this principle, the Court has not judged many laws unconstitutional by virtue of Article 3.

In relation to the principle of equality, the Court was called upon to pronounce on Act No. 1422 dated December 20, 1956, which reduced by 30 % farm rentals payable in hemp in the province of Campania, regardless of how that rental was originally determined.³⁸

Given the fact that the Act, in specifying "rentals... regardless of how determined", created the assumption that uncontrolled rentals could exist alongside controlled rentals, the former being determined by any methods and criteria whatsoever, the Court decided that for the Legislature to have placed on the same level situations which it assumed to be different was not in harmony with the principle of the equality of all citizens before the law; it therefore declared the provision unconstitutional.³⁹

controllo di costituzionalità delle leggi," *Revista amministrativa*, 1952, p. 290; Crisafulli, "Sulla motivazione degli atti legislativi," *Rivista di diritto pubblico*, 1937, p. 415; Esposito, *La Costituzione italiana - Saggi* (Padua: 1954) p. 31 ff.; Mortati, *Istituzione, op. cit.*, p. 782 ff.; Paladini, "Osservazioni sulla discrezionalità e sull'eccesso di potere del legislatore ordinario," *Rivista trimestrale di diritto pubblico*, 1956, p. 1025 ff.; Crisafulli in *Giur. cost.*, 1958, p. 868, reduces the terms of the problem to two clearly defined alternatives: either the Court should have no control over evaluations by the legislative body of the aims, premises and metajudicial criteria set forth in the Constitution, in which case many constitutional checks, both positive and negative, would vanish (since their observance would be subjected to the discretionary appreciation of political bodies), or else the primordial importance of rendering those checks effective should be recognized, when the Court's authority would have to be recognized, even though within certain limits.

³⁸ Section 1, Act No. 1422 reads: "As from the agricultural year 1955-56 and until the end of the agricultural year in which a new Act to reorganize agrarian contracts shall come into force, farm rental payable in cash or in hemp with reference to the cash value thereof, *regardless of how such rental is determined*, in the provinces of Campania, shall be reduced by 30%." [Author's emphasis.]

The situation of inequality complained of was found to arise out of the fact that the new legislation imposed a price reduction only in respect of rentals for farms in Campania.

³⁹ See Constitutional Court decisions No. 53 of July 14, 1958 (*Giur. cost.*, 1958, p. 603), and No. 16 of March 29, 1960 (*Giur. cost.*, 1960, p. 164), for the constitutionality in respect of Article 3 of the Constitution of the provision contained in Act No. 790 of August 6, 1958, which amends Act No. 1422 by reducing the percentage from 30% to 25% and deleting the words "regardless of how such rental is determined". This is the first decision given by the Court in respect of an Act which amends another previously declared unconstitutional. By giving such a ruling, the Court affirms its power of control over the discretionary powers of the Legislature when these are used in a manner which is contradictory, unreasonable and arbitrary. See in this connection Mortati, "In tema di legge ingiusta," *Giur. cost.*, 1960, p. 167.

In this connection, an authoritative opinion⁴⁰ notes that as regards the all-round reduction of rentals, the 1956 Act did not treat in the same way different situations but reduced subjectively on an equal scale the rents of all lessors and lessees of farms. All of them were entitled to receive (or bound to pay) the full amount of the rental, however determined; the obligation on the one hand and the right on the other, which were of equal force for all persons concerned, were reduced by 30 %.

From the point of view of equality before the law, it was not Act. No. 1422 which was to blame for transgressing that principle of equality, but rather the norms of private and public law from which the payment and perception of controlled and uncontrolled rentals originated.

In order to show the invalidity of the law in question, as infringing the principle of equality, it should have been pointed out that the legislator was bound to eliminate the existing inequitable situations; in other words, that the law was at fault, not because it created a new and unjust situation but because it perpetuated an existing situation which was inequitable.

The consideration is not a negligible one, but we must bear in mind that to consecrate such a conclusion would be equivalent to affirming a general obligation for the legislator to eliminate all unjust situations, on pain of nullity of the laws enacted. But the Court did not intend to enlarge its sphere of competency to include such a grave and far-reaching supervision of the legislation.

Another norm which was deemed to conflict with Article 3 of the Constitution was Section 7 of Act No. 1176 of July 17, 1919, which bars women from public office involving the exercise of political powers and rights. This provision does indeed violate Article 51 of the Constitution which proclaims the right of individuals of both sexes to accede to public office and elective positions on a basis of equality. Since Article 51 is not merely a specification but a confirmation of Article 3, then difference of sex as such (and not as a factor of incapability or lesser capability, defining incapability as the rule and not the exception) can never be a lawful motive for discrimination.⁴¹

⁴⁰ See Esposito, "L'art. 3 della Costituzione e il controllo dell'ingiustizia delle leggi," *Giur. cost.*, 1958, p. 604.

⁴¹ Thus expressly Constitutional Court decision No. 33 of May 18, 1960 (*Giur. cost.*, 1960, p. 563); see also decision No. 56 of October 3, 1958 (*Giur. cost.*, 1958, p. 861), which declares constitutional and in conformity with Articles 3 and 51 Act No. 1441 dated December 27, 1956 (according to which Assize Courts may not comprise more than 3 female members), since this limitation is based on a criterion which concerns the most desirable functioning of the Court. For theoretical comment, see: Esposito, "Il sesso e i pubblici uffici," *Giur. cost.*, 1960, p. 568; Crisafulli, "Eguaglianza dei

Still in connection with Article 3 of the Constitution, Section 98 of the Code of Civil Procedure (C.C.P.),⁴² which requires a guarantee deposit from parties to legal action who are not eligible for free legal aid, has been declared unconstitutional.

Now, if we correlate the constitutional norm of equality with that of Article 24,⁴³ it becomes clear that the principle according to which all are free to bring legal action for the defence of their rights and interests (and defence is an inviolable right in all stages and degrees of legal proceeding)⁴⁴ must be rendered applicable to all, regardless of their personal or social circumstances.

Section 98 of the Code of Civil Procedure, however, in providing for a deposit to be paid by persons not eligible for free legal aid when it seems likely that the court costs may remain unpaid, subordinates the initiation of legal proceedings to the financial circumstances of the plaintiff.⁴⁵

sessi, requisiti e sindacato della Corte," *Giur. cost.*, 1958, p. 862; Esposito, "Le donne e i pubblici uffici," *Giur. cost.*, 1958, p. 869; Cereti, "Accesso all'ufficio di giudice popolare e composizione del Collegio," *Rivista italiana di diritto processuale penale*, 1958, p. 1241. In respect of public office, see also decision No. 15 of March 28, 1960 (*Giur. cost.*, 1960, p. 147), according to which Article 3 of the Constitution is not violated by Paragraph 1 of Section 21 of Act No. 748 of August 9, 1954, which limits access to the office of Communal Secretary in the Province of Bolzano to citizens who are natives of the Province; and the note by Paladin, "Una questione di eguaglianza nell'accesso ai pubblici uffici," *Giur. cost.*, 1960, p. 149.

⁴² Section 98 reads: "The examining magistrate, the ordinary judge or the judge with powers to reconcile the parties may, at the request of the defendant, order a plaintiff who is not eligible for free legal aid to deposit his bond for the refund of court costs, where there is reason to suppose that the sentence may not be carried out. Failure to deposit such bond within the prescribed time limit extinguishes the case."

⁴³ Article 24 reads: "All persons may take judicial action for the protection of their own rights and legitimate interests.

The right to defence is inviolable in every state and at every stage of the judicial process.

Destitute persons are assured, through appropriate bodies, the means to act and defend themselves before any court.

The law specifies the methods and procedures for the redress of judicial errors."

⁴⁴ Concerning the right to be defended, see Constitutional Court decisions No. 46 of March 18, 1957 (*Giur. cost.*, 1957, p. 587), on the constitutionality of Section 510 of the Code of Criminal Procedure (execution of penal sentences following failure to appear on the part of the guilty party) with a note therein by Vassallit, "Natura giuridica della opposizione al decreto penale di condanna", p. 587; and No. 59 of December 1, 1959, (*Giur. cost.*, 1959, p. 1132), on the unconstitutionality of Section 133, Paragraphs 1 and 2. To what extent is an objection based on Article 24 pertinent to the defence of several accused persons by a single counsel, with notes therein by Conso, "L'art. 24 della Costituzione e l'incompatibilità della difesa di piu imputati," p. 1133 and Gianzi, *ibid.*, p. 1138.

⁴⁵ See Constitutional Court decision No. 67 of November 29, 1960 (*Giur. cost.*, 1960, p. 1195), and for doctrinal comment, Lucarini, "L'art. 98 c.p.c.

Another provision which violates the principle of equality is that contained in the second Paragraph of Section 6 of Schedule E of Act No. 2248 of March 20, 1865, which concerns the institution of "solve et repete".⁴⁶

Obviously, this provision accords different treatment to the taxpayer who has not sufficient means to pay his debt and cannot even have recourse to a loan because refund of the sum (in the event of winning the case) would come too late for him, and the taxpayer whose assets are sufficient to enable him to pay the sum which he intends to claim as a refund. The latter's financial situation enables him to demand and obtain justice if he is in the right, but for the former this satisfaction is placed out of his reach *de facto* and *de jure* because of the procedural requirement of depositing a sum which is usually fairly large.⁴⁷

e las Costituzione," *Rivista di diritto processuale*, 1958, p. 421; Bianchi D'Espinosa, "Illegittimità costituzionale della cautio pro expensis," *Giust. civ.*, 1960, III, p. 209; Satta, "Incostituzionalità della cautio pro expensis," *Giur. cost.*, 1960, p. 1197.

⁴⁶ This expression means that the taxpayer, in order to have the right to appear before a judge ordinarily having jurisdiction, must first have paid up in full his taxes as determined by the fiscal authority. Section 6, Paragraph 2, the provision challenged, provided in fact that "in all tax controversies, the admissibility of the appeal in court is subject to simultaneous submission of the tax receipt".

⁴⁷ See Constitutional Court decision No. 21 of March 31, 1961 (*Giur. cost.*, 1961, p. 138), and in respect of doctrine, Treves, "Exit solve et repete," *Giur. cost.*, 1961, p. 139; Esposito, "Considerazioni sulla morte del solve et repete," *Giur. cost.*, 1961, p. 142; Capaccioli, "La eliminazione del "solve et repete," *La Provincia di Lucca*, 1961, No. 2.

The following Constitutional Court decisions also refer to Article 3 of the Constitution: No. 22 of May 5, 1959 (*Giur. cost.*, 1959, p. 319): no discrepancy between this Article and Section 313, Paragraph 3, of the Penal Code (authorization to proceed against offenders who publicly defame constitutional institutions), since the Section makes no distinction between one citizen and another but metes out the same treatment to all those who find themselves in the situation described. For doctrinal comment, see: Casetta, "Legittimità costituzionale dell'istituto dell'autorizzazione a procedere," *Giur. cost.*, 1959, p. 320; Conso, "Illegittimo l'istituto dell'autorizzazione a procedere," *Rivista Italiana di diritto processuale penale*, 1958, p. 877 ff.; Esposito, *Eguaglianza, op. cit.*, p. 17 ff.; No. 64 of May 25, 1957, (*Giur. cost.*, 1957, p. 713), for the constitutionality of the Act No. 841, *legge stralcio* [this means a short Act passing the principal provisions of a longer Bill] dated October 21, 1950, and that of Presidential Decree No. 67 of February 7, 1951, since the intention of the Legislature was to initiate a gradual process of alteration of the economical and juridical treatment of land ownership to bring it into harmony with Article 3, Paragraph 2 of the Constitution; No. 38 of June 15, 1960 (*Giur. cost.*, 1960, p. 628), on the constitutionality of Legislative Decree No. 1222 of October 3, 1947 (issued by the provisional Head of State), concerning the obligation for private undertakings to hire persons mutilated or incapacitated in accidents at work; No. 3 of January 26, 1957 (*Giur. cost.*, 1957, p. 11), on the constitutionality of Presidential Decree No. 1067 dated October 27, 1953, Section 52, of which prohibits former

IV

Our study of the Constitution, at this point, requires some conclusions to be drawn in the light of the constitutional principles which we have examined and in connection with the manner in which our framework of laws applies them.

Our Constitution, like other basic Charters drawn up from time to time, affirms the inalienable right of all individuals to recognition and protection of their freedom. However if it is not to be likened to a book containing only the chapter headings followed by pages and pages of blank space waiting to be filled in,⁴⁸ it needs to be supported by perfectly functioning legislative bodies and instruments created for the purpose of effectively protecting liberties and rights.

It is principally this need (particularly acute, if the truth be told, at the present time) which is the mainspring of the efforts made to awaken interest in the concrete problems of protection of the ideals of Human Rights and liberties, and thus to promote the necessary action for the improvement of the country's institutions and the various branches of statutory law.

bookkeepers (*ragionieri*), who were formerly registered as belonging to that profession and are now registered in the Register of Economic and Commercial Consultants, though without possessing a degree in commercial sciences, from registering in the new register without having previously cancelled their former registration; No. 28 of January 26, 1957 (*Giur. cost.*, 1957, p. 398), on the constitutionality of Section 10 of Act No. 253, of May 23, 1950, which controls the renting of buildings serving as dwellings through regulations separate from those governing buildings for other uses; No. 46 of July 15, 1957 (*Giur. cost.*, 1959, p. 743), on the constitutionality of Act No. 74 of February 15, 1958, which fixes the rent for farms under long lease in the Veneto region at a maximum of three times the landlord's income; No. 70 of December 6, 1960 (*Giur. cost.*, 1960, p. 1209), on the constitutionality of Section 4, of Act No. 692, of August 4, 1955, respecting discounts on the price of medicaments for certain bodies and institutions; No. 42 of July 11, 1961 (*Giur. cost.*, 1961, p. 951), on the constitutionality of the provisions of Section 15 of Law No. 570, of May 16, 1960, as amended, concerning the membership of and elections to communal administrative bodies; No. 64 of November 28, 1961 (*Giur. it.*, 1962, I, p. 1,357), on the constitutionality of Section 559 of the Penal Code respecting adultery, in view of the affirmation that this provision did not create a position of inferiority for the wife but merely took note of a different situation of fact and applied to it a different branch of Law.

