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To mark the
Fiftieth Anniversary of the
International Labour Organization

**THE INTERNATIONAL LABOUR ORGANISATION
ITS CONTRIBUTION TO THE RULE OF LAW
AND THE INTERNATIONAL PROTECTION
OF HUMAN RIGHTS**

by

NICOLAS VALTICOS*

In 1969 fifty years will have gone by since the International Labour Organization (I.L.O.) was set up to promote the cause of social justice. The need for international action in this field had been prompted, at the end of the first World War, by three main considerations: the conviction that 'universal and lasting peace can be established only if it is based upon social justice', the demands of 'justice and humanity', and the desire to ensure that international competition did not prevent or hamper the promotion of social progress at the national level.

The work of the I.L.O. should not be seen purely in terms of the part it has played over the past fifty years in improving the conditions of workers. In carrying out this task, the Organization has largely based its action on legal instruments and procedures which have led to the establishment of a body of law and to the more general protection of human rights at the international level. By their wide scope, the lead that they have always kept in contemporary ideas, the methods and the principles which have guided them, the standard-setting activities of the International Labour Organization have had an importance extending far beyond the field of labour and a substantial influence on the development of international action in general. On the eve of the Organization's fiftieth anniversary, it is appropriate to draw up a short balance-sheet of this aspect of the I.L.O.'s work.

The I.L.O.'s contribution to the Rule of Law and to the international protection of human rights may be considered in relation to the following fundamental aspects.

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The establishment of the I.L.O. had the effect of introducing a quasi-legislative function into the international community, particularly in the field of human rights.

Through its work, the I.L.O. has shown both the feasibility and the importance of laying down rights in binding international instruments, based on constitutional principles and amplified by case law.

By means of its standard-setting activities, the I.L.O. has built up a form of international common law covering large sectors of human rights and relevant to economic and social rights as well as to civil and political rights.

Finally, the machinery that the I.L.O. has developed for implementing these rights at the international level is still one of the most advanced of its kind.

A. THE CREATION OF A QUASI-LEGISLATIVE FUNCTION

The I.L.O.'s establishment and the functions and powers given to the Organization in themselves produced a profound change in conceptions of international law and international organization. Its establishment introduced an international legislative function which was considered to be 'the most advanced form of international legislation'.¹

The innovation related, in the first place, to the subject-matter of international regulation, since the I.L.O. was given the task of adopting international standards in a vast field which covered large sectors of human rights and which had hitherto been considered, with only rare exceptions, to fall within the domestic jurisdiction of States. Before 1919, with the exception of a few bilateral treaties and two conventions adopted at Berne in 1906, international treaties were essentially aimed at regulating the external relations of States and their specific interests. In setting up the I.L.O., the Versailles Treaty recognized for the first time the interest which the world community had in regulating in a quasi-legislative way matters which had up to then been considered exclusively domestic questions, in order to deal with problems which arise for the world from 'injustice, hardship and privation'.² The world thus became aware of its collective interest in facing up to these problems, and set up a body for the purpose of regulating them by means of standards. Questions of labour in the widest sense became

¹ G. Scelle, *Précis de droit des gens*, 2nd part, Paris 1934, p. 513.

² Preamble to Part XIII of the Treaty of Versailles.

the subject of international regulation, which represented 'the expression of international solidarity in the social field'.¹

The form and methods of this legislative activity also represented an important innovation in international law. The I.L.O. Constitution introduced the idea of international instruments being adopted by a given majority in an international conference, similar in many ways to national legislative assemblies; the difference between such instruments and traditional treaties signed by plenipotentiaries remained for a long time a cause of surprise to certain traditionalist chancelleries. As was stated² twenty years after its creation, the I.L.O. constituted man's first attempt to establish, within a constitutional framework, a systematic procedure of international legislation, applicable in varied and very important areas.

Under this new conception of collective international instruments, which were much more than simple multilateral treaties, one characteristic of particular importance to the development of international legislative activity was the abandonment of the old unanimity rule. The I.L.O. Constitution in 1919 introduced the rule that only a two-thirds majority of the delegates to the International Labour Conference would be required for the adoption of Conventions or Recommendations. Thus collective decisions by a qualified majority in an international body replaced the rule requiring the consent of all States Parties for the conclusion of diplomatic treaties. Though the technique of such collective conventions within an institutional framework has been widely used since, their introduction in 1919 was a remarkable innovation.

Another innovation which resulted from the establishment of the Organization, and which has lost none of its significance, was the fact that, for the first time, an official international body was not made up exclusively of State representatives. The representatives of the two main partners in a country's economic life, the employers and the workers, were given an equal voice in an international forum with the representatives of governments, and this in a two-fold sense: they had the right both to speak and to vote. Thus, not only were the representatives of the various interests involved directly associated with the decisions taken on questions that affected them, but in a more general way, public opinion itself could find official expression at the international level. International questions ceased to be exclusively for governments; the people themselves were thenceforth to have full access to them through representatives of wide sectors of the economy.

¹ G. Scelle, *Cours de Droit international public* (Doctorat), Faculty of Law of Paris, 1947-1948, p. 284.

² C. Wilfred Jenks, 'Les instruments internationaux à caractère collectif', *Recueil des Cours de l'Académie de droit international*, 1939, Tome III, p. 455.

Fifty years later, among all international organizations, this highly original characteristic remains unique to the I.L.O. Its effect has been two-fold. At the national level it has prepared the representatives of the workers for the growing responsibilities they must shoulder in modern societies and has contributed to democratic development and stability; following the I.L.O. example, the tripartite system was later adopted in many national bodies. At the international level it has given particular dynamism to the I.L.O.'s activity and greater weight to the Organization's decisions.

The Constitution of the I.L.O. involved a further important innovation, concerning the effect of the instruments adopted by the International Labour Conference. Though international labour Conventions are binding only on States which ratify them (in spite of the proposals of the French and Italian governments, in 1919, to give them general force of law), all member States of the I.L.O. must submit the Conventions and Recommendations adopted by the Conference to their competent national authorities — usually their legislature — within 12 or 18 months from adoption, irrespective of whether they have or have not voted in favour of the particular instrument. Parliaments are called upon to examine the action to be taken on the Conventions and Recommendations. This obligation under the I.L.O. Constitution, which is intended to ensure that I.L.O. instruments are duly taken into consideration by the authority capable of implementing them and, in a more general way, that they are brought before public opinion, has certainly contributed a great deal to stimulating the implementation and ratification of Conventions. The rule has since been adopted by other organizations,¹ and the suggestion has even been made of extending it in particular to the Conventions adopted under the auspices of the United Nations.² The rule acquires special force in the I.L.O. because it is embodied in the Constitution and because the Organization follows up and checks on its implementation through supervisory procedures, which will be discussed below.

One important consequence of the institutional framework and the procedure for the adoption of international labour Conventions — and especially of the participation of non-governmental elements in this adoption — is that in virtue of a well-established rule³ such

¹ See Roberto Ago, 'La Codification du droit international et les problèmes de sa réalisation', *Recueil d'études de droit international en hommage à Paul Guggenheim*, Geneva, 1968, p. 119 and, for UNESCO, H. Saba, 'L'activité quasi-législative des institutions spécialisées des Nations-Unies', *Recueil des Cours de l'Académie de droit international*, 1964, Tome I, pp. 650-651.

² Roberto Ago, *op. cit.*, pp. 120 *et seq.*

³ See the memorandum of the International Labour Office to the International Court of Justice (ICJ *Pleas*, 'Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide', 216-282, and ILO *Official Bulletin*, Vol. XXXIV, 1951, pp. 274-312.

Conventions cannot be ratified with reservations; on ratification, a State is bound to apply all the provisions of the Convention concerned. Thus, there is no danger of ratifications being accompanied by reservations rendering them ineffective¹ or of inequality in the obligations undertaken by the various States ratifying Conventions.²

B. THE ADOPTION OF INTERNATIONAL INSTRUMENTS AND THE FORMULATION OF INTERNATIONAL STANDARDS

In 1919, then, the I.L.O. Constitution had set up the framework for a quasi-legislative international function: the system had still to be made to work. During the intervening fifty years, the quasi-legislative function of the Organization has been exercised vigorously and intensively. There now is an imposing body of instruments creating international obligations in the field of labour, reinforced by certain of the Organization's constitutional principles, and amplified by the case-law established by its supervisory bodies.