In explaining the grounds for these decisions, the Court affirmed that the Legislature may enact varying provisions to regulate situations which are considered to be different (in its discretionary evaluation), since in so doing it adapts the legal order to the varying aspects of human society, with provisions aimed at different categories and not at individuals, always subject to the observance of the limits laid down by Article 3 of the Constitution.

⁴⁸ Romano, "Le prime carte costituzionali," *Annali Università di Modena*, 1906-1907, p. 20.

What has been done up till now is in conformity with the main principles of social ethics and contributes substantially to bringing nations closer together, since the relationship between a State and its citizens is a determining factor for the existence of trust among States.⁴⁹

This principle of ethics and law which proclaims the inviolability of rights and liberties governs not only the acts of individuals but also those of the State, which has a duty to protect the citizen by restraining its activity, particularly legislative activity, wherever this might encroach on the rights of the citizen.⁵⁰

In our opinion, it is precisely the legislative activity of the State which requires stimulus and attention; our lawmakers must be well grounded in law but they must also have the wisdom and sense of responsibility to interpret the principles embodied in the Constitution in such a way as not to go beyond the limits of its text.

It should be stressed that in our legal system the legislative body is free to act as it judges best, save for the specific limits set by the Constitution.

And even the Constitutional Court has, after all, only a narrow sphere of control, since this is limited to the constitutionality of "laws and of acts having force of law", Article 134 of the Constitution and, according to Section 28 of Act. No. 87 of March 11, 1953, respecting the functioning of the Court, the supervision of constitutionality does not include "evaluations of a political nature or control of the use made by Parliament of its discretionary powers".

Although aware of the extreme delicacy and risk of modifying the Court's supervisory activity, we are nevertheless inclined to ask, despite the danger herein implied, whether it would not be advisable to institute some kind of control, naturally in cautious and measured form, over the power of discretion of the Legislature. For even when a prescription adheres to the very letter of the Constitution it may exceed or be entirely contrary to the spirit thereof, with very serious consequences for the effective equality of citizens and their freedom.

ANNAROSA PIZZI *

⁴⁹ Such is the lofty aim of the International Commission of Jurists, with whom the Italian Association of Jurists (*Associazione italiana Giuristi*), founded in Italy in 1956, is associated as a National Section.

⁵⁰ See Carnelutti, *La missione del giurista* (Padua: 1959), p. 13.

* Assistant in the Department of Administrative Law, University of Pisa.

THE OMBUDSMAN IN NEW ZEALAND

(Part II)

In view of the interest taken in an article on this subject in the Summer 1962 issue of this *Journal*, it is deemed advisable to bring readers up-to-date on the matter. The simple fact is that, by Act of Parliament to which the Governor-General's assent was given on September 7, 1962, New Zealand has, since October 1, 1962, had an Ombudsman. What is of much interest, even if not of constitutional importance is that, by statute, his title is that of Ombudsman.

The gentleman appointed to the office is Sir Guy Richardson Powles, K.B.E., C.M.G., E.D., LL.B. Sir Guy, who is 57, was educated in New Zealand where he took the LL.B. degree and where he was called to the Bar. He served with the New Zealand Military Forces in World War II, attaining the rank of Colonel. After the war he was for some years Counsellor to the New Zealand Legation (as it then was) at Washington, D.C. This appointment was followed by a lengthy tenure of office as High Commissioner of Western Samoa – until its recent attainment of independence a Trust Territory administered by New Zealand. Latterly Sir Guy had been High Commissioner for New Zealand in India and Ceylon. He has thus combined the careers of lawyer, soldier, administrator and diplomat. Success in these careers should make him a worthy person to hold the important office to which he has now been appointed.

So much for the personal details.

It will be remembered that in the New Zealand Parliamentary session of 1961 a Bill was introduced which provided for the appointment of a Parliamentary Commissioner for Investigations – the word "Ombudsman" was not officially known. This Bill was not proceeded with because of the pressure on parliamentary time, but it was made clear that the proposal would be proceeded with in the following session.

Very early in the 1962 session, the Bill, in general terms the same as that introduced in 1961, but with certain amendments to which reference will be made, was introduced by the Attorney-General and received its first reading. After a lengthy debate on the second reading, the Bill was referred to the Statutes Revision Committee of the House of Representatives. The proceedings before this committee, as is the case with most committees of the House, are not reported. One does not know, therefore, what transpired

during the hearings before the committee; but the amendments, few in number, recommended by the committee were all adopted by the House at the Report stage. As so amended, the Bill had its third reading and, after receiving the Governor-General's assent, passed on to the Statute book.

The most interesting amendment recommended by the Statutes Revision Committee concerned the title of the Act and that of the Commissioner. As introduced to the House the Bill bore the title "Parliamentary Commissioner for Investigations Bill" and the officer concerned was styled the "Parliamentary Commissioner for Investigations". The committee recommended that the legislation, on being enacted, should be styled the "Parliamentary Commissioner (Ombudsman) Act" and that the clause creating the office should read: "There shall be appointed, as an officer of Parliament, a Commissioner for Investigations, to be called the Ombudsman". The House divided on these questions, but, on a free vote, the committee's recommendations were adopted. But inasmuch as, throughout the Act, the officer is referred to as "the Commissioner", one wonders by whom he is to be called the Ombudsman.

The new Act differs from the Bill introduced in 1961 on only a few points, some important, others less so.

The Ombudsman is no longer required to retire at the age of 72 years. Indeed, no retiring age is fixed.

The Ombudsman's salary is no longer fixed by the Act but by the Governor-General by Order in Council. In fact, the relevant Order in Council has fixed the salary at the same figure as that named in the 1961 Bill - £3500 per annum.

The functions of the Commissioner are somewhat elaborated by Section 11. In the 1961 Bill, it was stated that the Commissioner should investigate certain matters "either on a complaint made to him or of his own motion". The new Act adds words to the effect that where a complaint is so made he may commence any investigation notwithstanding that the complaint may not on its face be against any decision, recommendation, or act done by any person or administrative Department against whose activities the Act is aimed.

Another amendment [contained in Subsections (4) and (5) of Section 15] provides for consultations between the Commissioner and Ministers of the Crown. Subsection (4) provides that the Commissioner may, in his discretion, at any time during or after any investigation, consult any Minister who is concerned in the matter of the investigation. Subsection (5) provides that on the request of any Minister in relation to any investigations or in any case where any investigation relates to any recommendation made to a Minister, the Commissioner shall consult the Minister after making the investigation and before forming a final opinion on any of the

matters on which the Commissioner is authorized to report and recommend to the appropriate Department.

What is probably the most important amendment is that contained in Section 17(2). It is designed to limit the power of the Crown to withhold documents from production before the Commissioner on the grounds of what is popularly known as Crown Privilege. In a recent decision of the New Zealand Court of Appeal – *Corbett v. Social Security Commission* [1962] N.Z.L.R. 878 – that Court held that the Court could look at the documents which the Crown or the Minister wanted to withhold and could itself decide whether those documents should be produced in evidence or whether they should be withheld on the grounds of public interest. This decision was somewhat of a limitation on the Crown's power as stated by the House of Lords in *Duncan v. Cammell, Laird & Co. Ltd.*, [1942] A.C. 635. But Section 17(2) goes further and provides that, subject to the provisions of Subsection (1) to which reference will be made later, the rule of law which authorizes or requires the withholding of any document or paper, or the refusal to answer any question, on the ground that the disclosure of the document or paper or the answering of the question would be injurious to the public interest shall not apply in respect of any investigation by or proceedings before the Commissioner.

On the other hand Section 17(1) does set out the circumstances in which the Crown can claim privilege in proceedings before the Commissioner. It provides that where the Attorney-General certifies that the giving of any information or the answering of any question or the production of any document or paper or thing –

- (a) might prejudice the security, defence or international relations of New Zealand (including New Zealand's relations with the Government of any other country or with any international organization), or the investigation or detection of offences;
- (b) might involve the disclosure and the deliberations of the Cabinet; or
- (c) might involve the disclosure of proceedings of Cabinet, or of any confidential nature, and would be injurious to the public interest—

the Commissioner shall not require the information or answer to be given or, as the case may be, the document or paper or thing to be produced.

Two matters which were the subject of criticism when they appeared in the 1961 Bill have been retained in the 1962 legislation. They relate to the tenure of office of the Ombudsman and to the exclusion of the activities of local authorities from review by him.

In the second reading debate, the Attorney-General described

as "quite ill-founded" the criticism that the Commissioner should be appointed for a term of years to give him security and thereby make it easier to attract a suitable man. The Attorney-General sought to justify the provision for what is in effect triennial review – so long as New Zealand has triennial elections – on the grounds that the Ombudsman is Parliament's man and Parliament must have confidence in him. Each Parliament therefore should have a say in his appointment. Contrasting the position of the Ombudsman with that of the Controller and Auditor-General, the Attorney-General said that the Controller and Auditor-General could only be removed from office for such things as incompetency and serious dereliction of duty, but the Ombudsman might be competent, painstaking and efficient but still unacceptable to the Parliament of the day. Under the Act, it was possible to replace him by the simple process of non-appointment. That was much fairer to him than to have to find a reason to get rid of him. The Attorney-General continued: "If his appointment was for a term of some years it would be intolerable to Parliament to have him continue in that office if Parliament had in fact no confidence in him. He should have the confidence of the Government". A member interjected to say that he should also have the confidence of the people. The Attorney-General concurred but went on to say that if the Ombudsman did not have the confidence of the Government, the office could degenerate into one of the worst sorts of political appointment one could think of. What would be the position if some future political party deliberately appointed a Parliamentary Commissioner to embarrass a succeeding Government? He thought the strongest reason for the provision in the legislation was that the re-appointment principle every three years gave the opportunity to the opposition to express every three years its view of his suitability.

Although the Attorney-General spoke of the Ombudsman being Parliament's man, he will, in fact, be the Government's man. This is made clear by the Attorney-General's statement that he should have the confidence of the Government. It is the fact that the appointment of Sir Guy Powles was warmly welcomed by both parties and to date it may be said that he has the confidence not only of the Government but of Parliament. Whether he will retain that confidence, as assuredly he will strive to do, only time will tell. The suggestion made by the Attorney-General that some future political party might deliberately appoint an Ombudsman to embarrass a succeeding Government is rather a fanciful one. Governments, it is believed, rarely enter upon a General Election or, even before that time, make political manoeuvres with the expectation of being removed from office. Much more to the point is the consideration that the reports of the Ombudsman might

well embarrass the Government of the day and thus, almost *ex hypothesi*, provide ammunition for the opposition to fire. If the opposition were returned to power, the probabilities are that they would reappoint the Ombudsman. But can the same be said if the Government retained office? Independence of thought and action, should, it is submitted, be the touchstone of the Ombudsman's office and it may well transpire to be so, even if his activities come up for review every three years. But there is less prospect of his independence being threatened if his tenure of office was fixed by statute than if it was dependent on the result of a General Election.

The Attorney-General also made the point that the Controller and Auditor-General is concerned with financial matters in relation to the laws of the land, while the Ombudsman is concerned with opinions on administrative matters, which he said, come into an entirely different field. But an administrative question may well call for as careful a consideration of the issues involved as a purely legal question. Experience, in both Denmark and New Zealand, may result in the Ombudsman's office being less of a purely political matter than it could become under the present legislation.

Dealing with the criticism that the Ombudsman should have jurisdiction over local authorities which, the Attorney-General admitted, could abuse their powers just as much as Government Departments, the Attorney-General said it would be unwise to bring local authorities into the ambit of the Ombudsman at present. It would call for different machinery, because local authorities are not responsible to Parliament for their actions in the same way that Governments are. The Attorney-General did not, however, rule out the possibility of local authorities being brought within the Ombudsman's jurisdiction. The legislation was, in the meantime he said, being confined to acts or decisions of central government authorities.

The possibility of local authorities being brought within the Ombudsman's jurisdiction is particularly interesting in view of the fact, that, in the course of the debate, one of the few illustrations that the Attorney-General gave of the possible cases with which the Ombudsman might be concerned, was that of the investigation of the taking of a piece of land under the Public Works Act to see whether the taking was justified. Although statistics are not available, it is believed that more land is taken under that Act by local authorities than by Government Departments. The exercise by the Ombudsman of his powers of reporting on questions of compulsory acquisitions of land would, indeed, be more relevant if local bodies were included in the agencies under his jurisdiction. It is of interest to note that since April 1, 1962, the Danish Ombudsman's jurisdiction has been extended to cover persons acting

in the service of local government authorities in matters for which recourse may be had to a central government authority.

One of the weaknesses of the debate on the legislation was, it is submitted, the lack of references to practical cases in which the Ombudsman might properly be called upon to act. One Government member referred to the question of import control when an import licence granted to one person inevitably causes a sense of grievance in another. The deputy Prime Minister referred to the failure of the Minister of Railways in the previous Government to provide a railway station for some of his constituents who, though the railway line passed their door, had to walk a mile to the railway station. In general, however, speakers did not give concrete illustrations of the circumstances in which the Ombudsman might investigate the alleged grievances.

Meantime the Ombudsman has made his first report to Parliament. Section 19 of the Act requires the Ombudsman to make an annual report to Parliament on the exercise of his functions under the Act, but the Section states specifically that this requirement does not limit his right to report at any other time. This first report covers the brief period of five weeks from the time of his appointment up to November 5, 1962.

When he took up office, the Ombudsman found that a large number of complaints had already been lodged. As at November 5, 42 complaints had been received and new complaints were coming in at the rate of about two a day. A schedule of complaints received shows that the largest number – 15 – were directed against the Inland Revenue Department, the Social Security, Education and Health Departments coming second with 9 each. Of the total of 142 complaints, 19 are shown as being directed against organizations into the functioning of which the Ombudsman is not empowered to enquire and 18 are labelled as “obscure”.

The Ombudsman declined 44 cases after initial investigation. The principal reason for his action was that the complaints did not come within the provisions of the main empowering Section of the Act – Section 11. This Section excludes from investigation by the Ombudsman any decision in respect of which there is a right of appeal to any Court or tribunal, any decision of any person acting as a trustee within the meaning of the Trustee Act 1956 and any decision of any person acting as legal adviser to the Crown or acting as counsel for the Crown in relation to any proceedings. The same Section precludes the Commissioner from investigating any matter relating to a member of the armed forces so far as the matter relates to the terms and conditions of his service or any order, command, decision, penalty or punishment given to him.

In only four cases had the Ombudsman completed his investigation. In each of those cases he was not satisfied that the

decision complained against came within the terms of Section 19(1); that is, he was not of the opinion that – in terms of the Subsection – the decision, recommendation, act or omission which was the subject-matter of the investigation –

(a) appeared to have been contrary to law; or

(b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any enactment or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or

(c) was based wholly or partly on a mistake of law or fact; or

(d) was wrong.

While the schedule of complaints attached to the Ombudsman's report shows that complaints were directed against 28 Government Departments, nowhere in the report is there any mention of the nature of the complaints. It may well be that in future reports the Ombudsman will give details of some of the cases investigated by him. The general public would find such details not only of interest but useful as a guide to the extent to which genuine grievances could be redressed by the intervention of the Ombudsman. Details concerning some cases of special interest investigated by him have been given by the Danish Ombudsman, Professor Hurwitz, in a pamphlet published in Copenhagen in 1961. They show the value, in the modern political environment, of an officer exercising the functions of an Ombudsman. New Zealand has, in most matters affecting the Parliamentary Commissioner, followed the pattern laid down in Denmark. There seems to be no reason why in this matter also, Denmark's example should not be followed.

A. G. DAVIS *

* Professor of Law, University of Auckland, New Zealand.

CHRONICLE OF CONSTITUTIONAL CASES

JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF ELECTORAL LAWS

Participation of the citizen in the formulation of State policy, mainly through the right to vote, is based on the idea that a citizen is free only if he is actively associated in the establishment of the legal order to which he is subject. Among all the political rights of the citizen, the right to vote is a fundamental right under many Constitutions. They are laid down as such in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations, Article 21 of which reads as follows:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The principles governing the right to vote and the voting procedure laid down in the third Paragraph and in many Constitutions are spelled out in greater detail in electoral laws. Such laws must in no way weaken, distort or infringe upon these principles. Often other basic rights, such as equality before the law, are also required to be respected in the formulation of electoral laws. Thus, in countries where the constitutionality of laws is subject to judicial review, such review applies, *inter alia*, to electoral laws. The following analyses of decisions given by the Supreme Court of the United States of America, the Swiss Federal Court and the State Court of the Principality of Liechtenstein are cases in point.

United States of America

In March of 1962 the Supreme Court of the United States gave judgment in the case of *Baker v. Carr*. The Court held, by six Justices to two, that the plaintiffs had set forth a justiciable cause of action within the meaning of "judicial protection" in the Fourteenth Amendment to the Federal Constitution of the United States, and that the Federal District Court of Tennessee, which had previously dismissed the case, should hear and decide the claim.

This commentary sets forth to describe briefly why the case is an important one.

In the State of Tennessee a Statute of 1901, the Apportionment Act, sought to apportion members of the General Assembly (Parliament) among the 95 counties of the State. Under this Act for the purposes of apportionment, State enumeration, that is a count of the number of electors in the State, was abandoned in favour of reliance on the Federal census which had been taken in 1900. Article II Section 5 of the Tennessee Constitution reads:

The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each . . .

There is a similar provision for election to the Senate. In the 60 and more years since the Act all proposals for reapportionment have failed. The Federal census of 1900 has always been used for apportioning representatives in the Tennessee General Assembly. The population of the State has, of course, grown considerably in the meantime and there has been noticeable redistribution. In the words of Mr. Justice Brennan, who gave the Supreme Court's majority opinion, "It is primarily the continual application of the 1901 Apportionment Act to this shifted and enlarged voting population which gives rise to the present controversy."

The present situation in Tennessee was illustrated by Mr. Justice Clark, who concurred with the majority, as follows:

The controlling facts cannot be disputed. It appears from the record that 37% of the voters of Tennessee elect 20 of the 33 Senators while 40% of the voters elect 63 of the 99 members of the House.

And later in the same opinion:

As is admitted there is a wide disparity of voting strength between the large and small counties. Some samples are: Moore County has a total representation of two with a population (2,340) of only one-eleventh of Rutherford County (25,316) with the same representation. Decatur County (5,563) has the same representation as Carter (23,303), though the latter has four times the population . . .

So much for the situation as it exists. Now the plaintiffs, persons qualified to vote for members of the Tennessee Legislature, alleged before the District Court that they had been deprived of their federal constitutional rights in that the 1901 Act "arbitrarily and capriciously" apportioned the seats in the General Assembly, and further by the State's failure to reapportion they suffered a "debasement of their votes" and were denied the equal protection

of the laws guaranteed them by the Fourteenth Amendment. They therefore sought a declaratory judgment that the 1901 Act was unconstitutional and an injunction to restrain certain State officers from conducting any further elections under it. The District Court dismissed their case on the grounds first that they had no jurisdiction and secondly that no claim was stated upon which relief could be granted. The plaintiffs appealed to the Supreme Court. Arguments were heard in April and October of 1961 and the case was finally decided on March 26, 1962. It was held that:

(1) the Federal District Court *did* have jurisdiction to hear the case, the subject matter being within the federal judicial power as defined in Article III, Section 2 of the Federal Constitution, an unbroken line of precedents sustaining the federal courts' jurisdiction in constitutional matters of this kind;

(2) the complainants' allegations of a denial of equal protection under the Fourteenth Amendment presented a justiciable cause of action. Mr. Justice Brennan firmly rejected the District Court's view that the plaintiffs' suit presented a "political question", and was therefore non-justiciable. In this regard the Court carefully examined but repudiated the argument that the case fell within Article IV, Section 4, of the Constitution which guarantees to every state a republican form of government;

(3) the appellants had standing to sue.

The case was therefore referred back to the Tennessee District Court though the Supreme Court did not specify what relief the District Court should order.

Two members of the Supreme Court, Justices Frankfurter and Harlan, dissented. One commentator, Mr. N. de B. Katzenbach, has written

"... In the minority view the Tennessee case is an article IV guarantee claim masquerading under a fourteenth amendment voting rights label. The Court, says Mr. Justice Frankfurter, is asked to choose among competing bases of representation — or competing theories of political philosophy — in order to establish an appropriate frame of government for Tennessee and thereby for all states of the Union. And why? Because, he says, for a court to determine what "equal protection" protects there must first be determined the republican-form issue, that is, what frame of government is allowed. Hence, equal protection cannot be divorced from republican form, and equal protection supplies no clearer guide for judicial examination of apportionment methods than the republican-form guarantee.

Reviewing the English and American systems of representation, past and present, the minority concludes that it is simply not true that representation proportioned to the geographic spread of population is universally accepted as a necessary element of equality between man and man, and must therefore be taken to be the standard of a political equality preserved by the fourteenth amendment. Such equality, however desirable, has not been generally practiced; and because of the manifold social, economic, and political factors which are combined in

decisions which determine representation and apportionment, and because of the party conflicts which are engendered, in the view of the minority the federal judiciary ought not to become embroiled. The issue, said the minority, is unfit for federal judicial action.

What has *Baker v. Carr* decided? Clearly it has *not* decided on the merits of the apportionment claim. But it did emphatically decide that the courts were the proper place for apportionment claims to be heard. And furthermore apportionment cases were not "political" issues outside the judicial pale. Up to the time this case was decided federal decisions had always treated differently, on the one hand, the question of the impairment of voting rights because of race or colour (the Fifteenth Amendment type of case) and, on the other, impairment on account of disparities between voting population and legislative representation. The latter kind of case has hitherto been labelled a "political question", and outside the competence of the judicial power. The dilemma in which the voters of Tennessee found themselves was well brought out in the following passage taken from Mr. Justice Clarke's opinion:

Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no "practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination". Tennessee has no initiative and referendum. I have searched diligently for other "practical opportunities" present under the law. I find none other than through the federal courts. The majority of the voters have been caught up in a legislative strait jacket

Certainly had the Court not intervened it is difficult to see how the injustices being suffered by the electors would have been remedied.

The effect of *Baker v. Carr* has been dramatic. According to an article in the *Harvard Law Review* in May 1962, there were suits on apportionment issues under way in 22 States.* For instance, in Alabama the three-judge Federal District Court gave the State Legislature a time limit within which to reapportion. A three-judge Federal Court held in Florida that the apportionment laws were "void" and that it would reapportion by judicial decree unless the Legislature acted promptly. In Kansas a State court held in July 1962 that the apportionment of both houses of the Legislature was invalid in the light of both the State and Federal Constitutions and ordered that the election of certain legislative members be held at large. In Rhode Island the State Supreme Court ruled the current legislative apportionment to be in violation of the Fourteenth

* According to the *New York Times* of April 1, 1963, some reapportionment has been accomplished in 15 States in the year since the *Baker v. Carr* decision.

Amendment, issued no reapportionment order, but remarked that if the General Assembly failed to reapportion a Federal Court would probably do so.

In Tennessee itself the General Assembly was convened in extraordinary session in May 1962 (i.e. *after* the decision in *Baker v. Carr* by the Supreme Court), and hurriedly passed two separate Acts reapportioning legislative seats. But these Laws did not satisfy the Federal District Court of Tennessee now fully competent to hear and decide on the issue. The District Court held on June 22, 1962, that these two Acts were "utterly arbitrary and lacking in rationality". In other words the "invidious discriminations" present in the Apportionment Act of 1901 had not been removed. The Court entered an order reserving final judgment until the General Assembly had had an opportunity during its regular 1963 legislative session to reconsider the two Acts.

In conclusion, the decision in *Baker v. Carr* presages the restoration of equal voting rights of citizens all over the United States. This may have especially profound results in the southern States of the Union. Furthermore the case is a highly significant one for the Rule of Law. There is no doubt that the Rule of Law fully supports the proposition that Legislatures must be truly representative of the electors.

Switzerland

By the decision of March 28, 1962, in the case of *Geissbuehler and Associates v. the High Council of the Canton of Fribourg*, the public law Division of the Swiss Federal Court declared Section 20(3) of the Law respecting Election of the High Council of the Canton of Fribourg unconstitutional. Under Article 36 of the Constitution of the Canton of Fribourg, members of the High Council (i.e., the Canton Parliament) are elected in accordance with the proportional representation system. This is done in the following manner. Under Section 20 of the Canton Electoral Law, the total number of votes cast in a constituency is divided by the number of members to be elected. This operation gives the electoral quotient. Each party receives as many seats as the number of times the quotient is covered by votes received. Parties that obtain less than 15 % of all valid votes for their candidates are not entitled to any seats (eliminary clause). Votes obtained by these parties are considered as not having been cast and are not taken into account in the calculation of the electoral quotient. Through the operation of this clause the Social Democratic Party in the Sense Constituency and the Workers' and Employees' Party in the See Constituency failed to obtain any seats. The Social Democratic Party had received 6.6 % and the Workers' and Employees' Party

12.4 % of the votes. Had the eliminatory clause not been applied, the Social Democratic Party would have obtained one seat out of 20 and the Workers' and Employees' Party two out of 15.

Members of the two eliminated parties lodged a protest with the Swiss Federal Court, arguing that the eliminatory clause laid down in Section 20(3) of the Electoral Law was compatible neither with the principle of proportional representation as laid down in Article 36 of the Fribourg Canton Constitution, nor with the principle of equality before the law set out in Article 4 of the Swiss Federal Constitution.

In the decision of the Federal Court, the following passages in the motivation of the judgment are worthy of attention:

Article 36 of the Fribourg Constitution stipulates that the High Council is to be elected according to the principle of proportional representation. The meaning of this provision would be clear if rules governing the proportional representation system were clearly laid down and unchangeable and if there were only one type of proportional representation system. This, however, is not the case. Such systems can take different forms. The canton legislator, upon whom the Constitution lays the obligation of implementing the system, can choose the type which in his opinion most exactly corresponds to the intent of the framers of the Constitution and to the customs of the canton . . . If, as is the case in the Canton of Fribourg, the Constitution merely lays down the principle of proportional representation, the legislator may not add rules to the system he has chosen which would so change its nature that it could no longer be considered as a proportional representation scheme. It is therefore necessary to examine the eliminatory clause in this light and to see whether it represents such a rule . . .

The proportional representation system is a voting procedure which guarantees that existing political, economic and social groupings, associations of interests and other more neutral bodies, etc., in a given electoral body will be represented according to their strength, independently of the will of the majority of the electoral body (Federal Gazette 1914, Vol. 2, p. 124). Experience has shown that the proportional representation system promotes the proliferation of small groupings intent on having their say in the legislative body, even if they represent the thinking of only a small minority of citizens. It has been said that such a dispersion of strength, and the splintering of parties which generally accompanies it, hamper efficient administration of public affairs. The danger exists that it may, in effect, prevent the emergence of a stable majority capable of assuming governmental responsibility.

After acknowledging the constitutionality of eliminatory clauses in general, the Federal Court concerned itself with the question whether its form in the Fribourg Electoral Law – i.e., the laying down of a quorum of 15 % – could give rise to misgivings on constitutional grounds.

It considered that –

With reference to the election of the High Council, the importance of the groups which the clause would exclude has to be judged not only

by reference to the individual constituency but also at the level of the Canton as a whole. The membership of a political party may in practice vary in size from one part of the Canton to another. Seen from this angle, a quorum of 15% seems too high. It creates the danger that a group will lose individual seats which it might have obtained in one or more constituencies and which, together with more numerous seats obtained in other constituencies, would have given it a sizeable number of seats in the legislative assembly and thus enabled it to play a significant part in the management of public affairs. Moreover, the voter whose political convictions are not widespread in a given region is thus prevented from supporting the party of his choice, even though this party represents a not unimportant and useful trend of thought in the Canton. The 15% quorum could have resulted in the exclusion from the High Council of a group representing 14-15% of the voters, and thus of a large minority. Should two parties of such strength be excluded entirely from the legislative assembly, then the latter could no longer claim to be based on proportional representation of the voters, since about 29% of the citizens would be excluded from participating in its work.