1. International Conventions and Recommendations

(a) *Existing Conventions and Recommendations*

As provided for in the I.L.O. Constitution, it is in the Conventions and Recommendations that are to be found the essential standards established by the I.L.O. There is a difference in the legal nature of the two kinds of instruments. Recommendations are not capable of creating binding obligations for States to apply their provisions, but are intended as guidance to action at the national level. They carry some obligations, however, in the sense that national authorities must examine the action to be taken on them and must report to the Organization on the manner of their application. Conventions, on the other hand, are intended to bind States which ratify them and thereby undertake to apply their provisions.

In the fifty years from 1919 to 1968, the International Labour Conference has adopted 128 Conventions and 132 Recommendations.

¹ On the subject of the existence of such a danger for the U.N. Covenants on Human Rights, see C. Wilfred Jenks, 'The United Nations Covenants on Human Rights Come to Life', *Collection of studies of international law in tribute to Paul Guggenheim*, Geneva, p. 808.

² A distinction must of course be made between reservations, which cannot be accepted by the I.L.O., and certain cases where international labour Conventions expressly authorize States to make, under specific conditions, declarations indicating the obligations assumed in ratifying them.

The general policy of the Organization throughout its legislative activity has been the successive adoption (taking into account the degree of urgency and the ripeness of the questions) of distinct and precise instruments bearing on well-defined questions and capable of being ratified separately. It has preferred this to the adoption of general instruments covering a wide range of different rights, which would necessarily be less precise, would encounter greater difficulty in obtaining sufficiently wide agreement to ensure their adoption and (because of difficulties in regard to one or other of their provisions) would receive a smaller number of ratifications. It is therefore in dealing successively, and in separate instruments, with questions within its competence that the I.L.O. has progressively evolved a body of international labour standards.

(b) *Ratification of International Labour Conventions*

International labour Conventions have, up to date, been the subject of about 3,400 ratifications¹ and a further 1,200 declarations of application to non-self-governing territories. There has thus arisen a vast network of international obligations, which in itself bears witness to the success and vitality of this standard-setting procedure. There is, furthermore, a very clear tendency towards acceleration in the rate of ratifications, which is not solely due to the increased number of Conventions and of Member States of the Organization, and which has not been slowed down by the greater care of States in proceeding to ratification caused by the vigilance of the supervisory agencies. Whereas it took nearly thirty years to reach the figure of 1,000 ratifications, it required only twelve more years to attain two thousand and less than five more years to pass the three-thousand mark.

In this network of international obligations, the meshes may be tighter or looser, according to the individual case. In the first place, the number of ratifications varies considerably from country to country, owing to a variety of factors — constitutional, legal, technical, political, economic or social. Thus, 24 countries have ratified at least 40 Conventions each, 15 countries at least 50, and 8 countries more than 60. The average number of ratifications is 43 for the countries of Western Europe, 39 for those of Eastern Europe, 29 for the Americas, 23 for Africa, 20 for the Middle East, 15 for Asia and 36 for Australasia.

¹ This figure includes 655 ratifications representing confirmation by 44 newly-independent States of obligations that were previously assumed by the States responsible for their international relations. The practice followed in this matter by such a large number of States has made an important contribution, in cases of State succession, to maintaining international obligations in the field of human rights.

Similarly, some Conventions have obtained far more ratifications than others. Thirty-two Conventions have had at least 40 ratifications, 21 at least 50 ratifications, and 13 at least 60. In particular, the six Conventions which are considered to concern fundamental human rights most directly — those dealing with freedom of association, forced labour and discrimination — have had an average of 77 ratifications.¹

(c) *Present-day Significance of International Regulation*

Some may wonder, however, whether is it not taking too legal a point of view to base international action on the adoption of instruments creating international obligations rather than on more direct practical action, more particularly where instruments which do not create strict international obligations are involved. This objection might have some weight if there were not four essential factors to be taken into account.

In the first place, in addition to adopting standards, the Organization uses other means to attain its objectives, such as large-scale technical assistance, education and training.

In the second place, practical action cannot achieve solid results unless it is based on properly-defined and incontestable standards; and this is one of the many uses of the Conventions and Recommendations.²

In the third place, legislation is becoming more and more an essential instrument of social policy in all countries and is subject to constant modification in an ever-changing world. The international standards — which are themselves constantly being revised, as will be seen — are thus more than ever necessary as an influence for national legislatures.

In the fourth place, without under-estimating the influence that these international standards can have more generally in various States, they create binding international obligations for States which ratify the respective Conventions, and the creation of international

¹ Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) — 76 ratifications; Right to Organise and Collective Bargaining Convention, 1949 (No. 98) — 84 ratifications; Forced Labour Convention, 1930 (No. 29) — 100 ratifications; Abolition of Forced Labour Convention, 1957 (No. 105) — 82 ratifications; Equal Remuneration Convention, 1951 (No. 100) — 64 ratifications; Discrimination (Employment and Occupation) Convention, 1958 (No. 111) — 66 ratifications. The ratification figures relate to the end of October 1968.

² See C. Wilfred Jenks, 'The Function and Forms of International Labour Legislation', *Miscellany offered to Ernest Mahaim*, Paris, 1935, Vol. II, pp. 561-569.

obligations provides the most solid basis for vigorous international action to make these standards an effective reality.

Thus, both in themselves and as a basis for other activities of the Organization, the international standards laid down in the Conventions and Recommendations have lost none of their importance today.

The quasi-legislative standards contained in international labour Conventions and Recommendations are moreover supplemented in a number of ways by the principles formulated in the constitutional texts of the I.L.O.

2. Constitutional Principles

The Constitution of the I.L.O. is not, strictly speaking, a declaration of rights. Its essential aim was to create an Organization and machinery for the establishment of standards by Conventions and Recommendations and to define the mandate of the Organization and the objectives of its standard-setting activities. At the same time, however, the I.L.O. Constitution set forth certain essential principles, affirmed in its original text of 1919 and further developed after the second World War. These principles were — and still are — enunciated in the Preamble of the Constitution, which enumerates the areas in which the Organization is to take action. In 1919, they also took the form of nine ‘ general principles ’ annexed to Part XIII of the Treaty of Versailles. In 1944 a Declaration concerning the Aims and Purposes of the Organization was adopted by the International Labour Conference at Philadelphia, and later incorporated in the Constitution, reaffirming and amplifying the basic principles of the Organization. These constitutional principles have not only served to guide the action of the Organization. They have not had, as is often the case with such solemn declarations, solely a moral authority (which in itself should not be under-estimated). They have also produced legal effects in a number of fields, the belief having become progressively more prevalent that a Member State of the I.L.O. is bound, by the mere fact of its participation in the Organization, to respect certain fundamental principles provided for in general terms by the Constitution of the I.L.O., which it has accepted.

It is in this way that the principle that the ‘ freedom of expression and of association are essential to sustained progress ’ has been one of the bases of vigorous action in the field of trade union freedom. In the same way the principle that ‘ all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity ’ has been the basis of action by the Organization against discrimination and especially against *apartheid* in the field of labour.

3. The Case Law of I.L.O. Bodies

The provisions contained in I.L.O. Conventions and Recommendations and the principles set out in its Constitution have, over the years, been given more specific content, and have sometimes been amplified, by the case-law of the quasi-judicial bodies set up by the I.L.O. to promote and supervise the implementation of its standards. The Committee of Experts on the Application of Conventions and Recommendations has, since its creation in 1927, established a considerable body of case-law which, though it has not the binding character that Article 37 of the I.L.O. Constitution gives to advisory opinions of the International Court of Justice in matters of interpretation, has nevertheless acquired an incontestable authority.¹ This case-law has defined the scope of various standards, especially in respect of certain Conventions drafted in general terms, such as the Conventions on freedom of association and forced labour. Furthermore in the field of freedom of association, as will be seen below, the Committee on Freedom of Association, has, in the course of its examination of complaints, formulated a series of principles which have in several respects supplemented the standards contained in the relevant Conventions.²

C. THE CREATION OF AN INTERNATIONAL COMMON LAW

From as early as 1919, the I.L.O. opened the way for the creation of an international common law on human rights. In the words of René Cassin: 'The idea of an international common law on essential freedoms of the individual first found a conventional basis in Part XIII of the Treaty of Versailles, which is the Charter of the International Labour Organization'.³ Since then, the Conventions and Recommendations adopted through the years have progressively built up a coherent body of law constituting an international labour

¹ On this point, see C. Wilfred Jenks, 'The Corpus Juris of Social Justice', *Law, Freedom and Welfare*, London, 1963, p. 124.

² On this point, see C. Wilfred Jenks, *The International Protection of Trade Union Freedom*, London, 1957, pp. 235-459, N. Valticos, 'La Commission d'investigation et de conciliation en matière de liberté syndicale et le mécanisme de protection internationale des droits syndicaux', *Annuaire français de droit international*, 1967, p. 454.