Based on these considerations, the Federal Court decided that the 15 % quorum laid down in Section 20(3) of the Electoral Law constituted a violation of the principle of proportional representation as established by Article 36 of the Fribourg Cantonal Constitution. The Court accordingly annulled the allocation of seats in the See Constituency on the ground that 12.4 % of the votes – those cast in favour of the Workers' and Employees' Party – had been disregarded. In so doing, it took the view that its considerations pertaining to a 15 % quorum applied equally to the figure of 12.4. With respect, however, to the elections in the Sense Constituency, where the Social Democratic Party had only obtained 6.6 per cent of the votes, it considered a quorum of this size to be admissible.

Principality of Liechtenstein

A similar situation to that which the Swiss Federal Court had to deal with in the case described above is illustrated by the decision of the Liechtenstein State Court of May 1, 1962, on a complaint lodged by the Christian Social Party of Liechtenstein against the Liechtenstein Government.

The decision concerned the Landtag elections of March 25, 1962. The Landtag is the Parliament of the Principality of Liechtenstein. It is made up of fifteen Members, nine of whom are elected in the Oberland Constituency and six in the Unterland Constituency.

Article 46 of the Liechtenstein Constitution stipulates that parliamentary elections are to be held in accordance with the principles of equal suffrage and strict proportional representation. According to Section 22 of the Electoral Law of January 18, 1939,

the total number of votes cast is to be divided by the number of members to be elected plus one. This gives the electoral quotient. Once the electoral quotient has been obtained, Section 22 provides that the allocation of seats shall be determined as follows. Each party receives as many seats as the number of times the votes obtained by that party are covered by the quotient. Should all seats not be allocated in the first round, the remaining seats are to go to the parties with the largest number of votes left over. Completely excluded from the allocation of seats, according to Section 22(3) of the Electoral Law, are those parties whose members entitled to vote account for less than 18 % of all registered voters. The votes received by these parties are not included in the calculation of the electoral quotient.

In the 1962 parliamentary elections the Christian Social Party obtained around 9 % of the total votes in the Oberland Constituency and 10.5 % in the Unterland Constituency. Having thus been eliminated, it lodged a protest before the State Court against the allocation of seats arrived at. The Party submitted that Section 22(3), according to which parties whose voting membership represents less than 18 % of the total number of voters in a given constituency are not to be taken into consideration in the allocation of seats, should be declared unconstitutional and that the principle of strict proportional representation without any limitations, as laid down in Article 46 of the Constitution, should be enforced. In support of its submission, the party argued that the principle of equality as embodied in Article 31 of the Constitution, according to which "all citizens of the State are equal before the law" had been arbitrarily violated and that, moreover, it was clear from Article 46 of the Constitution, which stipulates that parliamentary elections are to be held in accordance with the principles of equal suffrage and strict proportional representation, that each vote should not only have the same numerical weight, but also the same effect and that every vote, even if not taken into consideration in the first count, should at least be taken into reckoning in the allocation of seats on the basis of remaining votes.

The State Court quashed Section 22(3) of the Electoral Law on the ground that it was unconstitutional, and ordered that the electoral quotient should henceforth be calculated taking into account the votes obtained by the Christian Social Party, provided, however, that should the number of votes cast for the party be less than the quotient it should be excluded from the allocation of seats on the basis of remaining votes. Under this ruling, a party that does not obtain a number of votes equivalent to the quotient may not receive a seat even if the number of votes it obtains exceeds the number of votes left to the other parties after the first allocation. The State Court thus used the electoral quotient as an eliminatory device.

The Court's decision was based, *inter alia*, on the following considerations:

In generally recognized doctrine and practice, equal suffrage is usually held to mean that every fully-fledged citizen admitted to the polls has the same right to vote, irrespective of race, creed, profession, wealth, education or political conviction, and that no such citizen can be denied that right on such grounds. Although the principle of the equal effect of the vote is often supported in theory, it is not fully applied in practice . . .

If the principle of equality were to be extended to the effect of the vote, this would mean that all parties participating in an election and receiving votes would have to be taken into consideration in the allocation of seats. This would inevitably lead to a splintering of the representation of the People, thereby preventing emergence of the clear majority which is required to ensure stability and responsible government, and would unavoidably render the democratic system inoperative. In order to minimize the risk of dispersion, States with the proportional electoral system find it necessary to mitigate the equal effect of votes through other measures, for instance by combining the proportional system with the majority system, as in Germany, where in each constituency several representatives are elected under the proportional system from provincial party lists, in addition to the representative elected by a majority vote. The German Constitution provides (Article 31) that Federal legislation will lay down detailed provisions for the (Bundestag) parliamentary elections . . .

The Austrian Constitution lays down the principle of equal, direct, secret and personal suffrage, based on the proportional representation system. It specifies that the federal territory is to be divided into constituencies and that a federal law is to regulate voting procedure in detail. The Electoral Law giving effect to this provision of the Constitution stipulates that a party has to obtain a seat in at least one constituency in order to have the right to be included in the allocation of seats. This "basic" seat can be obtained only if the party has received the electoral quotient in a constituency. In Austria this is also calculated by dividing the number of votes received by the number of seats allotted to the constituency plus one (Hagenbach - Bischoff formula). The electoral quotient is therefore the decisive factor, and it is impossible to allot seats without first calculating it and using it as a divisor. Thus it is an objective and inherent characteristic of the proportional representation system which varies according to the number of valid votes received by the various parties, i.e. according to the extent of participation in the voting . . .

As has already been mentioned, the need for preventing the proliferation of small parties is a principle that has to be borne in mind in connection with the proportional representation system. The electoral quotient gives a fair and objective measurement of a party's importance. On the basis of Section 22(3) of the Law of January 18, 1939, the electoral quotient is obtained by dividing the number of valid votes by the number of seats plus one. The addition of one favours the small parties because it reduces the electoral quotient to 10% in the Oberland and to 14.3% of the valid votes in the Unterland, whereas division by the number of seats would have given a quotient of 11.11% for the Oberland and 16.66% for the Unterland. The electoral quotient therefore acts automatically as an eliminatory clause . . .

The principle of equality demands that equal things should be dealt with equally and unequal ones unequally, unequal treatment being, however, justifiable only on objective grounds. The principle of equality in elections is not only applicable to individual voters, but also, in the same manner, to political parties as groups of voters. It is undeniable that there is no electoral system which does not put certain parties at a disadvantage; the need for avoiding the splintering of parties must, after all, be borne in mind. However, any unequal treatment that is not justified either by overriding necessity or by objective considerations is unconstitutional. The electoral quotient constitutes such a purely objective element and is an integral part of the proportional representation system, whereas an eliminatory clause, expressed by a percentage, is more of a subjective factor. Added to this is the fact that Section 11(1) of the Law of January 18, 1939, refers to 18% of "those entitled to vote". A 100% turnout is impossible even if voting is compulsory. Whenever participation is lower, the eliminatory percentage rises accordingly - i.e., if 90% of those entitled to vote do so, the eliminatory percentage will be 20; if the turnout is 75%, it will be 24. An increase in the eliminatory percentage from the limit set by the electoral quotient (e.g., 14.3 % for the Unterland), which is an integral part and objective characteristic of the proportional representation system as it exists in Liechtenstein, to 18% has no legal foundation. The Liechtenstein Constitution contains no provisions which might justify the eliminatory clause based on a figure of 18% as prescribed by the Proportional Representation Law. Neither can the latter be justified by reference to the principles and requirements of the proportional representation system. The electoral quotient, on the other hand, is an essential feature of that system. The 18% eliminatory clause laid down in Section 22(3), and especially the fact that it is based on the number of persons entitled to vote, is contrary to the principle of equality before the law laid down in Article 31 and to that of equal suffrage laid down in Article 46 of the Constitution. Therefore, Section 22(3) of the Law of January 18, 1939, is unconstitutional and must be repealed.

REPORT ON A SEMINAR HELD AT BANGALORE FROM JULY 6-8, 1962, UNDER THE AUSPICES OF THE INDIAN COMMISSION OF JURISTS AND THE MYSORE STATE COMMISSION OF JURISTS

CONTENTS

I. Inaugural Speech by Shri M. C. Setalvad, Attorney-General of India	334
II. Presidential Speech by Honourable Shri Nittoor Sreenivasa Rau, Chief Justice of Mysore	337
III. Report of Committee One	339
IV. Report of Committee Two	343

In September 1961 the Mysore State Commission of Jurists wrote to the Indian Commission of Jurists expressing a keen desire to hold a Seminar at Bangalore for reviewing the progress of the Rule of Law, in its various aspects in India, during the past 10 years.

The proposal was considered by the Indian Commission of Jurists at its Annual General Meeting held on October 8, 1961, when it was decided to hold a Seminar in collaboration with the Mysore State Commission of Jurists. It was also decided that the scope of the Seminar should be restricted to the following two subjects:

- (1) investigation in Criminal Cases and the reasons for delay in bringing the accused person to trial;*
- (2) the Indian Electoral Law.*

The Working Paper on the first subject was prepared by Shri N. S. Narayana Rao, Advocate, Bangalore, and on the second by Shri G. S. Ullal, Advocate, Bangalore. The Seminar was held from July 6-8, 1962, at Bangalore, Mysore State.

The Seminar was inaugurated on July 6, with a speech by Shri M. C. Setalvad, the President of the Indian Commission of Jurists and the then Attorney-General of India; the Honourable Shri Nittoor Sreenivasa Rau, the Chief Justice of Mysore, was in the Chair.

On July 7, 1962, the participants at the Seminar divided into two Committees, one Committee concentrating on the first subject and the other on the second. A plenary session of the Seminar was held on July 8, 1962.

Amongst those taking part in the Seminar from Mysore were Shri Justice A. R. Somnath Iyer, Shri Justice M. Sadasivayya, Shri Justice Sadananda Hegde, and Shri G. R. Ethirajulu Naidu, Advocate-General of Mysore. Prominent participants from outside Mysore included Shri Justice S. K. Das, Judge, Supreme Court of India, Shri K. V. K. Sundaram, Chief Election Commissioner, Shri B. N. Gokhale, retired Judge, Bombay High Court, Shri K. Rajah Iyer, Shri Purshottam Trikamdass and Shri S. D. Vimadallal.

I

INAUGURAL SPEECH OF SHRI M. C. SETALVAD, ATTORNEY-GENERAL OF INDIA

Mr. President, Ladies and Gentlemen,

May I congratulate, on behalf of every one present here, the Mysore Commission of Jurists for the initiative they have shown and the efforts they have made in organizing this Seminar in Bangalore? If I may say so this is characteristic of the interest which the south has always taken in matters concerning law and allied topics. Its interest in matters which concern the Rule of Law has been shown by the number of gatherings held in the south at which its importance has been emphasized.

It is difficult to overrate the importance of Seminars such as we are proposing to hold. We aim not at mere academic discussions or theoretical propositions between lawyers or those interested in law. The true object of a Seminar such as this is, I think, to bring together in close discussion persons concerned not only with the theory and philosophy underlying the problems but with their practical aspects. Let us take, for example, the topic of criminal law. We shall be having a discussion not only of the provisions of the law and their interpretation but also of its administration by the Executive, the police and so forth. Similarly, in the matter of elections, not only shall we discuss the provisions regulating elections but the practical aspects of elections, with the persons concerned in organizing them and with candidates concerned in contesting them. Such discussions blending the theoretical and practical aspects of the problem are bound to result in the formulation of conclusions to which those in authority may well give consideration for their acceptance. Further, our discussion will be, as it were, off the record. The press will not be admitted to them. The advantages of such discussions are obvious. Government officials and those concerned with every day administration will be able to take part in them and express their views freely and without restraint because what will ultimately be summarized as the conclusions of the Seminar will not be the views expressed by the particular participants but the general sense or the views of the majority or the minority or of a substantial number of participants.

The President of the Mysore State Commission of Jurists has referred to the importance of the Rule of Law. That expression has been variously defined. Indeed the meaning attached to it in recent days has completely thrown out of recognition the narrow sense in which it was understood by Dicey. It is difficult to give the expression a connotation suitable to all contexts and all platforms. It has been said that "the essence of the Rule of Law lies not so much in technical legality as in the supremacy of certain ethical convictions, certain prevalent standards of decent conduct and in the psychological fact that those who exercise powers share their standards and convictions with the rest of the community and feel bound to conform to them." Perhaps in this Seminar we are not concerned with so broad a conception of the Rule of Law. Our discussions would be directed to finding out ways and means which will ensure the observance not only of the letter of the law but its spirit.

It is a matter of great satisfaction that we have been able to obtain in holding this Seminar the cooperation of such distinguished persons as the Chief Justice of Mysore, a Judge of the Supreme Court, Judges of the High Court and many others whom we see on the platform and in front of us.

Two subjects of great importance have been selected for discussion. The first, the investigation of crime and the reasons for delay in bringing the accused to trial, is a vast subject which touches the day to day life of the citizen and requires adherence to certain basic problems which underlie it. The second subject, elections, concerns the efficiency and the purity of the vital processes which bring into existence the Legislatures, national and regional. It is fortunate that we have been able to secure experienced men to guide the deliberations of the committees on these subjects.

The want of efficiency in the investigation of crime leads to delay in investigation which in its turn accounts for the delay in bringing the accused to trial. If my memory serves me right some police officials themselves stated to the Law Commission that there had been "a terrible deterioration" in matters relating to investigation. The causes were stated to be the inadequacy of personnel. Notwithstanding the increasing population the strength of the police staff had not been kept up. One may compare the number of the police in Uttar Pradesh with that in England where there were twice as many for a much lesser population. Another factor was the want of a systematic training in modern and scientific methods of investigation which had made great progress in other countries whereas police in our country still relied on old methods. There was also a lack of supervision over investigation by the superior officers. In order that investigating officers may be able to discharge their duties efficiently they must have legal assistance at all stages of the investigation. Many a time defective investigation leads to *lacunae* in evidence which result in the discharge or acquittal of the accused by the courts. As has been recommended by the Law Commission, there should be appointed directors of public prosecution at district and sub-divisional levels who could direct and supervise not only prosecutions but, if necessary, guide investigation of crime. There is also a lack of cooperation on the part of the public with the police and the courts. In British times the police were looked upon with suspicion and that attitude of the public still persists largely because the police have not changed their methods. The public must trust the police before they can be expected to offer their cooperation with the police. The manner in which witnesses are treated both

by the police as well as the subordinate courts also requires alteration if people are to come forward readily to help in the investigation of crime and assist in its detection.

Our Constitution has laid down only very general provisions in regard to the election of our Legislatures. Subject to these provisions contained in Articles 80 and 81, 170 and 171, 324 to 329, Parliament has been given the power to regulate the system of election to the Legislatures. In enacting the Representation of Peoples Act, Parliament had made a delegation of power to various authorities so that the bulk of the election machinery is relegated to the rules.

A right to free and truly representative elected bodies is the right of every citizen in a democracy. If this right is restricted or fettered or destroyed democracy itself will be undermined and the Rule of Law will cease to exist.

How do the democratic governments come into being in our country? The elections prescribed by the Legislature involve huge election expenses. Even the amount permitted by the rules is, I think, fantastically excessive when one considers the poverty of the country and the average income of the Indian citizen. Further the prescribed maximum is always largely exceeded by resorting to various subterfuges in different forms which the law is unable to control. In the result no citizen can afford to carry himself the burden of an election. If he wants to be elected he must seek to be adopted as a candidate by a party. How is this worked? The candidate has to make an application and offer his fitness to be a candidate for examination by a hierarchy of bodies. It appears that this is a process to which few self-respecting persons would subject themselves.

Then we have the party caucuses who in substance rule over the party. When we talk of the ruling party in substance it is the rule of a few who are at the top of the party and control it. In practice it tends to become not a rule by the majority of the citizens but a rule of the few who happen to dominate the party.

How do the parties obtain their funds? Scores of rupees are donated to party funds by corporations and big business. Can the ruling party, whichever it be, escape being influenced by these donors who have made it possible for it to win the election contest? Do we not so frequently hear of such and such a person having a pull with the government in a certain matter by reason of his having largely assisted the party? In this matter we seem to have gone even further than what is permitted in other democratic countries. We have enacted legislation enabling corporations to donate their funds to political parties.

All these are matters of vital moment to the purity of our elections and to the representative character of those whom we elect. Until we can devise methods which will enable the citizens to come forward and seek election to representative bodies with ease and without undue expense all talk of socialism and benefits to the common man and the growth of democracy will be idle.

In my view the broad points which need consideration are:

- (1) Are there not possible methods of election which would prevent the domination of the party caucuses and give free play to the individual citizens?
- (2) The drastic reduction of election expenses, real and disguised.

- (3) The prevention of donations to parties by big business.
- (4) In any event a compulsory audit of accounts and publication by all parties of all donations received by them showing their sources and all election expenses incurred by them.
- (5) Much larger powers in the Election Commission or in an independent permanent tribunal to investigate election abuses particularly those alleged against the party in power.

I cannot help mentioning in conclusion the very useful working papers which have been compiled to assist discussions at the Seminar and particularly the working paper submitted by Mr. Ullal.

I am sure the deliberations of the Seminar which we are holding will of Jurists and Friends,

II

PRESIDENTIAL SPEECH BY HONOURABLE SHRI NITTOOR SREENIVASA RAU, CHIEF JUSTICE OF MYSORE

Mr. Attorney-General, Mr. President of the Mysore State Commission of Jurists and Friends,

When some two months ago the organizers of this Seminar informed me about it I felt very glad since I am amongst those who feel that such discussions are essential for our country not only in the interests of a scientific development of jurisprudence but in the general public interest also. You are all aware of the aims and objects of the International Commission of Jurists, of the great work it has done and of the work done by the Indian Commission of Jurists. The State Commission has also been active since its inception some three years ago and the present Seminar represents a landmark in its career. About a month ago, a Seminar was organized here under the auspices of the Indian School of International Studies on topics pertaining to the field of International Law. It was inaugurated by the Attorney-General and I may speak with personal knowledge of the excellent way in which the work of the Seminar was done and how fruitful the discussions were. You are also aware that a State Unit of the Indian Law Institute has recently come into being here and is endeavouring to promote scientific study and discussion in the field of law. I am quite sure that the present Seminar, in addition to making a useful contribution in a practical way to the solution of problems relating to the two topics chosen, will also help in promoting a lively interest in the study and examination of legal problems.

I have had the benefit of reading both the working papers, which, I may say, represent the result of considerable effort by way of collecting material and bestowing independent thought on the questions involved. They will form the basis of discussion and it would be hardly appropriate for me to anticipate such a discussion. I shall only venture to make some general observations relating to these two important topics. One of them, as you know, relates to Election Law and the other to the Investigation of Crime.

The success with which three general elections, with an unprecedentedly

large electorate, were organized and completed in our country appears not only to have given general satisfaction in India but has elicited warm commendation from thoughtful observers in other countries. Nevertheless, since the process of election forms the very foundation of the structure of democracy, the mode in which the election machinery functions requires constant vigilance and scrutiny. A reading of the Representation of the People Act and the rules show that much thought had been bestowed in drafting them; and the periodical reports of the Election Commission and the constant guidance given by those in charge of the election machinery with the Chief Election Commissioner at its head show that they are keenly alive to the need for such alertness. In fact the reports of the Commission are very valuable source material. We should also note that the Act and the Rules have been amended from time to time to remedy the deficiencies noticed and to effect the improvements suggested. It is a matter of great pleasure that the Chief Election Commissioner with his rich experience in this field is presiding over the meeting pertaining to this topic.

May I venture to refer to an aspect of the election process, which raises serious concern in the minds of thinking persons, though the matter may not be one which is wholly amenable to solution in terms of law and rules? I refer to the great change in human attitudes and moral values that election psychology brings about. One might almost say that those who embark on elective competition feel compelled to adopt an inverted code of conduct. Neither the ancient tradition of our country nor, for that matter, the accepted values elsewhere permit a man to "crack up his own wares". Nevertheless that is one of the things that every aspirant in an election is expected to do. Since the secret of success lies in the magic of numbers, the process of enlisting support, namely, canvassing votes, has led to the development of techniques hardly conducive to the maintenance of human dignity. The sense of rivalry generally goes so deep that armed camps surround the competing candidates. The top leaders no doubt are able to preserve the veneer of mutual courtesy and other social amenities, but deep down in the ranks of the followers rivalry degenerates into animosity and we see the sorrowful phenomenon of factious fighting manifesting itself in the context of elections. One of the most serious consequences of this deterioration of moral values associated with elections is that worthwhile people are effectively discouraged from getting into elective bodies. I admit that no ready solution can be offered and I must also say that the only real solution that one can see is in the gradual improvement in individual and public ethics. That may appear to be an unrealistic view. But, we have before us the example of Great Britain and to some extent the United States where there has been a phenomenal change in the ethics of elections. In the early days election time was the byword for the manifestation of all sorts of crudities and corruption. To-day not only is an enlightened code of decent conduct recognized but it is in operation there. One index is that you hardly find candidates embarking on election disputes in those countries in contrast to the epidemic of election petitions that breaks out in this country after elections at every level from Panchayat elections upwards. One also notes with sorrow that the election atmosphere has pervaded even institutions devoted to science, art and culture where the time-honoured custom was to elect committees by unanimity arrived at after consultation and discussion.

The other topic, namely, investigation of crime and bringing the

accused to trial and the need for avoiding delay is also a matter of vital importance, for, the working of the system has consequences in the field of fundamental human rights and liberties. In considering the problems arising in this field, one cannot forget the history of the conditions in this country. It was recognized very early in this country that prevalence of crime required stronger restrictions on the liberties of individuals than, for example, in England while at the same time the same amount of trust could not be imposed in the police force in the matter of investigation as in England. Thus we find on the one hand that the powers of arrest are wider in this country. Arrests are effected on the basis of reasonable suspicion here while, for example, in the United Kingdom and the United States of America, arrest is made only when the authority concerned has decided to prosecute. On the other hand the provisions of the Criminal Procedure Code barring the use of police statements is a recognition of their infirmity while there is no such ban under the laws of the countries I mentioned. But the position is more or less the same in regard to confessions, the basis there being what are known as Judges' Rules. It must be recognized that even before our Constitution enshrined the fundamental freedoms, the importance of the liberty of the subject had long been recognized and the laws relating to criminal procedure laid severe restrictions on the powers of the police to restrain the liberty of the subject, as, for example, by compelling the production of an arrested person before a magistrate within 24 hours and by enabling the police to obtain remands only after scrutiny by the magistrate. At this time, when the centenaries of the three premier High Courts of our land are being celebrated, we must also remember with gratitude that those High Courts and subsequently the other High Courts have established and maintained high traditions in safeguarding the liberty of the subject. The power of granting bail has been exercised in liberal measure all through the years. Even in regard to this field, I cannot refrain from remarking that the effectiveness with which the police and the courts can function is closely related to the level of public ethics. The sense of civic duty and responsibility has not yet fully developed in this country with the result that the investigating authorities find it difficult to gather necessary information, while voluntary communication of relevant information is virtually unknown in this country. This is a sad state of affairs and one can only hope that there will be a rapid improvement in regard to the awareness of civic duties and responsibilities.

May I add that we are quite fortunate in having the Honourable Justice S. K. Das to preside over the meeting relating to this topic?

I thank the organizers for affording me this opportunity of associating myself with the Seminar and along with you all I look forward to a very fruitful session.

III

REPORT OF COMMITTEE ONE ON DELAY IN INVESTIGATION OF CRIMES AND IN THE TRIAL OF AN ACCUSED

The Chairman, Mr. Justice S. K. Das, in his opening remarks, suggested the consideration of the following points in addition to those dealt with in the Working Paper.

1. The impact of Panchayat Courts both on investigation of crimes and in the trial of the accused.
2. Complete separation of the Judiciary from the Executive.
3. Delay caused in the conduct of the security proceedings.
4. Need for change in the provisions of the Code relating to bail.
5. Constitution of Regional Courts exercising jurisdiction within convenient territorial limits.
6. Public co-operation during investigation and in trial to be sought by creating necessary atmosphere.

The Chairman elucidated the points referred to above in detail.

Thereafter, the scheme of the Working Paper (which was taken as read) was explained.

The first part of the paper dealt with the necessity for holding the Seminar on this topic, the second part with the causes for delay and the third part with the remedies suggested. It was also explained that the aspect in relation to the Panchayat Courts was not referred to in the Working Paper as such an institution was not set up uniformly all over India; re: the separation of the Judiciary from the Executive, the same was effected in many parts of the country, including Mysore, and hence was not referred to in the Working Paper.

Causes of delay in investigation

So far as the causes for the delay in investigation of crimes were concerned, there was consensus of opinion in regard to the following:

1. Corruption and/or inefficiency of the investigating officer.
2. Various kinds of pressure brought to bear on the investigating officer.
3. (a) Lack of equipment and resources;
(b) Pressure on time owing to want of adequate staff; and
(c) Large areas over which single police stations are endowed with jurisdiction.
4. Want of timely and proper supervision or guidance during investigation.

Causes of delay in trials

There was also consensus of opinion that the delay in trial was attributable mainly to the following:

1. Non-separation of the Judiciary from the Executive.
2. Pressure of work in courts of the judicial magistrates.
3. Non-attendance of witnesses owing to a variety of causes.

Suggested remedial measures

1. Constitution of the Department of Public Prosecution:

After examining the Systems prevailing in the UK and the USA and also taking into consideration the recommendations of the Law Commission in this respect, the majority view was that such a department should be constituted consisting of a Director-General at the State Level and a Director at the District Level. Regarding the functions of these officers, a view was expressed that the Director-General at the State Level and the Director at the District Level should possess only the power to certify whether on the materials gathered by the investigator, a prosecution should or should not be launched. The majority opinion, however, was that the Department of Public Prosecution should not only have the power to certify as above but should also have powers to advise on and to supervise and check investigations as recommended by the Law Commission. The criticism that such a thing might lead to conflict of authority between the Executive of the State and the Department was not shared by the majority. It was felt that the Director-General at the State Level and the Director at the District Level should have the power to call for reports of investigation, on complaint or *suo motu*, when something out of the way comes to their notice and that each of them should see to it that the power vested in the investigator is not abused.

On the question as to the authority to which the Director-General should be responsible, the opinion generally expressed was that he should not be under or responsible to the Home Ministry or the Inspector-General of Police of the State. A point of view was expressed that the Director-General should be responsible to the Advocate-General of the State but it was not shared by a large section present at the Seminar.

So far as the conditions of service of the Director-General were concerned, it was felt that while there was no objection to the State Government making the first appointment, his promotion and other conditions of service must be under the control and supervision of the High Court.

There was consensus of opinion that the functions of the Director-General of Public Prosecution should also include the power of supervision and control over all the Directors at the District Level and to give them advice and guidance whenever consulted in special cases.

It was also felt that the Director at the District Level should be a person recruited from the legal profession with the rank and status of Additional District Magistrate and should be given a requisite number of assistants to effectively discharge his duties.

It was felt that, apart from his powers of supervision mentioned above, the Director of Public Prosecutions should have the following principal functions to perform:

(a) He should be the Head of the Prosecuting Machinery in the District and exercise administrative control over all the prosecutors in the Sessions and Magisterial courts of the District.

(b) He should receive copies of all First Information Reports in all cognizable cases as also Case Diaries in such cases promptly.

(c) He should advise the police department on the legal aspect of a case at any stage of criminal proceedings including investigation.

2. Regarding investigations the following conclusions were reached:

(a) *Case Diaries*: That copies of Case Diaries with regard to the progress of investigations must be sent immediately to the jurisdictional magistrate.