³ René Cassin, 'L'homme, sujet de droit international, et la protection des droits de l'homme dans la société universelle', in *La technique et les principes du droit public. Etudes en honneur de Georges Scelle*, Paris 1950, Vol. I. p. 68.

code. This standard-setting activity has related to social and economic rights as well as to civil and political rights, being based on the principle of the close interdependence of these two broad categories of rights. In some cases the rights involved may be immediately enforceable, in others they are rather ' programmatic ' rights. This process of regulation has naturally raised the question as to the level at which standards of a universal nature should be set, and the past half-century has raised the problem too of their adaptation to the passage of time. The standards thus adopted have resulted in the creation of an international common law in the field of human rights. These various points require more detailed analysis.

1. International Regulation and the Interdependence of Social and Economic Rights, and Civil and Political Rights

The standard-setting activity of the I.L.O. has resulted in the first place in the recognition and in the international regulation of a great number of matters that fall within the category of social and economic rights. As has been pointed out,¹ the result has been that, unlike what has happened in most national legal systems, economic and social rights were recognized at the international level well before civil and political rights. Economic and social rights were internationally recognized as far back as 1919 by the I.L.O. Constitution and then by the Conventions and Recommendations adopted by the Organization. After the second World War, in 1944 — four years before the Universal Declaration of Human Rights — the principles and purposes of the I.L.O. were reaffirmed and developed by the Declaration of Philadelphia. Indeed, several of the fundamental principles of the Universal Declaration were to a large extent inspired by those of the I.L.O.

The standard-setting work which the I.L.O. has carried on over the last fifty years to regulate questions within its competence has resulted first of all, in the adoption of an impressive body of standards in the field of economic and social rights. It has also, however, led to the adoption of important standards in the field of civil and political rights and has emphasized the close interdependence which must exist between these two broad categories of rights for the concept of human rights to assume its real and full meaning.

The idea of social justice, which sums up the purposes of the Organization, has been promoted by the I.L.O. in order to emphasize

¹ C. Wilfred Jenks, ' Human Rights, Social Justice and Peace — The broader significance of the I.L.O. Experience ', in *Norwegian Nobel Institute Nobel Symposium 7, International Protection of Human Rights, Proceedings of the Seventh Nobel Symposium*, Oslo, September 1967, ed. Asbjørn Eide and August Schou, Stockholm, 1968, pp. 227 *et seq.*

that an improvement in working and living conditions and the struggle against 'injustice, hardship and privation' — in the words of the I.L.O. Constitution — are an essential part of human dignity. For millions of people suffering from hardship and privation, the enjoyment of civil and political rights is clearly far from sufficient if no measures are taken to improve their material condition. The I.L.O. has greatly contributed to the idea that human rights, originally confined to civil and political freedom (as in the first national declarations of rights of the eighteenth century), must also include what are now called economic and social rights. Since 1919, a large number of I.L.O. Conventions and Recommendations have laid down specific standards concerning working and living conditions, such as the limitation of working hours, weekly rest, paid holidays, the employment of women and children, social security, safe and healthy working conditions, wages, the development of human resources, etc. — all areas in which general provisions were later included in the Universal Declaration of 1948 and the 1966 Covenant on Economic, Social and Cultural Rights.

Conversely, merely to improve physical conditions, essential as this may be, is far from being all that is needed to improve man's lot. The I.L.O. has given equal emphasis to certain basic freedoms without which human dignity would likewise have no meaning. By affirming that 'labour is not a commodity', that 'freedom of expression and of association are essential to sustained progress' and that all human beings 'have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity', by adopting Conventions to protect freedom of association and to forbid forced labour and discrimination in employment,¹ the I.L.O. has stressed the importance of freedom and equality and of the need for a simultaneous fight against want and against fear.

This interdependence of economic and social rights and civil and political rights has been apparent not only in relation to particular civil rights, such as freedom of association for trade union purposes, which it is the special task of the I.L.O. to protect. It has also become evident in relation to civil rights in general, on whose observance the effective enjoyment of rights which are of direct importance to the I.L.O. depend. The Committee of Experts on the Application of Conventions and Recommendations has pointed out that practice in the field of freedom of association 'necessarily reflects the more general background of the civil and political liberties enjoyed by the inhabitants of the country', and it has underlined in this connection 'the importance, in all countries, of maintaining the "rule of law", which

¹ See C. Wilfred Jenks, *Human Rights and International Labour Standards*, London and New York, 1960.

alone can ensure respect for fundamental human rights ' and which ' is essential, irrespective of the nature of the political, economic and social system. ' ¹

The Committee on Freedom of Association, in many cases where it has examined complaints of infringement of trade union rights, has insisted on the need for States to observe certain general human rights principles, since otherwise the application of the standards contained in the Conventions on freedom of association would be impaired or even become impossible. It has therefore formulated a certain number of rules which are relevant to the wider field of protection of human rights such as the right of assembly, freedom of expression through the press, freedom of speech and of movement, the right of any person arrested to a prompt and fair trial by an impartial and independent tribunal and the non-retroactivity of penalties. These wider civil rights do not in themselves fall within the area of responsibility of the I.L.O., but their enjoyment is a precondition for the achievement of its objectives. For this reason, the I.L.O. has undertaken to cooperate fully with the United Nations in the field of human rights. It is in this spirit too that it is now contemplated to place the question of freedom of association and civil liberties on the agenda of a forthcoming session of the International Labour Conference.

In the same way, the Abolition of Forced Labour Convention 1957 (No. 105), which prohibits forced labour, *inter alia*: ' as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system ', though not intended to guarantee freedom of thought or expression as such, still raises many aspects of these more general civil rights.

2. Immediately Enforceable Rights and Programmatic Rights

The question of economic and social rights as human rights has already been examined in a recent issue of this *Journal*.² Briefly, it may be recalled that unlike most civil rights, many of the so-called economic and social rights do not have a content that can be applied automatically; they often merely state in general terms the objectives to

¹ International Labour Conference, 43rd session, Report III, Part IV, *Report of the Committee of Experts on the application of Conventions and Recommendations*, Part Three, paragraphs 155-156, page 128.

² See C. Wilfred Jenks, ' Work, Leisure and Social Security as Human Rights in the World Community ', *Journal of the International Commission of Jurists*, June 1968, Vol. IX, No. 1, pp. 49-58.

be attained.¹ Frequently therefore, they constitute programmes of action for governments rather than rights which individuals could directly seek to have enforced. Their implementation may thus depend on national measures or procedures giving content and definition to the international standard; but this in no way derogates from their character of rights. What have been called 'rights over society' are as much rights as individual 'rights to freedom'.² However, this necessarily affects the exact formulation of such rights at the international level. For this reason, certain of the rights recognized in the international labour Conventions are formulated in terms which presuppose that they can be applied immediately upon acceptance of the standard by a particular country — without prejudice to the different question as to the legal method by which a standard is incorporated in municipal law (for example, in the Conventions relating to the minimum age for admission to employment, maternity leave, freedom of association and the prohibition of forced labour). Other rights require detailed measures to be taken at the national level to bring about their — at times progressive — application through a systematic programme of action and methods which may vary, being either legislative, administrative or contractual in nature (for instance, in Conventions relating to social security, equal remuneration, equal opportunity and treatment, employment policy or social policy). Nevertheless, this difference does not prevent the same supervision procedures from being used by the I.L.O. for these two categories of rights, whose border-line is in any case not always very clear.³

¹ See also, in relation to the International Covenants, Egon Schwelb, 'Some Aspects of the International Covenants on Human Rights of December 1966' in *International Protection of Human Rights. Proceedings of the Seventh Nobel Symposium*, Oslo, 1967, published under the direction of Asbjörn Eide and August Schou Stockholm, 1968, pp. 107-110.

² See René Cassin, 'Twenty Years after the Universal Declaration', *Journal of the International Commission of Jurists*, December 1967, Vol. VIII, No. 2, at p. 11.

³ On the other hand, in the case of the International Covenants on Human Rights, different measures of implementation are laid down in the Covenant on Civil and Political Rights, and that on Economic, Social and Cultural Rights. The explanation given was that in the former case, States would have specific and immediately applicable obligations whereas, in the latter, their obligation would be to ensure the progressive realization of the rights in question. This distinction is perhaps unfortunate, for the difference of subject-matter of a right is not a sufficient reason for limiting supervision over its implementation. Indeed, in the case of rights to be realized progressively, it is particularly important to be able to check on the progress actually made over the years. Moreover, international supervision is all the more necessary in regard to 'programmatic rights' since by definition, they cannot be the subject of enforcement proceedings by individuals at the national level.