(b) *Equipment and Staff*:

(i) That the Department should have an adequate number of officers and men in each police station. Systematic training must be imparted not only in modern methods of investigation but training in law should also be given at the police training schools by utilizing the services of experienced judicial officers or practising lawyers. That in each station investigational work should be assigned to a separate set of officers who would not be required to attend to other duties.

(ii) That each station should be equipped with modern means of communication and transport.

(iii) That each State should be self-sufficient in the matter of laboratory facilities and other equipment.

(iv) That officers and men of the Department should be adequately remunerated consistent with their powers and responsibilities.

(v) That the practice prevailing in some parts of the country of departmental officers being placed in charge of prosecution be discontinued, and suitable amendments, if any, necessary for the purpose be effected in the Code of Criminal Procedure.

(c) That a time limit should be imposed within which a charge sheet should be placed after apprehending the accused. That in cases of delay, the magistrate should recommend to the High Court the quashing of the investigation, unless for reasons to be recorded in writing, he condones such delay. Suitable amendments may be introduced in the Code of Criminal Procedure in this respect (Sections 167 to 173).

(d) That violations by the investigator of the procedure prescribed under the Code of Criminal Procedure, Police Manual, or any other law should be severely dealt with upon being noticed by courts or the Director of Public Prosecution.

3. Recommendations for avoiding delay in the trial of the accused:

(a) The congestion of work in the Courts of the judicial magistrates may be relieved by encouraging Nyaya Panchayatas functioning in villages or groups of villages to deal with petty offences (to be classified). Wherever such a system is not obtaining, Nyaya Panchayatas should be set up. It was felt that the personnel of such Nyaya Panchayatas should work by rotation so that party or factional feelings may not be reflected in the administration of justice by such Panchayat Courts.

(b) As many Regional Courts as are found necessary may be constituted, each of them exercising jurisdiction within convenient territorial limits. Provisions similar to Section 497(3A) be introduced for the benefit of the accused in the Sessions Courts as well.

(c) Proper facilities should be afforded to witnesses to overcome the disinclination of the public to appear in Courts and to testify to what they know or have observed.

(d) Arrangements should be made to have ready cases taken up for trial *de die in diem*.

(e) *Security Proceedings*: (Sections 107 to 110 Code of Criminal Procedure). The callous way in which such proceedings were protracted came to the notice of most of the members, and it was generally felt that such proceedings should not become instruments of harassment in the hands of police. The suggestion that time limit should be imposed within which such proceedings should be completed was unanimously agreed to. There was also agreement in regard to the desirability of such proceedings being instituted before and tried by judicial magistrates.

IV

REPORT OF COMMITTEE TWO ON INDIAN ELECTORAL LAW

While the working paper formed the basis for discussion, the Committee, under the Chairmanship of Shri K. V. K. Sundaram, also considered a few other connected points relating to the holding of elections.

The Committee first discussed the question whether the maximum limits for the election expenses of candidates prescribed in the rules should not be substantially reduced. It was mentioned that the figures put down by the candidates in their returns were in many cases much below the prescribed maximum but this did not mean that the actual expenditure incurred by the main contesting candidates, especially where the contest was keen, was below that limit. The Committee felt that reliable information and statistics regarding the expenditure actually incurred under various heads, such as transport, printing, meetings, agents, etc., should be collected and analyzed in order that reasonable maxima could be fixed by law.

In the absence of such information, the Committee could not come to a definite conclusion, that the present maxima are high and could be reduced. It was agreed that the subject of free and fair elections being vital to the country, this particular aspect, as well as other aspects, of the problem should be taken up for study by a committee of the Indian Commission of Jurists.

A suggestion was made that in view of the widespread feeling that despite the existing legal provision large sums of money were spent by a number of candidates on their elections, there was no point in prescribing maximum limits and this might as well be omitted. This suggestion did not find favour with the majority of the members present. It was suggested that a substantial reduction of election expenses of the individual candidates as well as of the State could only be obtained by replacing the present direct elections by some form of indirect elections. After considerable discussion, the Committee agreed that this was not desirable and there was no warrant for changing the present system.

In regard to the heavy expenditure incurred by political parties at election time on propaganda, it was generally agreed that this should be taken into account along with the expenditure incurred by individual party candidates, while considering whether the prescribed maxima had or had not been exceeded.

The majority of the Committee were of the view that companies should be prohibited from making any donations to party funds. The Committee also was in favour of the view that the accounts of political parties in regard to the sources of their income and expenditure on elections should be subject to outside audit and publicity.

The question was raised that besides public companies, there should also be some curb on individuals and firms spending large sums on behalf of candidates. The Committee considered that this should be left to the proposed Committee of the Indian Commission of Jurists.

The Committee considered a few suggestions designed to reduce or control the expenses of candidates.

- (1) The suggestion that mobile booths should take the ballot box to the voter was generally considered impracticable;
- (2) The Committee however agreed that free postal facilities to candidates for sending out their appeals might be of some help, although not substantial;
- (3) The issue of poll-cards by the election authorities instead of the present system of "identity slips" issued by the candidates was also not likely to reduce appreciably the expenses of candidates. On the other hand, official poll cards would render impersonation easier and more difficult to challenge;
- (4) By way of controlling expenditure, the suggestion was made that candidates and parties should maintain a record of the motor vehicles used by them and of the particular oil supply stations where petrol and oil are bought by them.

The Committee agreed that there should be a check on the filing of substantially incorrect returns of election expenses, e.g., by making it an electoral offence. The further suggestion that the Election Commission should be authorized to inquire into allegations of excessive spending against defeated candidates and to disqualify them for the corrupt practice, found favour, with some members, but the Committee left it for future consideration.

The Committee considered whether it would be practicable for election authorities to make prompt inquiries into allegations of malpractices made during the election period, and to take action against those who were found guilty. Alternatively, it was suggested that the collection of evidence of such malpractices immediately after their occurrence would be useful later. The consensus of opinion was that this would not be practicable and might well lay the election officers open to allegations of partiality and create opportunities for fabrication of evidence.

The Committee agreed that the deposit of Rs. 2,000/— required of an election petitioner by way of security for costs was excessive and it should be reduced to Rs. 1,000/— which was the sum required before the amendment of 1961. At the same time, the law could provide for the award of penal costs against a petitioner in case his petition was found to be frivolous or vexatious.

The Committee considered certain aspects of the preparation and publication of electoral rolls and felt that these were in some places unsatisfactory.

It urged that greater and more effective supervision by senior election officers was necessary at the stage of preparation. Copies should be made available for inspection more freely and at a larger number of places. A suggestion that judicial officers should be in charge of this work was however not acceptable to the Committee.

The Committee considered a suggestion that the village panchayats should be charged with the responsibility of preparing the voter's lists, although it should be subject to checking by the Chief Election Officer and his staff. The general opinion of the Committee was that at the present stage of development of the panchayats this might lead to greater inaccuracies in the lists in places where factions exist.

The suggestion that Chief Electoral Officers of the States should be Central Government Officers selected and appointed by the Election Commission without reference to the State Government and that they should not be given a subordinate role in the latter's secretariats was discussed. The Committee agreed that such a change was not necessary. There were no complaints against the Chief Electoral Officers and it was desirable from the practical and administrative point of view that they should have a secretariat status.

The Committee agreed that steps should be taken to secure the early disposal of election petitions, e.g., by the promotion of more subordinate judges to take the place, temporarily, of District Judges and Additional District Judges appointed as members of Election Tribunals.

The Committee considered that the existing provisions for recounting of votes were not always observed by the Returning Officers and this led to dissatisfaction. If suitable provisions were made for remedying this defect, it would reduce the number of election petitions.

BOOK REVIEWS

Law in Eastern Europe. A series of publications issued by the Documentation Office for East European Law, University of Leyden.

Edited by Z. Szirmai. [Leyden: A. W. Sythoff, No. 1 (1958), 83 pp., fl. 9.50; No. 2 (1958), 132 pp., fl. 15.50; No. 3 (1959), 158 pp., fl. 23.75; No. 4 (1960), 52 pp., fl. 16.50; No. 5 (1961), 384 pp., fl. 36; No. 6 (1962), 168 pp., fl. 20; No. 7 (1963), 457 pp., fl. 57.]

During the three decades of Joseph Stalin's rule over the destinies of international communism and – *a maiori ad minus* – over those of the Soviet Union, studies on various cultural and scientific fields in that area could have been limited to the interpretation of the dictator's will as it was expressed in the general political line and reflected in the complicated demonology of the lesser Kremlin positions. The importance rightly attributed to the grouping around the leader of the upper hierarchy gathered on the platform of the Lenin mausoleum on occasions of important reviews and parades is still remembered. While it might be unwise and premature to disregard such outward manifestations of dictatorial whim in the present administration of the Soviet Union, there will hardly persist any doubt about the growing need for a deeper analytical probing into Soviet developments following the death of Stalin.

Soviet painters and writers have learned recently that there are limits to their – by our standards still tightly circumscribed – conception of freedom of expression; yet the fact itself that some of their controversial artistic products were allowed enough publicity to attract official criticism represents a novel phenomenon in Soviet cultural life. By the same token, similar signs of ferment have in the past couple of years stirred the legal community. The notion of the presumption of innocence of the accused in criminal trials, for instance, has not been ensconced in new Soviet legislation and judicial practice; yet it has been widely discussed together with a number of other principles usually associated with the Rule of Law as understood in the West. In neither of these fields has there been so far any physical or even symbolic *auto-da-fe* of dissenters and one is certainly free to speculate on the future acceptability to Soviet artists and scientists of such *pronunciamentos* by those in power that tend to bring about a “voluntary” revision of their aberrations. Appetite grows with the taste of the fruit of freedom. The hunger for contacts with the outside world has in the last few years reduced the role of the Iron Curtain to that of a filter of foreign ideas rather than of their dam. The time seems to be approaching when the Western world will face the responsibility for striving not only for

an intelligent assessment of the stirrings in the Soviet orbit but also for the development of independent and attractive intellectual positions that could be proposed as a basis for a *bona fide* discussion between the two areas hitherto virtually sealed off in terms of a spiritual cross-fertilization unburdened by political taboos.

While a long range projection of the present trend in the Soviet Union provides some hope for a broadening dialogue on substantially equal terms of a free exchange of views – a development not necessarily desired by, but soon perhaps out of control of, the powers that be – there remains the traditionally fertile cultural soil of the East European states that follow Soviet leadership to a varying degree of integration. The Yugoslav and Polish search for self-expression and genuine exchanges with the capitalist world has been far ahead of similar, mostly still latent, tendencies in, say, Czechoslovakia or Rumania. A debate on many crucial issues has been going on between Polish intellectuals at home and their exiled colleagues in the West; for the first time, such a mutually profitable discussion has been taking place in an atmosphere devoid of criminal charges on one end and violent recriminations on the other. On the expanding availability of opportunities for a dispassionate review of the respective positions of both sides will to a great extent depend the prospects of competitive cultural coexistence; few are left whose faint-hearted doubts of the superiority of the cause of freedom would make them prefer an isolated entrenchment.

It is of course obvious that cultural and scientific fields more remote from the central issues of political action will with the passage of time become more susceptible of a fruitful confrontation than those still considered direct tools of the governmental monopoly in domestic as well as foreign affairs. Whatever inroads have so far been made in the monolithic conception of the Communist-controlled countries concern the quantity of state reglementation rather than the quality of a totalitarian system. The velvet of the glove covering the iron fist has become softer and finer; the fist remains clenched but the grip itself may in time weaken under the growing pressure of the intellectual ferment. It would indeed be farfetched to read a decisive meaning into the limited positive evidence that has so far transpired from the Soviet area; an opposite long range development would however defy all basic laws of human behaviour which remain for a non-Marxist the determining factor of political processes.

To the regret of those engaged in comparative legal studies as well as in positive action on behalf of Human Rights, Law has so far remained a *politicum* of the highest order on the Soviet list of debatable topics. Socialist Legality and the Rule of Law – to talk in symbols rather than concrete issues – continue to be separated not only by the basic difference resulting from their respective approach to equal justice under law and to genuine independence of the

Judiciary, but also by the apprehension in the Soviet orbit of capitalist subversion suspected from the Western hierarchy of human and political values, of individual and collective approaches toward the pursuit of happiness. It has therefore been so far impossible to discuss legal problems without having the advocates of Socialist Legality fall back on fundamentally political defensive positions against "bourgeois conceptions" of natural law, "cosmopolitan attempts" at limiting national sovereignty, "legal imperialism", and other phrases meaningless outside their dialectic setting and necessarily obstructing an intelligent comparative approach. This is the more regrettable as many aspects of the theory and practice of Socialist Legality might well emerge in a far better light than that in which they actually appear in their ancillary role to political expediency. Unless this basic fact will be recognized by the leadership of the Soviet Union and – through that effective osmosis of which they hold the secret – by the rulers throughout the bloc, the value of the contribution of Communist lawyers to a *bona fide* search for common ground will necessarily remain limited.

It is because of this situation of political restrictions on the free flow of thought – the cancellation of Professor Harold Berman's Moscow law course is a case in point – that objective studies undertaken in the Western world on problems of Socialist Legality acquire a special importance for students of comparative law in general and of Communist law in particular. One of the most successful recent contributions in this field is a series of publications issued by the Documentation Office for East European Law at the University of Leyden and edited by its Director, Dr. Z. Szirmai. Seven attractive volumes, bearing the mark of A. W. Sythoff's high publishing standards, have appeared since the first issue was launched in early 1958.

The decision to publish a series on East European Law was not made on the spur of the moment. Rather has the Leyden Documentation Office, since its establishment in October 1953, gradually developed into a versatile research centre, the activities of which have benefited mainly the Dutch legal community through publications in the renowned *Rechtsgeleerd Magazijn Themis*. It was the desire to make the solid production of the Office internationally accessible that prompted the venture into independent publishing in English.

The readers of the *Journal* are familiar with the more than adequate supply of legal periodicals and with the proportionately high death-rate among those which were wanting in scholarship and skilful editing. *Law in Eastern Europe* has been able to assert itself just because these qualities have consistently marked each of its seven issues.