3. The Level of Universal Standards

Whatever the rights which are thus internationally recognized, the question arises in each case as to the level at which it is appropriate to set an international standard intended to be applicable to States at very different stages of development and with considerable variations in economic, social and political conditions.

In the case of rights that are to be universally valid, there might appear to be a dilemma: either to adopt a standard which could be accepted by the greatest number of countries — but with the danger that, in seeking a common denominator, the standards would be too low to stimulate real general progress — or at the other extreme, to fix so high a level that the Conventions would be beyond the capabilities of most of the countries concerned.

It should be borne in mind that, unlike certain attempts at national or international codification, the object of international labour Conventions is not simply to establish standards which at the moment of their adoption correspond to most existing national provisions and to bring about their harmonization for purposes of convenience. Conventions represent not a static method of codification, but dynamic instruments designed to ensure harmonized progress. It has been emphasized that ' a standard which represents no substantial advance upon average existing practice is also of very limited utility '.¹ Moreover, in the case of certain essential principles of freedom and equality, the main preoccupation at the time of adopting the Conventions which deal with them is above all to safeguard the rights in question rather than to establish standards which reflect the level attained in most countries. At the same time, international labour Conventions are not a code for Utopia: they belong to a particular place and time. If a standard is an obviously impracticable one or can be attained only by a very small number of countries, it would — as has also been pointed out — be of extremely limited effect. Whenever a standard is formulated, it is necessary — even if often difficult — to strike a balance between ' the ideal and average existing practice '. For this reason, a Convention is only drafted after an analysis of the legislation and practice in each country, consultation with governments and discussions in the tripartite committees of the Conference. The developed techniques employed by the I.L.O. in preparing Conventions and Recommendations are not the least of the services which it has rendered to the establishment of international instruments.

Various formulae have been used to achieve the flexibility necessary for universal instruments which are to apply to widely differing

¹ I.L.O. International Labour Conference, 29th Session, Montreal, 1946, *Constitutional questions* (Report II (I)). p. 63.

States, yet without loss to their efficacy. For example, an effort is made to deal only with essential points in Conventions; some Conventions provide that they are to be applied in each country by methods appropriate to national conditions and practice; others give States a choice between various parts or provide for the acceptance, in addition to certain compulsory provisions, of optional parts or annexes, or allow certain exceptions. In this area, no single formula is a panacea. In each case, the right balance is a matter of judgement and negotiation, the object being to formulate standards which can be widely accepted and to stimulate further progress.¹ The number of ratifications of Conventions by countries with widely differing economic, social or political conditions is evidence of the effectiveness of the formulae used, while the progress resulting from these ratifications, even in developed countries,² shows that the standards have not been unduly diluted as a result of such formulae.

It has sometimes been wondered whether, in view of differing economic and social conditions in the various regions of the world, regulation on a regional basis would not solve some of the problems arising from the adoption of universal standards. One should not overlook the supplementary and sometimes *avant-garde* measures that can be taken on the regional level as in the case of the European Convention on Human Rights. The I.L.O. has nevertheless chosen the more difficult road of universal regulation, essentially because the existence of regional standards different from general international standards would tend to accentuate rather than attenuate the existing differences in conditions in the various regions of the world and would inevitably give rise to divergences between the general and regional standards and tend to discredit both.³ The danger would be an almost complete shutting off of the standards applicable in the various regions of the world, thus depriving the countries of each region of the element of comparison provided by universal standards; for, even if they establish objectives which may appear distant for some countries in spite of all flexibility devices used, universal standards have, by this very fact, a certain power of stimulation. As was stated, in striking terms, at a regional meeting of the I.L.O. in Africa in 1967, it is impossible, in the case of such universal values as freedom and equality, to conceive of 'sub-standards for sub-humans'.

¹ International Labour Conference, 47th Session, 1963, Report of the Director General, *Programme and Structure of the I.L.O.* (Report 1, Part 1), pp. 168-171.

² See the studies on the influence of the Conventions in Switzerland, Italy, Norway, United Kingdom and Belgium, in the *International Labour Review*, June 1958, June 1961, September 1964, May 1968 and November 1968.

³ International Labour Conference, 1963, Report cited above pp. 188-189.

4. Rights and Time

In addition to the problem of space, there is the problem of time. At the quickening pace of history, fifty years is for organizations, as it is for men, an age of maturity, but not without the dangers of ageing. Over the half-century that the international labour Conventions have been adopted, year by year, time has shown up the imperfections of some and put the mark of age on others. Their adaptation and renovation have often appeared necessary. Only some ten years after the creation of the Organization, the general question of the revision of international labour Conventions was examined; there was at first controversy as to the effects that the entry into force of a revised Convention should have on the original Convention and on the obligations assumed under it.¹ The formula arrived at from 1929 onwards was the insertion in Conventions of a final article under which the adoption of a revised Convention on the same subject would not cause the original Convention to be abrogated nor invalidate the obligations assumed under it; the earlier Convention, however, would not be open to further ratifications — unless the International Labour Conference decided otherwise — after the entry into force of the later instrument; and the ratification by a state of the new Convention would *ipso jure* involve the denunciation of the earlier one.

Under this procedure, twenty Conventions have been revised; the aim of the revision has been either to render the terms of original Conventions more flexible to take into account difficulties encountered, or to adapt them to present-day circumstances, or again, to raise the previous standard and provide for increased protection. In addition, four other Conventions, though not technically revisions, have supplemented or adapted standards drafted under different circumstances. Thus about one-fifth of all the Conventions adopted are the result of the adaptation of older conventions, and this work of revision is being systematically pursued. International standards cannot be a rigid and immutable code but must always remain alive and in continual development, open to changing conceptions and methods in human societies, with the proviso, however, that the modifications made correspond effectively to real needs and do not prejudice fundamental objectives. Here also, the legal methods used to revise international labour Conventions may well have a more general significance for techniques applied to multilateral treaties and the development of procedures through which the international order can, through law, be adapted to changing circumstances.

¹ See, in this connection, C. Wilfred Jenks, 'The Revision of International Labour Conventions', *British Year Book of International Law*, 1933, pp. 43-64.

5. An International Common Law in the field of Human Rights

How far then have the body of standards contained in international labour Conventions and Recommendations contributed to the creation of an international common law in wide areas of human rights?

One first point is immediately obvious. The great number of ratifications that some of the Conventions have received, and especially those relating to fundamental rights, have given them considerable weight in positive law. Since the two Conventions on freedom of association have had an average of 80 ratifications and the two Conventions on forced labour an average of over 90 ratifications, the standards contained in them, apart from entailing strict international obligations for ratifying States, have also acquired a more general authority. The action of the International Labour Organisation in the field of certain rights contained in these Conventions, the application of certain constitutional principles and the case-law established by its quasi-judicial bodies have had the effect, even with respect to States not bound by the Conventions, of increasingly giving the essential standards on which they are based the force of rules of custom or general principles of law.¹ For this reason, Paul Ramadier, who as former Prime Minister of France certainly had a sense of reality, could state that the action of the Committee on Freedom of Association (over which he presided for ten years) had 'succeeded in laying down the principle that freedom of association was a kind of customary rule in common law, outside or above the scope of any Convention'.²

It can therefore be said that by the adoption of Conventions and Recommendations and by its supervision procedures, to be discussed below, the I.L.O. has contributed to the creation or has accelerated the creation of rules of custom in this field, in addition to bringing about strict international obligations.

If this perspective should seem to some to be too theoretical or exaggerated, the position can be put more simply: 128 Conventions and 132 Recommendations contain standards which cover large sectors of human rights; in relation to the standards contained in the Conventions, States are bound by some 4,500 international obligations; for those States which are not so bound, the fact that these standards have been adopted by a Conference which brings together representatives of governments, employers and workers from all over the world

¹ On this subject, see N. Politis: 'Les transformations du droit international', *Revue de droit international*, 1927, No. 1. p. 64, — an article written over forty years ago.