The editor, Dr. Z. Szirmai, has experimented with four basic approaches to the task. The first consisted in articles on varied legal

subjects limited to one country per issue (No. 1 and No. 6). The second presented unrelated papers on developments in diverse countries (No. 2 and No. 7). Then separate Codes of the Soviet Union formed a single subject discussed in one issue (No. 3 and No. 4). Finally, the idea of a comparative compilation on one single topic from the viewpoint of all East European countries – and China – was tried out (No. 5).

Whatever the merits of each format may be – this writer prefers the comparative discussion of one field of law, such as was applied in No. 5 to the Law of Inheritance – the editor was throughout the five years fortunate in securing the co-operation of excellent contributors and successful in attuning their individual papers to a harmonious whole characterized by meticulous research and objective presentation.

The high level of translation of original documents from the several East European languages as well as a painstakingly correct reproduction of vernacular citations testify to the care and expertise which underlie the drafting and editing of the texts, notes and bibliographies.

The usefulness of the Leyden series makes it particularly desirable that the individual issues appear with greater regularity. The difficulties confronting the editor of a specialized legal documentation can of course seriously affect the publication schedule. Nor are his problems limited to the selection of suitable contributions, the watch over the deadlines and the streamlining of the translations. Yet it might still be possible to avoid in the future such accumulation of material that necessitates an issue of 457 pages (No. 7). The resulting miscellany of articles and texts is not conducive to an easy orientation of the reader and buries under the weight of material many a fine contribution that would stand out to better advantage in a slimmer and more selective volume.

The importance of serious contributions to the understanding of the theory and practice of Socialist Legality cannot be overestimated. The Leyden project concentrates on the practical side of the problem and has done in this field some important and pioneering work, to wit, the annotated publication of the Merchant Shipping Code of the USSR in No. 4. The self-imposed restraint in dealing with legal theory is in itself an asset; there are many specialized reviews covering that field but very rare indeed are sources of understanding of the practical impact of Socialist Legality on the lives and fortunes of East European subjects. *Law in Eastern Europe* has already provided much of what Professor R. P. Cleveringa calls “the boon of enlightenment concerning what – whether one likes it or not – is accepted as positive law in a large part of the present-day world”. It is to be hoped that it will continue to do so.

V. M. KABES

The Soviet Legal System. By John N. Hazard and Isaac Shapiro. [Dobbs Ferry, New York: published for the Parker School of Foreign and Comparative Law, Columbia University by Oceana Publications Inc., 1962, 595 pp., index, bibliographies.]

It was not until after World War II that jurists in the West made sustained efforts to understand the Soviet legal system. The Soviet Union, the war-time ally, emerged as a world power whose sphere of influence was extended over large parts of East and Central Europe. Countries of this area were – mostly against strong resistance – compelled to introduce the Soviet political, social and legal systems. Interest in this legal system, previously neglected, has recently increased rapidly. A considerable literature has been developed on the subject of Soviet law in English, German and, on a smaller scale, in French in an attempt to grapple with the problems raised by the impact of the Soviet legal system on the world scene. In the immediate post-war period, Soviet legal science was dominated by Andrei Vyshinsky, Procurator-General of Stalin's great purges. His works on Soviet law together with other relevant material have now been translated, analyzed and debated in the West. This period culminated in an attempt to present in one work, not only the legal system of the Soviet Union, but also that of the Peoples' democracies modelled after the Soviet pattern. The outcome was the publication in 1959 of the two volume, 2000 page compilation on *Government, Law and Courts in the Soviet Union and Eastern Europe* edited by Vladimir Gsovski and Kazimierz Grzybowski (see the book review in the *Journal of the International Commission of Jurists*, Vol. II, No. 2, 1959–1960, pp. 215–225).

Now we have before us a new book by Professors Hazard and Shapiro on the Soviet Legal System conveying the "new image" of Soviet law. It is quite obvious by now that the Soviet legal system is undergoing far-reaching changes. Since the death of Stalin in 1953, new developments have taken place, which have necessitated a re-writing of Soviet legal history. It is generally accepted in both East and West that the death of the steel-fisted Soviet dictator has ushered in changes in Soviet law, for better or worse. Three Congresses of the Communist Party of the Soviet Union, the 20th in 1956, the 21st in 1959 and the 22nd in 1961 have resulted in legislative activity producing, as at the time of this review, four new Codes. Other new laws, including a new Constitution for the USSR, have been promised which would reshape the entire Soviet legal system. The Congresses inspired an ever growing stream of legal articles in Soviet periodicals commenting on and discussing these reforms. A number of books have also been published in the Soviet Union which have assessed the effects and the future tasks of the current legal reforms for what is called "the period of the full-scale construction of communism".

Western students of Soviet law have watched this development with growing interest. A great number of articles have been devoted to different aspects of this reform. The *Bulletin* of the International Commission of Jurists has repeatedly drawn attention to this most interesting development (see Nos. 5, 6, 9, 12, 13 and 14).

The book under review is, however, the first undertaking to give an overall picture of the reform, to present the Soviet legal system "as it stands in the 1960s".

One can entirely agree with the authors who consider in their *Preface* that the culminating year of their study, 1961, was very propitious for such an undertaking. It was the year of the 22nd Party Congress which laid down directives to build up "the material and technical basis for communism" and for the "development of the dictatorship of the working class into a State of the whole people" proclaimed as a "new stage in the development of the Socialist State". Proposals for a new Constitution corresponding to this new stage were circulated, and, as the authors remarked, "the law reform initiated soon after Stalin's death had sufficiently progressed to provide revisions of basic codes". All in all the timing of the research for the book and for its publication was a happy one: by 1962, the reform had progressed far enough to reveal its limitations, its component forces, its progressive and retrograde elements without, of course, enabling a prediction of the outcome of the struggle between the opposing forces engaged in the reform. Yet, as the book proves, the new image of Soviet law differs considerably from the former one.

In the opinion of this reviewer the key problem of the whole book is found in a question raised in the Foreword to Part I. The question reads: "Have the codifiers struck out in new directions, liberalizing the legal norms that have heretofore governed the basic structure of the Soviet state and its relationship with its citizens? . . . and have the Soviet legal reforms imparted a new dignity and freedom to the Soviet citizen?" The authors answered: "It is still early to tell". All the selected documents reproduced in the book are grouped around this basic question.

Part I is devoted to problems of Socialist Legality and Human Rights and points to efforts to strengthen the former. Repudiation of Vyshinsky's theory of law, new experiments with social control and the "participation of the masses" in the administration of justice, as realized in the Comrades' Courts and voluntary militia, are dealt with here. Amendments in this field introduced by the "Fundamentals of Legislation on the Judicial System" of 1958 are also examined later in this section. Finally Part I covers new regulations for the protection of civil rights in the criminal code of the Russian Soviet Federated Socialist Republic of 1961, the role of the Procurator-General in the preservation of these rights, procedural due process of law in both criminal and civil procedure and the role of

criminal law in the preservation of public order.

Under the title "Administering Soviet Socialism", Part II is devoted to the difficult task of outlining in 200 pages the rules concerning the administration of the Soviet economy which is practically always being re-organized, the last change being announced only in December 1962. Land law and labour law are dealt with in this Part as well as the rules on "directing, planning and operating agencies". Under the heading of operating agencies are reproduced documents relating to the management of Soviet industrial and commercial enterprises. There are chapters on contracts between Socialist enterprises, the disputes between them, and their settlement by State arbitration, on labour relations and on the cooperatives. A chapter on the "Encouragement of Inspiration" sums up contemporary Soviet protection of inventions and copyright as incorporated in the "Fundamental Principles of Civil Law of the USSR and of the Union Republics" of 1961.

The presentation of the relevant Soviet documents is such as to emphasize the place of the Soviet citizen: interest is focussed on the common man working in this centrally administered economy. Special concern is shown too for the legal aspects *vis à vis* the survival of the remaining elements of private enterprise.

Part III entitled "Legal Relations between Soviet Citizens" is concerned with the field of law that retains the greatest resemblance to the original Romanist model. In Western parlance it represents the remnants of private law in the Soviet Union. Chapters of this part deal with personal property, contracts between citizens, inheritance, torts, social insurance and family law.

On the basis of the relevant Soviet documents assembled in three Parts, the reader is invited to seek the possible answers to the book's fundamental question, namely, the trend of Soviet reform. And this leads us to a discussion on the method chosen by the authors for the elaboration of this topic.

This method consists in the traditional Common Law practice of presenting casebook studies on the given topic together with a commentary thereon rather than of indulging in theoretical considerations and generalizations. The authors give in each chapter a short historical review to introduce the reader to the context of the given problem. The requirement of brevity is respected: none of these short reviews, which are formulated clearly and concisely, exceed four pages. They are followed by a careful selection of documentation, which includes relevant legislation, decrees, Communist Party rules and directives, court cases, judicial opinions and the views of Soviet legal scholars on the theoretical aspect of the question. Then the reader is left to his own judgment. If he still wants to broaden his factual knowledge of the problem, a list of selective reading of both Soviet and non-Soviet literature is offered to him at the end of each

Part. One may question the merits and defects of such a method. It could be advanced that the Party's continuing monolithic control over the whole public order does not get due attention in the presentation of the reform legislation. However, on balance, it does seem perhaps to be the most appropriate way of presenting a picture of a legal system undergoing reform in a changing society. With its self-imposed limitation of leaving a considerable part of the evaluation and assessment of the documents to the reader, this book avoids the pitfalls of precipitate prognostics, approaching the study of the Soviet legal system in a matter-of-fact, unbiased manner and supplying the inquiring reader with a trustworthy guide. Such a guide can never be comprehensive, but it can be, as it is in this case, highly representative. It does not dispense with a laborious analysis and evaluation of the legal institutions as they emerge in course of the reform. It serves deliberately as a reference book, a "post-Stalinist documentation of Soviet law" as the subtitle of the work indicates. In this field it is unprecedented and will be difficult to surpass; it would also make an excellent textbook for law schools. Due to the activities of the Soviet legislative machine currently in full swing, a considerable part of the legislation cited will soon become outdated, a fact of which the authors are fully aware. They, accordingly, consider their work merely as a prologue to Soviet legal reform. One may add that the book is also highly stimulating for further study of such reform by the science of comparative law. Thus it seems justifiable to conclude this review with the only prediction the authors have ventured to express:

This collection is also a prologue, for the Soviet public order system seems to stand on the brink of far-reaching change. Two currents of thought will emerge from the pages that follow. If one becomes dominant, there may appear attitudes and forms increasingly reminiscent of those familiar to political scientists and lawyers of the non-Soviet world. On the other hand, if the other dominates, the system may revert to the spirit that infused its early years devoted to the achievement of popularity and simplicity. Perhaps the two will fuse, each functioning to control a segment of social relations in quite different ways.

JÁNOS TÓTH

Commission on Human Rights: Report of the Eighteenth Session.

A report to the Economic and Social Council of the United Nations Organization published by the Secretariat of the United Nations. [New York: United Nations Publication No. E/3616, 1962.]

At its eighteenth session held from March 19 to April 14, 1962, the UN Commission on Human Rights resumed study of a problem of some sixteen years' standing: the creation of national consultative Committees on Human Rights. The Economic and Social Council, as early as its second session, in 1946, had already on the recommendation of the initial group of the Commission on Human Rights invited the Members of the United Nations "to examine the possibility of setting up, within their respective countries, information groups or local committees on human rights which would collaborate with them to develop the activities of the Commission of Human Rights".

It was only at its sixteenth session, in 1960, however, that the Commission again came to explore the question of the creation of these committees. At the end of the session, the Commission voted a recommendation which subsequently became Resolution 772 B (XXX) of the Economic and Social Council on July 25, 1960. With a view to bringing about an exchange of information and experience in connection with the activities of the national committees on Human Rights, the Council, in this Resolution, requested the governments to give the Secretary-General all the information they had pertaining to this question so that the Secretary-General might make a report to the Commission and to the various governments.

In this instance, the response was meagre; and some members of the Commission openly complained about this at the eighteenth session.

The discussion of the few replies that were received did, however, led to an interesting confrontation of the different points of view. Some of the speakers were definitely hostile to the setting-up of national committees, on the score that other State agencies, such as the courts or the legislative assembly, were better equipped to defend Human Rights at the national level than any committees having a purely consultative capacity.

Others spoke up in favour of setting up such committees, asserting that these bodies would be cast in a double role: initially a consultative role, that of submitting opinions and proposals on questions involving Human Rights to the proper governmental agencies; but also a more general role, that of keeping the public informed about problems connected with Human Rights.

Finally, the Commission decided to recommend to the governments "the setting-up of the bodies mentioned in Resolution 772 B (XXX) of the Economic and Social Council - i.e., national com-

mittees on human rights". At the same time, the Commission specified the part these committees were called upon to play: "These bodies could, for example, study matters having to do with human rights, examine the situation at the national level, advise the government and contribute to the formation of a public opinion favourable to the respect of human rights."

JEAN ZIEGLER

International Protection of Human Rights. By Manouchehr Ganji, with a foreword by Professor Paul Guggenheim. [Geneva: Librairie E. Droz; Paris: Librairie Minard, 1962, 317 pp.]

The theory of humanitarian intervention is based on the assumption that States in their relation with their own nationals have the international obligation of guaranteeing to them certain basic fundamental rights. The guarantee of these rights takes on a double significance, since, first, it is necessary to allow citizens to lead lives marked by liberty and justice, and, secondly, it affects the continuity of friendly relations between States. The theory of humanitarian intervention further maintains that the existence of this guarantee of fundamental rights is of such importance that violation thereof by any State cannot be ignored by other States. Thus, if a State refused to grant certain fundamental rights to its citizens or violated the guarantee already granted with respect to these rights, the other States would be authorized to intervene, provided that the State in question had acted in a flagrant manner.

Mr. Ganji's book, written in a clear and unpretentious style, makes a substantial contribution to the clarification of this much mooted concept of humanitarian intervention.