² *I.L.O. Minutes of the 121st Session of the Governing Body*, Sitting of 5th March 1953, p. 39.

gives them a special authority and is frequently a source of inspiration and reference for these governments in developing social policy and legislation. This is especially true for new States, which can thus benefit from the experience of other countries crystallized in the international standards; but it is valid also for older States which seek to rejuvenate outmoded national rules and structures. The potential influence of the international standards, even in the absence of their legal acceptance by a particular State, is enhanced by the fact that they are taken into account in the technical assistance which the International Labour Office is constantly providing to many States, and also by the fact that highly developed procedures have been drawn up by the I.L.O. to promote their application. This influence is effectively shown by the reports sent every year by governments on unratified Conventions and on Recommendations, as well as by individual studies made on this subject concerning a number of countries.¹

In addition to constituting positive international law for those countries which have accepted their obligations, international labour standards are thus for the rest of the international community, a kind of natural law or *ius gentium*, whose profound influence, though necessarily still unequal and incomplete, goes beyond the thousands of ratifications received. They are without doubt an important element in the evolution of an international common law in the field of human rights.

D. THE ESTABLISHMENT OF PROCEDURES FOR PROMOTION AND SUPERVISION OF THE APPLICATION OF INTERNATIONAL STANDARDS

However important may be the adoption of international standards and the ratification of the Conventions which contain them, these are only the first steps in an international standard-setting activity. The rights proclaimed, and in many cases legally accepted, might remain without effect if there were no machinery to follow up their application. The next step, and the most difficult one in the present state of international relations, is therefore to set up effective supervisory procedures. In this matter too, the I.L.O. has been in the vanguard and its procedures have always been considered as the most

¹ Such studies have been made on about a dozen countries with widely varying conditions; they have been published in the *International Law Review* between 1955 and 1968. The series of studies is continuing.

advanced at the international level¹ (with the single exception, from the point of view of purely judicial procedures, of the European Human Rights Convention of 1950).

These implementation procedures have two objectives. They seek to ensure that the obligations undertaken by States which have ratified Conventions are carried out in a satisfactory way. At the same time, they aim more generally at promoting the application of international standards independently of the obligations that states have expressly undertaken.

1. Supervision of the Application of Ratified Conventions

Since the end of the first World War and even more so since the second, the problem of the international supervision of international agreements has taken on considerable importance for international relations and indeed for the future of humanity itself, because of the growing interdependence of countries, the breath-taking pace of technological progress and the conclusion — often within the institutional framework of international organizations — of agreements on questions that arise on a worldwide scale.

The organization of any kind of international supervision, however, meets with two kinds of difficulty: in the first place, on the political level, there is — in spite of the continuing erosion of the concept — the doctrine of national sovereignty² together with political hostility

¹ See, *inter alia* F. M. van Asbeck, 'Quelques aspects du contrôle international non judiciaire de l'application par les gouvernements de conventions internationales', *Nederlands Tijdschrift voor internationaal Recht*, in honour of Professor François, Leyden, 1959, pp. 27-41; H. Golson, 'Implementation of International Protection of Human Rights' *Collection of Lectures of the Academy of International Law*, 1963-III pp. 33-48; P. Juvigny, 'La protection juridique des droits de l'Homme sur le plan international', *International Review of Social Sciences*, vol. XVIII, No 1, 1966, p. 65; D. W. Bowett, *The Law of International Institutions*, London 1964, pp. 128 and 130; H. Saba, 'L'activité quasi-législative des institutions spécialisées des Nations Unies', *Recueil des Cours de l'Académie de droit international*, 1964, tome 1, pp. 636-642; *The United Nations and Human Rights* (18th Report of the Commission to Study the Organization of Peace), New York, August 1967, p. 36. See also F. Capotorti, 'The International Measures of Implementation included in the Covenants on Human Rights', in *International Protection of Human Rights*, Proceedings of the Seventh Nobel Symposium, Oslo, 1967, published under the direction of Asbjörn Eide and August Schou, Stockholm, 1968, pp. 131-148 *passim*.

² See N. Politis, 'Les transformations du droit international', *Revue de Droit international*, 1927, No. 1, pp. 59-61; Jean Morellet, 'Le principe de la souveraineté de l'Etat et son déclin en droit international', *Mahaim Miscellany*, Paris 1935, Vol. II, pp. 200-206, and more recently, C. Wilfred Jenks, 'Sovereignty today', in *Law in the World Community*, London, 1967, pp. 31-41 and, for the role of specialized agencies in this process, S. Korowicz, 'Some Present Aspects of Sovereignty in International Law', *Collection of Lectures of the Academy of International Law*, 1961-1, p. 105.

between States and groups of States, and secondly, on the legal and practical level, there are the difficulties of organizing such supervision. The problem, which has sometimes given the impression of trying to square the circle, is that of organizing a method of supervision which is both effective and acceptable to States.

In this area, the I.L.O. has opened up new paths and its system has, to some extent, inspired several other organizations.

Apart from the fact that supervision of the application of ratified conventions is of importance in a more general way to prevent the idea of international obligations itself from being discredited, the I.L.O. has given particular attention to the question, for two reasons: its objective has always been that the standards it adopts should lead to a real improvement in conditions for workers; and the Conventions were considered right from the start as being *inter alia* a kind of code of fair competition between States.

The supervision of international labour Conventions has always been closely linked with the very principle of international labour legislation. When a motion was proposed in the German *Reichstag* in 1885 for international labour legislation, Bismarck opposed it primarily on the grounds that such legislation could not be supervised to the same extent in all countries. When, however, the International Labour Organization was set up in 1919, its Constitution contained, on the basis of a British draft, clear provisions for supervising the application of the Conventions. During the following fifty years, this system of supervision was developed in some respects and simplified in others in the light of experience and needs.

There are a variety of procedures under the system. Those of general application — for, as will be seen, there is also a special procedure in the field of freedom of association — are based, on the one hand, on the examination of reports submitted at regular intervals by governments and on the other, on the submission of complaints.

(a) *Examination of Periodic Reports from Governments*

First, member States of the I.L.O. must, under its Constitution, supply annual reports on the application of ratified Conventions, drawn up in accordance with a specific questionnaire. Detailed reports are now called for only every two years, except in cases of important discrepancies. Copies of these reports must be sent to national employers' and workers' organizations, which may submit comments on them.

Of course, the submission by governments of reports does not in itself constitute a real system of supervision. It is only when the reports

are examined and meticulously and objectively compared with the obligations undertaken that it becomes possible to speak of supervision.

The reports are first examined by a Committee of independent experts, whose members are persons of the highest standing appointed in their personal capacity by the Governing Body of the I.L.O. on the proposal of the Director General. This Committee has emphasized that it has always considered that its task is to examine 'in a spirit of complete independence and entire objectivity' whether the position in each state is in conformity with the obligations that it has undertaken, and that its members 'have continually borne in mind the fact that they are appointed in their personal capacity and that they must endeavour to accomplish their task in complete independence as regards all member states'. The Committee of Experts points out any discrepancies which have become apparent to it in the application by each State of the Conventions which it has ratified and in the fulfilment of the obligation to submit Conventions and Recommendations to the competent authorities.

On the basis of the Experts' conclusions, the discrepancies which have been noted are then discussed with delegates of the governments concerned in a committee comprising representatives of governments and of national employers' and workers' organizations which is set up each year by the International Labour Conference; the object of these discussions is to bring about the elimination of the discrepancies. The spirit in which this committee carries out its task was summed up in June 1968 by its Workers' vice-chairman, who had held this position for 17 years, when he underlined the importance of objectivity, understanding, impartiality and honest discussion.¹

Each year, these two Committees re-examine cases that have not yet been settled as a result of their earlier comments; this continuity is an essential element in the efficacy of the system.

While this procedure may not achieve the suppression of all discrepancies the results as a whole have been clearly positive. During the last five years alone, discrepancies have been eliminated in nearly 400 cases. A recent study covering several thousand cases examined by the Committee of Experts² in thirty years has shown that in almost three quarters of the cases no discrepancies appeared to exist at the time of ratification. In the other cases, where discrepancies had been found, the measures necessary for their total or partial elimination had been taken as a result of comments by the supervisory bodies in

¹ See International Labour Conference, 52nd session, 1968, *Provisional Record* No. 27, Report of the Committee on the Application of Conventions and Recommendations, p. XI, paragraph 64.

² E. A. Landy, *The Effectiveness of International Supervision — Thirty Years of I.L.O. Experience*, London and New York, 1966.

over 60 per cent of the cases. The effectiveness of the procedure must also be judged from the point of view of the preventive role that the mere existence of vigilant supervisory machinery plays; and there are many indications that it has often had this effect.

(b) *Examination of Complaints*

In addition to the system of the examination of reports, the I.L.O. constitution provides for another set of procedures based on the submission of complaints. These may take the form of representations emanating from organizations of employers or workers or of complaints in the strict sense, made by one State against another, alleging non-observance of a Convention that both have ratified. For a complaint to be made, it is not necessary that the complainant State or its nationals should have suffered any direct injury, and it has been pointed out that in such cases the rule in classical international law that a claimant must have suffered a direct injury has been abandoned in favour of the general interest.¹ The Governing Body can also set this procedure in motion on its own initiative or upon a complaint from a delegate to the Conference. These procedures are clearly contentious in character. The Commissions of Inquiry which may be appointed to investigate complaints are called upon to decide, as a question of law, whether a Convention is being observed; their decisions are binding unless one of the parties appeals to the International Court of Justice.

These various procedures have not been used often, but, they have been applied in recent years in several important cases. Thus, in 1961, two complaints were made by one State against another State concerning the observance of Conventions dealing with forced labour. In conformity with the I.L.O. Constitution, these complaints were referred to Commissions of Inquiry, consisting of three persons of high standing appointed in their personal capacity by the Governing Body on the proposal of the Director General. The quasi-judicial nature of their procedure and the independence of their members were emphasized by the Governing Body as well as by the Commissions themselves. Their members were called upon to make a solemn oath similar to that sworn by the judges at the International Court of Justice. The Commissions heard the parties, as well as witnesses, the appearance of some of whom they had themselves requested, and in

¹ See N. Politis, *La justice internationale*, Paris, 1924, p. 252, and recently the opinion of Judge Jessup in the South West Africa Case (International Court of Justice, *Reports* 1962, judgment of 21 December 1962, pp. 428 and 431). See also in the second phase of the case, the opinions of Judge Jessup, ICJ Reports, 1966, pp. 374 & 377, of Judge Tanaka (p. 252) and of Vice-president Wellington Koo (p. 226).

one case the Commission made on-the-spot inquiries (in Angola and Mozambique) to gain first-hand impressions of the situation. The recommendations contained in the reports of these two Commissions were accepted by all parties and were followed by various measures taken by the governments concerned. The regular supervisory body — the Committee of Experts on the Application of Conventions and Recommendations — was then entrusted with the task of following up the action taken to implement the recommendations of the Commissions of Inquiry. More recently, a complaint concerning the application of the Convention on Freedom of Association was submitted by delegates to the International Labour Conference and was given preliminary consideration by the Governing Body in November 1968.

2. Promotion of the Application of International Standards

Side by side with the procedures already mentioned, there are two kinds of procedures which are intended in a more general way to promote the application of I.L.O. standards, independently of any specific obligations which may have been accepted in respect of them. On the one hand, there is the general procedure relating to unratified Conventions and to Recommendations; on the other, there exists a special procedure in the field of freedom of association.

(a) Unratified Conventions and Recommendations

Under certain amendments made to the I.L.O. Constitution in 1946, which came into force in 1948, the member States of the Organization, must, if the Governing Body so requests, supply reports on unratified Conventions, and on Recommendations, stating the position of their law and practice in the relevant field, showing the extent to which effect has been given, or is proposed to be given, to these instruments and stating the difficulties which prevent or delay ratification or application. On this basis, the Governing Body chooses each year a certain number of instruments of current interest and requests States to provide the above-mentioned information. Since 1948, such reports have been requested on about a hundred Conventions and Recommendations; for certain basic instruments concerning human rights, they have been requested on three occasions. This procedure has drawn the attention of governments to Conventions which they had not ratified and has led to ratification in a number of cases.

(b) The Special Procedure in the Field of Freedom of Association

The right freely to form, join and participate in the activities of trade unions represents a particular aspect of freedom of association. Like the latter, it is considered a fundamental human right. For this

reason it has been made the subject of special machinery, established by the I.L.O. in 1950 in agreement with the United Nations.¹ This special machinery is additional to the general procedures, which are, of course also applicable to the two Conventions on freedom of association adopted by the I.L.O. in 1948 and 1949.

This machinery is based on the examination of complaints which may be submitted either by States or by employers' or workers' organizations. The procedure is applicable even to States which have not ratified the Conventions on freedom of association. For them, it is based essentially on the obligation arising from their membership of the Organization and the fact that the I.L.O. Constitution proclaims the principle of freedom of association. It is also based on the fact that it was considered that the Organization might promote the achievement of its objectives through fact-finding and conciliation organs.

The special machinery which has thus been built up comprises two bodies, the Committee on Freedom of Association and the Fact-Finding and Conciliation Commission on Freedom of Association.

The Committee on Freedom of Association

The Committee on Freedom of Association is appointed by the I.L.O. Governing Body and consists of nine members: three from governments, three employers and three workers. Its procedure is governed by various rules to ensure its impartiality.

Originally set up to make a preliminary examination of complaints received, the Committee has gradually come to examine the merits of complaints in cases where it appears that reference of the matter to the Fact-Finding and Conciliation Commission would meet with difficulties.

On the basis of proposals contained in the reports of the Committee, the Governing Body has in many cases, made recommendations to

¹ See C. Wilfred Jenks, *The International Protection of Trade Union Freedom* London 1957; also, 'The International Protection of Freedom of Association for Trade Union Purposes', *Collection of Lectures of the Academy of International Law*, 1955, pp. 7-115 and, more recently, 'The International Protection of Trade Union Rights' in *The International Protection of Human Rights*, published under the direction of Evan Luard, London 1967, pp. 210-247; N. Valticos, 'La Commission d'investigation et de conciliation en matière de liberté syndicale et le mécanisme de protection internationale des droits syndicaux', *Annuaire français de droit international*, 1967, pp. 445-468; G. von Potobsky, 'Normas internacionales, libertad sindical y derecho colectivo del trabajo', in M. Develai *Tratado de derecho del trabajo*, Vol. V, Buenos-Aires, 1966, pp. 597-699; A. Cassere, 'Il controllo internazionale sul rispetto della libertà sindacale nel quadro delle attuali tendenze in materia di protezione internazionale dei diritti del uomo', *Comunicazioni e Studi*, Milan, 1966, pp. 293-418.

the governments involved. In the examination of some 550 cases which have come before it, the Committee on Freedom of Association has been guided by the Conventions on freedom of association. It has however also built up a considerable body of case-law which, as mentioned earlier, has amplified and supplemented the standards laid down in the Conventions

In an appreciable number of cases the recommendations of the Committee have been acted upon; laws have been repealed or amended, and factual situations have been remedied (imprisoned trade union leaders have been released or measures of clemency taken). In other cases, however, the recommendations of the Committee have had no, or at least no immediate, effect. Nevertheless, by introducing in this area a general obligation on States to account for their actions, even if they have not ratified the particular Conventions, this procedure has had a wider effect and has indirectly influenced the conduct of governments.

The Fact-Finding and Conciliation Commission

Under the machinery set up in 1950, the body responsible in the last instance for examining complaints of violation of trade union rights was to be a Fact-Finding and Conciliation Commission, consisting of independent experts appointed by the Governing Body of the I.L.O. on the proposal of the Director General. The Economic and Social Council of the United Nations accepted the services of the I.L.O. and of the Commission in question on behalf of the United Nations, and the latter Organization sends to the I.L.O. any complaints received against States that are members of both the U.N. and the I.L.O. However, except for those States which have ratified the Conventions on freedom of Association — which now number about 80— a case cannot be referred to the Commission without the consent of the government concerned. The first governments that were asked refused to give their consent and the future of the procedure before the Commission appeared at first to be in jeopardy. The Commission began to operate however, in 1964, when the government of Japan gave its consent to having an important case concerning the trade union rights of public employees in Japan referred to the Commission.

The procedure followed was similar to that of Commissions of Inquiry appointed under the I.L.O. Constitution. The Commission was made up of three independent members, to whom the I.L.O. Director General stated, *inter alia*, at their inauguration: 'The task entrusted to you... is that of ascertaining the facts without fear or favour. You are responsible to your own conscience alone'. The Commission received information, heard the parties, as well as witnesses, and then went to Japan where it held discussions in private

with representatives of the complainant organizations and with representatives and members of the government. It set out its conclusions and a series of recommendations in its final report. The Japanese government representative, as well as that of the General Council of Trade Unions of Japan (the complainant), accepted the report of the Commission as a basis for the progressive solution of outstanding questions; this case represented an important step in the history of industrial relations in Japan.

* * *

The importance of this machinery is two-fold: it has enabled inquiries to be undertaken and recommendations to be made to promote the application of international standards on freedom of association independently of the obligations that States have assumed in respect of the relevant Conventions; it has also enabled the bodies which have been set up — in particular the Committee on Freedom of Association — to establish a case-law supplementing the more general standards contained in the Conventions.