At the doctrinal level, Mr. Ganji subscribes largely to the views of Mr. Rougier. If such intervention is to be allowed, three factors must co-exist. They are stated by Mr. Rougier, and by Mr. Ganji in turn, as follows:

1. The violation justifying the intervention must be a violation by the public authorities, and not by an individual.
2. It should be a violation of Human Rights, and not a simple violation of positive national law.
3. Certain aspects of timeliness must favour the intervention.

After treating the most recent developments of the doctrine of humanitarian intervention, Mr. Ganji goes on to examine a number of concrete cases. In this way, he presents interesting analyses of the action undertaken by France, England and Russia against the Turkish massacres in Greece, which action eventually led to Greek independence in 1830, of the intervention by Austria, France, England,

Prussia and Russia in Syria in 1860, and of the action of Russia against Turkey when Christians were being persecuted in Herzegovina and in Bulgaria in 1877-78.

Most of these interventions by foreign powers in the internal affairs of a State failing to respect the fundamental rights of its citizens were induced by the persecution of a religious minority. Little by little, an international conscience has been taking shape. After the first World War, it was universally recognized that each State had the obligation to guarantee a certain number of fundamental rights to its citizens. A series of international treaties underwrote the principle at that period. Mr. Ganji gives a detailed and impartial analysis of the steps taken by the League of Nations in favour of racial and religious minorities. A sizeable chapter is devoted to examining the United Nations Declaration of Human Rights; another deals with the European Convention on Human Rights.

In this latter chapter, the author simply analyzes the mechanisms of the Convention, without going on to evaluate the effectiveness or lack of effectiveness of the Convention.

The mechanism for protection has been in operation since September 1953. By December 31, 1960, the European Commission on Human Rights had dealt with more than a thousand cases and had rendered 715 judgments (see the article by Philippe Comte, "The Application of the European Convention on Human Rights . . ." in the *Journal of the International Commission of Jurists*, Vol. IV, No. 1). Although we may regret that Mr. Ganji did not devote more space to the analysis of the jurisprudence of the European Commission, we must nevertheless recognize the very great merit of his book, which consists in having given a perspicacious and well constructed overall view of the various tentative efforts that have been made to establish effective protection of the fundamental rights of the individual through international guarantees.

J. Z.

Staat, Recht und Geschichte. By Richard Baeumlin. [Zurich: EVZ-Verlag, 1962, 68 pp.]

Mr. Baeumlin's analysis of the constantly changing relationships assumed by the concepts of State, of Law, and of History affords an excellent introduction to the study of a problem central to any philosophy of Law, that of the moral content of the legal standard. The author first undertakes an examination of the mediaeval "Ordo". In scholastic philosophy, man and the works of man, that is to say the State and the Law, are parts of a pre-established order, ordained and instituted by God. The State and the Law, like any other creation of man, are therefore merely stages on the way towards the progressive revelation of this "Ordo".

The advent of rationalism utterly dismantled this conception of the State and the Law. For the jurists and the philosophers of the 17th and 18th centuries, the State was a creation *ex nihilo*, a work of man and of man alone. Alexander Hamilton could write, in *The Federalist*, "What is government itself, but the greatest of all reflections on human nature?" To put it another way, the State, the society created, patterned and given structure by Law, is a work of art, traceable to the genius inherent in Man himself. The upheaval produced by the rationalist philosophy uncovered an historical coordinate. Indeed, the scholastic philosophy which affirmed the existence of an "Ordo" essentially divine in nature, and which relegated the State and the Law to the rank of partial revelations of that "Ordo", could see in the action of mankind nothing other than a predetermined action. Man, in creating the State, in promulgating Laws, in reflecting and propounding the Law, was not acting as a free agent, but was simply serving as the tool of an historical determinism which obtained its manifestation through him. It is quite a different matter when we come to the rationalist philosophy. Here the human act is a direct outcome of the free exercise of individual liberty. The source of the Law is to be found in the will of men. It is because a multitude wants it so, that the State is what it is.

Mr. Baeumlin moves on to the third stage of historical development when he analyzes with penetrating clarity the epoch of the codifications of the *Rechtsstaat*, the Bourgeois "Law-State" of the 19th century. According to the author, the great strength of this epoch derived from the concept of "constitutionalism". That idea signifies that the Law evolves with the constantly changing requirements of the life of society, but that the constitution, the fundamental standard set up by the State, does not change, or in any event only changes with extreme prudence.

It is in this idea of "constitutionalism" that Mr. Baeumlin sees the remedy against what he rather felicitously terms the *Anpassungsrecht*, i.e., the Law which adapts itself to social changes without concerning itself with the importance of the moral value found in the legal standard. Mr. Baeumlin is a Professor of Public Law at the University of Berne. In support of his thesis, he chooses his examples primarily from the field of Swiss public law. Thus, he analyzes the development (in his view much to be criticized) which the popular referendum is undergoing at the Federal level. Pressure groups are making more and more use of the threat connected with the referendum, to exercise an influence on the discussions and decisions of the legislative assembly. Thus the referendum, which its legislators originally intended to enable the sovereign people to exercise the right of veto against the acts of the legislative branch, has increasingly become simply a weapon in the field of internal politics.

J. Z.

The European Convention for the Protection of Human Rights and Fundamental Freedoms: Its Impact on German Penal Law and Penal Procedure. By Erhard Appell. [Marburg: Gg. Nolte, 1961. 132 pp.] Thesis submitted to the Faculty of Law and Political Science, Marburg University, for the degree of Doctor of Laws.

The European Convention on Human Rights is the first treaty to lay down international legal standards for the protection of the major human rights and fundamental freedoms.

States signing and ratifying the Convention have thereby undertaken to conform to its standards, thus creating a new network of international legal obligations in a particular field. Furthermore, there is no doubt that membership in this system involves an obligation for each party to bring into harmony with the Convention any of its municipal law provisions which may be in conflict with it. The process will, of course, take time; it will, moreover, be decisively influenced and helped along by the decisions of the European Human Rights Commission and the activities of the European Court of Human Rights. Above all, decisions of municipal courts relating to the Convention will impress the lawmakers in the countries concerned with the need for adjusting municipal law. Effective protection of Human Rights under the Convention requires that there be no clash between its provisions and those of municipal law, and that any such discrepancies should be promptly eliminated. In order to do this, it will be necessary, among other things, to carry out studies in the various countries aimed at discovering any existing discrepancies. The purpose of the thesis here reviewed is to find out "how the provisions of the European Convention on Human Rights stand in relation to the substantive and procedural provisions of German penal law, how closely they agree with the latter, and what consequences arise out of the failure of individual penal law provisions to conform to the standards of the Convention".

The topic chosen is thus a very timely one, and the thesis itself, through its penetrating, clear, orderly and thoroughly documented presentation of the subject, constitutes a worth-while contribution to the current debate on the implementation of the European Convention on Human Rights by the municipal laws of the parties (See also P. Comte's article on "The Application of the European Convention on Human Rights in Municipal Law", published in this *Journal*, Vol. IV, No. 1).

Dr. Appell's book is divided into three parts. The first describes the most important features of the Convention, while parts II and III deal with the subject proper, discussing in turn the relationship between the Convention's provisions and, first, penal procedure and, secondly, substantive penal law.

The author devotes a particularly searching inquiry to the question of how far the penal procedure of German courts and administrative bodies meets the requirements of the Convention. In so doing, he takes each of the principles to which the penal laws of member States must conform under the Convention, compares them with the relevant German legal provisions, and draws up a sort of balance sheet for each major item, e.g. the right to a court hearing, rights of the defence, conduct of proceedings in public, etc. While Dr. Appell applies an extremely exacting and critical mind to this confrontation, his appraisal of the legal situation in the Federal Republic of Germany is, not unexpectedly, a very favourable one on balance. Only in a few minor respects – e.g., the provisions concerning court-appointed defence counsel, or assignment to an institution for employment under section 20 of the Social Welfare Ordinance – does he find discrepancies between German legislation and the requirements of the Convention. Space does not allow a detailed examination of the various points raised, nor of the question of international penal law, which is also broached by the author.

RUDOLF TOROVSKY

British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies. By T. Olawale Elias, Q.C., B.A., LL.M., Ph. D., Federal Attorney-General and Minister of Justice of Nigeria. [London: Stevens and Sons Limited, 1962. 323 pp., index, table of cases, table of statutes. £3. 10s. net].

Dr. Elias needs no introduction to readers of the Commission's publications. He has on a number of occasions contributed articles to the Journal, and in 1961 he was the rapporteur to the African Conference on the Rule of Law at Lagos. He has also written a number of authoritative books on various aspects of African law and his reputation as a legal scholar has been steadily increasing. In 1960 Dr. Elias became Attorney-General and Minister of Justice in the Nigerian Federal Government.

"British Colonial Law" is in the main a study of the coming of the Common Law to the British dependent territories, from Grenada to Fiji, and its resultant impact. Dr. Elias uses the word interaction, on local law. Early in his work the author removes all doubt from our minds that the study of "colonial law" is an outmoded one. Colonial law necessarily forms the base on which the legal order of newly independent states is built, and is consequently applied every day in the courts of the land. Of course in time many

of the old colonial statutes and laws are repealed, amended or revised to meet the requirements of modern independent States.

The book begins in Part I by explaining the nature and scope of the law administered in British colonies and goes on to discuss how the legal system is organized and how laws are made in the colonies. There is also a chapter on judges. In Part II of the book Dr. Elias discusses, often very fully, matters of substantive law. He has a particularly long chapter on criminal law which includes an account of the famous Kibi murder trial of the 1940s in the Gold Coast, as it was then called. In Part III Dr. Elias explores a number of subjects, viz., adjective law, codification, legal education and research. He enters an interesting *caveat* against too much codification of local law, especially land law and family law, on the grounds that such codification might defeat its own object, leading to "problems of statutory interpretation and *recherche* techniques such as only professional Western-trained lawyers and judges could handle" to the detriment of practice in the local courts. Dr. Elias rightly stresses the "crying need for the proper recording and publication of the reports of the more important decisions on local customary law in each colony". Obviously an absence of proper records makes the important new task of legal research more difficult.

This book has probably been written some little time before publication. For instance the work and report of the Denning Committee on legal education published in January 1961 is not mentioned. And in discussing the development of indigenous law and Islamic law in Northern Nigeria, there is no reference made to the Northern Nigerian Penal Code (introduced at the end of September 1960), which revolutionized, inter alia, the administration of homicide law in the Islamic parts of Northern Nigeria.

The author's views are well presented and his comments and ideas are always constructive and moderate. His tremendous knowledge and interest in his subject will do much, no doubt, to inspire others to follow the trail he has blazed in legal scholarship and research. It should be added that the author is now uniquely placed to mould and influence the course of legal development and action in the largest country in Africa.

A. A. DE C. HUNTER

RECENT PUBLICATIONS OF THE INTERNATIONAL COMMISSION OF JURISTS

Journal of the International Commission of Jurists

Volume IV, No. 1 (Summer 1962): The Rule of Law in the Contemporary Welfare State, by Fritz Gygi. The Lawyer in Communist China, by Shao-Chuan Leng. The Ombudsman in New Zealand, by A. G. Davis. Freedom of Movement: Right of Exit, by Rudolf Torovsky. The Application of the European Convention on Human Rights in Municipal Law, by Philippe Comte. The Power of Judiciary in East Germany, by Walther Rosenthal. Notes: Ombudsman for Britain? by A. A. de C. Hunter. Document: Inter-American Draft Convention on Human Rights. Book Reviews.

Bulletin of the International Commission of Jurists

Number 15 (April 1963): deals with various aspects of the Rule of Law and Legal development in Argentina, Bulgaria, Burma, Ceylon, France, Germany, Hungary, Nicaragua, Paraguay, Peru, Poland and Portugal.

Newsletter of the International Commission of Jurists

Number 14 (April 1963): **Resolution of Rio**; Conclusions, Proceedings and list of Participants, International Congress of Jurists on "Executive Action and the Rule of Law", Rio de Janeiro, Brazil; Organizational Notes.

SPECIAL STUDIES

The Rule of Law in a Free Society (July 1960): A report on the International Congress of Jurists held in New Delhi, 1959.

The African Conference on the Rule of Law (June 1961): Report on the first African Conference on the Rule of Law, held in Lagos, Nigeria, January 1961.

The Berlin Wall: A Defiance of Human Rights (March 1962): The Report consists of four parts: Voting with the Feet; Measures to Prevent Fleeing the Republic; the Constitutional Development of Greater Berlin and the Sealing off of East Berlin. For its material the Report draws heavily on sources from the German Democratic Republic and East Berlin: their Acts, Ordinances, Executive Instruments, published Court decisions and excerpts from the press.

South African Incident: The Ganyle Case (June 1962): This Report records another unhappy episode in the history of the arbitrary methods employed by the Government of South Africa. In publishing this report the Commission seeks to remind its readers of the need for unceasing vigilance in the preservation and assertion of Human Rights.

Cuba and the Rule of Law (November 1962): Full documentation on Constitutional Legislation and Criminal Law, as well as background information on important events in Cuban history, the Land, the Economy, and the People; Part Four includes testimonies by witnesses.

Spain and the Rule of Law (December 1962): Includes chapters on the ideological and historical foundations of the regime, the single party system, the national syndicalist community, Legislative power, powers of the Executive, the Judiciary and the Bar, defence of the regime, penal prosecution of political offences, together with eight appendices.

Signed contributions express the views of their authors, their publication by the Commission implies that they are thought to be of general interest by the Commission which, however, does not necessarily endorse them in their entirety. Unsigned contributions have, unless otherwise stated, been prepared by the staff of the Commission.

Contributions dealing with aspects of the Rule of Law in different countries will be considered for publication. They should be typed, submitted in duplicate and addressed to the Secretary-General at Geneva.

Published twice yearly in English, French, German
and Spanish and distributed by

INTERNATIONAL COMMISSION OF JURISTS
2, QUAI DU CHEVAL-BLANC
GENEVA, SWITZERLAND.

The *Journal* is distributed without charge to Supporting
Members of the Commission.

PRICE:

4.50 Sw. Fr.

\$ 1.00 U.S.

£ 0.7.6. U.K.