* * *

Though the special machinery for the protection of freedom of association was a bold innovation when it was introduced in 1950, it did not exhaust the possibilities of progressively adapting procedures to needs as they arose, and a new formula has recently been added. This is the creation of study groups of independent experts who, at the request of the government concerned, are to study the labour and trade union situation in a particular country. After discussions in 1967 and 1968, this principle has been accepted by the I.L.O. Governing Body and the International Labour Conference, in the case of Spain, and experience will show the growth potential of this formula.

3. Supplementary Means of Action

The various implementation procedures which have been described above are reinforced by other means of action available to the Organization.

In the first place, special studies and surveys may be made in certain areas when there is a particular need. For instance, in 1951 an *Ad Hoc* Committee on Forced Labour was set up by the I.L.O. jointly with the United Nations, whose work (carried on until 1959 by an I.L.O. Committee on Forced Labour) had considerable repercussions. Similarly, in the field of freedom of association, a committee was set up in 1955 to examine the question of the independence of employers' and workers' organizations in the member States of the

Organization; like those mentioned, it was composed of independent persons, under the chairmanship of Lord McNair, former President of the International Court of Justice.

In the second place, the I.L.O. resorts to a whole range of educational measures to promote the implementation of its standards.

Finally, technical cooperation, of which there has been a great development, can often help governments to reach the level of the international standards and close coordination has thus been established between the standard-setting and the operational activities of the Organization.

* * *

4. The main Characteristics of the Implementation Procedures

Following the foregoing description, it is possible to distinguish the main characteristics of the procedures for implementing international labour standards.

They are first of all dynamic procedures, which, though solidly based on the I.L.O. Constitution, are progressively adapted to new circumstances and needs.

Secondly, they are not only concerned with the fulfilling of obligations, but also aim in a more general way to promote the application of the international standards even by those States which have not formally undertaken to observe them. They have thus introduced a general responsibility on States to account for their actions in such important areas as freedom of association.

In the third place, these procedures are characterized by their diversity. Some are based on the examination of periodic reports from governments, others on the submission of complaints. In certain cases, they lead to binding decisions of a judicial character; in others they aim at conciliation. Legal and moral force are combined, so that the diversity and the complementary nature of the procedures make it possible to fill the gaps that arise from the exclusive use of one particular method, as is the case with certain other systems of supervision.

Fourthly, though these procedures are not of a purely judicial nature, they have been made subject to quasi-judicial guarantees to ensure observance of the rules of due process of law and to achieve an objective and impartial appreciation of the questions examined. One cannot over-emphasize how important guarantees of objectivity and impartiality are for the whole future of international supervision, which depends above all on the degree of confidence it can evoke among governments. The basic principle, which has been firmly adhered to by the I.L.O., is to entrust the technical and legal evaluation of situations to bodies composed of independent experts and not to

government representatives. Impartial examination by independent persons is the only means of equanimity, clarity and objectivity in international relations. The growing, though still incomplete, recognition of this principle in other systems of international supervision perhaps represents one of the greatest services that the I.L.O. has rendered to international organization.

Fifthly, participation in the supervision, at appropriate stages, of non-governmental organizations of employers and workers has been both a source of information and an incontestable factor of vitality in the procedures.

In the sixth place, these various procedures have been based on thorough and meticulous research and, in cases of particular difficulty, they have been accompanied by appropriate consultations which are part of the 'quiet diplomacy' carried out under the responsibility of the Director General of the I.L.O.

In the seventh place, these procedures are reinforced by the fact that they are interwoven with the I.L.O.'s activities in education, research and technical cooperation, each supporting the other and strengthening the overall activity of the Organization in the promotion of human rights.

Over and above these characteristics, however, there is another — essential — element, namely, the spirit in which the supervision is exercised, which constitutes a well-established tradition of the I.L.O. This tradition may be summed up by the ideas of integrity, moderation and firmness, without which even the best machinery might run on uselessly or quickly seize up.

It is due to these techniques and to this spirit that the implementation procedures of the I.L.O. have been able to achieve results which are remarkable in the present state of international organization.

The procedures based on the periodic examination of government reports have had the result that methods of supervision which may originally have appeared exceptional are now accepted as current practice. In spite of difficulties, each year brings a harvest of results and the procedures have served as a model for systems of supervision established more recently by other international organizations.¹

Although recourse to the procedures based on complaints has been more exceptional, their actual operation has made it possible to deal with situations of particular gravity. They have also made an important contribution to international methods of fact-finding and inquiry, both in procedures of a judicial nature and in those aimed at

¹ See N. Valticos, 'Les systèmes de contrôle non judiciaires des instruments internationaux relatifs aux droits de l'homme', *Mélanges Modinos, Problèmes des droits de l'homme et de l'unification européenne*, Paris, 1968, pp. 331-356.

conciliation, provision for which is to be found in various recent international instruments concerning human rights.

At a time when the need for effective supervision of various international standards is becoming more and more evident and urgent, the ways opened up by the I.L.O. take on a much wider significance for international action as a whole.

CONCLUSION

One may now perceive more clearly what the I.L.O. has contributed to the establishment of the Rule of Law and to the international protection of human rights.

The I.L.O. has widened the horizons and the very nature of international law by introducing an international legislative function and by adopting, on an unprecedented scale, international instruments in areas that had previously been considered as falling within the exclusive jurisdiction of States. It has contributed to the creation of an institutionalized international society alongside and sometimes above the international society of States. In this international society, it has broken the monopoly of States and has given rights to the representatives of various social groups. It has contributed to the recognition of individuals as subjects of international law. It has made the international community conscious of its collective interest in common action to fight injustice, hardship and privation. It has contributed to recognition of the importance of economic and social rights as an integral part of human rights, but it has also attached an essential significance to certain basic values of freedom and equality. It has built up a great body of international common law covering vast sectors of human rights and has exercised an effective influence on the legislation and practice of the various countries of the world. Lastly, to supervise and promote the implementation of its standards, it has created procedures which rely both on legal and moral force and are amongst the most advanced on the international scene.

The results attained are due to a number of reasons: the tripartite composition of the Organization, the developed legal techniques employed, the thorough study of questions, the role of a secretariat which, in the words of Albert Thomas, the first Director of the I.L.O. — who left his indelible mark upon the Organization — must be an 'instrument of action, and not just a machine for collecting and sifting information'.² These results are also due however in very large part to the spirit which guides more generally the activity of the Organization: a determination to act with a view to the material and

¹ See H. Saba, *op. cit.* pp. 685-686.

² See E. J. Phelan, *Yes and Albert Thomas*, London 1936, p. 23.

spiritual progress of humanity, firmness in principle and flexibility in method, capacity for renewal and adaptation to change, a dynamism which, while based on constitutional provisions, does not remain fixed but is able to supplement them by opening up new ways, and finally concern for scrupulous integrity and complete objectivity.

The activity of the I.L.O., in a more general way, prepared the road for the Universal Declaration and the International Covenants on Human Rights, and the question has been asked how far its own methods might provide a model for other international organizations. It is not easy to answer. One must have regard to the constitutional structure of each organization, to its areas of activity and to the general spirit in which the procedures would be applied.

Nevertheless, while some characteristics of the I.L.O. may be peculiar to its constitutional structure, certain principles governing its action could find more general application.

Thus, the method of adopting distinct and precise conventions could be of great use in the field of certain fundamental civil and political rights, for carrying further the work undertaken by the United Nations in adopting the Universal Declaration and the International Covenants on Human Rights.¹

While the participation of non-governmental organizations could not be envisaged in other organizations in the manner provided for in the I.L.O. Constitution for employers' and workers' organizations, a certain participation of representative and responsible non-governmental elements could nevertheless make a useful contribution to international life.

In regard to supervision of the implementation of international instruments, the methods of the I.L.O. have begun to influence other systems of international supervision. In addition, arrangements have sometimes been made for the I.L.O. to contribute to the procedures for supervising the implementation of instruments adopted by other organizations.²

In general, whatever the procedures used, the concern for accuracy, impartiality and objectivity, on which the I.L.O.'s activities have always been based, should be the guiding principle of all international action. This is not only a question of intellectual honesty, but also a condition for effective action.

What are the prospects for the future activities of the I.L.O. itself in the field of human rights? The Organization is clearly determined to

¹ See C. Wilfred Jenks, *Human Rights, Social Justice and Peace*, op. cit. p. 247.

² This is especially the case for the European Social Charter and the European Code of Social Security. For the future, the Covenant on Economic, Social and Cultural Rights provides for the cooperation of the specialized agencies, and thus the I.L.O. should be able to make a substantial contribution to its implementation.

carry on its activities with unrelenting vigour. This was emphasized by Mr David A. Morse, Director General of the I.L.O., in the report presented to the International Labour Conference in June 1968, which dealt with I.L.O. action in regard to human rights.¹ This was also decided by the Conference itself, at the same session, when it adopted a resolution calling for a significant concerted I.L.O. programme in the field of human rights. In this resolution the Conference appealed to all States to ratify and implement the I.L.O. Conventions concerning human rights and called for the strengthening of I.L.O. machinery for the protection of human rights and for consideration to be given to the adoption of further standards in the field of freedom of association and in regard to other basic rights.² In his reply to the discussion of this report, the Director General suggested in particular a number of measures to combat discrimination and declared his intention to propose a programme of more intensive measures in this area.

Thus, after the considerable contribution which it has made during the past fifty years to the strengthening of the Rule of Law and the protection of human rights, the I.L.O. intends to pursue and intensify its action. The results achieved must not be allowed to blind us to the immensity of the task which still lies ahead, nor to the frailness of the new international society which has begun to evolve and whose hold on States is still very limited. There are still many major obstacles to the effective realization of human rights and respect for the Rule of Law: armed conflicts, frequently with heavy loss of life, resort to force, the restriction of civil liberties to be seen in so many countries, intolerance between men of different race, colour, ethnic origin, religion or political opinion, exclusive concern with economic development, which sometimes leads men to forget that development is not an end in itself but a means to improve the human condition and enhance the freedom and dignity of man, the seriousness of the problems facing the third-world, and individual and national selfishness. To ignore them would be a sign of blindness. One must certainly be lucid, but lucidity must never lead to short-sightedness. Human progress has only been brought about by those who have been able to look ahead and whom the 'realists' have often treated as dreamers. When in 1941, at one of the most critical moments in the life of the I.L.O. and of the world as a whole, President Franklin Roosevelt spoke to the International Labour Conference in Washington, he recalled that in

¹ *The I.L.O. and Human Rights*, Report of the Director General (Part 1) to the International Labour Conference, 52nd session, Geneva, 1968.

² In the same Resolution, the Conference called on all States to grant a general amnesty or pardon to trade-unionists arrested or sentenced because of trade union activities. This appeal has already evoked a response in some cases, and a number of trade unionists have been released from prison.

1919 the International Labour Organization was still only a dream and, for many, a wild dream.¹ Fifty years have passed, the dream has become solid reality, and the I.L.O. has proved itself. In a world still divided, full of dangers but also of possibilities, in a year which has been devoted to human rights but in which one can only be aware of their precariousness, the task of the I.L.O. will be more than ever before to try with all the means at its command, by rules of law and by daily action, to make real this eternal dream of man for justice, law, and peace.

¹ See *Record of Proceedings*, Conference of the International Labour Organization 1941 (New York and Washington), Montreal, 1941, p. 156.

THE HOSPITALIZATION OF MENTAL PATIENTS

I. A PSYCHIATRIST'S VIEWPOINT

by

PAUL BERNARD *

This article does not set out to analyse the laws and regulations providing for the compulsory hospitalization of mental patients, nor does it examine the necessary safeguards and remedies for the protection of mental patients. To give jurists a doctor's appreciation of such legal material would be pretentious and indeed rash. Again, it is not proposed to discuss the laws or their reform (a subject of great interest today—at least in France, where the principal law, passed as long ago as 30th June 1878, is on the point of reform). The purpose of this article is simply to give an idea of the reaction of a doctor, who is in daily contact with the realities of hospital life, to periodic reports in the press that a person has been arbitrarily detained in a mental hospital.

The fear of arbitrary action by the authorities in this sphere is endemic and would seem to be in a permanent state of incubation, ready to prey on public opinion through sometimes sensational press campaigns. These frequently end with the patient's release, which would seem to justify the claim of inadequate protection of the individual; or, equally often, the patient has already been released before the scandal breaks out, which in a sense justifies allegations of arbitrary behaviour.

Almost every day—with much less hue and cry—in the course of hospital interviews and consultations, a psychiatrist's decision to keep a patient in hospital is objected to by the patient himself or his relations. In most cases, opposition is soon withdrawn after a few words of explanation to the patient and his relations. As a preliminary to the treatment described below, the psychiatrist usually explains the medical character of the patient's stay in hospital, the normally short duration of treatment, the need for cooperation—an acceptance of the situation by both the patient and his family—and the temporary need for the individual to be protected during the few weeks when he is not really

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aware of his condition and cannot make the decision to undergo treatment himself.

If a relation still cannot understand the situation and refuses to accept the psychiatrist's decision, the solution is to suggest that he, who generally has no moral or legal responsibility towards the patient, should become personally responsible for the care and supervision of the patient for as long as may be necessary. The relation then almost invariably draws back and murmurs: ' Oh ! I just said that . . . I'm not a doctor . . . it's for you to judge. ' Such cases of opposition show that the doctor should not be the sole judge and should have legal safeguards if his decision is appealed against.

The public is all the more concerned about stories of arbitrary confinement of patients because of the misconceptions that are still held concerning mental illness and its treatment: that insanity is incurable, that once a person has been inside a mental hospital he will be branded as insane for life, that such a person will never really be normal and that he will, for a long time if not permanently, be looked at askance by society.

It would be useful, as mentioned earlier, to outline the history of the hospitalization of mental patients in the general context of their treatment and rehabilitation.

First of all, the radical change of attitude towards mental patients should be emphasized. Today, the purpose of psychiatry is not so much to protect society from a mental patient or the patient from his illness and its consequences (the risk it presents to himself and to others, which however must not be entirely disregarded) but to fulfil the patient's *right to health*. From this point of view, mental illness—like physical illness—is a social handicap. Patients must be reintegrated into a productive life retaining their full rights, not through police action nor even charity but through measures of prevention, treatment and rehabilitation into the community. Rehabilitation today requires a new concept of the doctor's relationship with the patient and above all of the whole system of the treatment and of the administrative machinery for mental health.

Hospitalization in its traditional sense—the confinement of the patient—which was in the past, and in some countries still is, the basis of psychiatric treatment, is gradually giving way to a new system of treatment, which is outlined below. A patient's reintegration into society depends not only upon the early detection and cure of his disorder, but essentially upon his staying in hospital for as short a time as possible (and only if hospital treatment is absolutely necessary), the period being limited to that required for the administration of biological and psychotherapeutic treatment, which demands special equipment and a highly competent staff. This treatment will be superseded,

as soon as the critical stage is passed, by out-patient care avoiding any break in the patient's normal family and social environment. Moreover, whenever possible the patient should be cared for at home and even continue to work.

The forms of treatment designed to reintegrate patients into society are complex; they comprise a wide selection of therapeutic and rehabilitation methods, in hospital and at home, according to the various stages of the illness. The patient's stay in hospital on a full time basis, is thus only a first step, and the shortest possible one, on his road to rehabilitation. He will then go to hospital in the day time only or on some other part time basis; the next stages are a convalescent home, protected workshop and so on.

The stay in hospital, then, which was once the crucial and sometimes final stage of a mental patient's career, has lost much of its importance. The main concern of doctors has been to reduce this period as much as possible. The patient should never remain too long cut off from his every-day environment. If treatment in hospital is necessary, it will be temporary only. Research in several countries has shown that a patient whose illness has been discovered early should never stay in hospital for more than six months, and often for much less.

Accompanying this more liberal treatment of mental illness, which to a large degree takes place outside hospital, there is a new doctor-patient relationship which begins when the illness is detected and encourages patients to enter hospital of their own free will. In certain parts of France, and throughout some countries such as Britain and Holland, the proportion of persons who have entered mental hospitals as voluntary patients without formalities is as much as 90 per cent or over.

The general treatment has also changed in that the psychiatrist is no longer on his own; the patient is looked after by a large team of specialists, consisting of psychiatrists, psychotherapists, occupational therapists, psychologists, kinetotherapists, social workers, and nurses. It is therefore most unlikely that such a team of people could all with impunity keep a patient in hospital for longer than necessary. Moreover, modern psychiatry is not limited to the chronically insane, who come to the mind of most people when they think of mental illness. More and more people are being treated for minor disorders. Moreover, biological and chemotherapeutic treatment in particular have considerably modified the symptomatology of mental illness: the symptoms follow each other much more quickly and the many excited and depressive phases now last only a few weeks or days. Today then, the question of safeguards for the mental patient is much less relevant than it was in the past, particularly when the French law of 30th June 1838, which contained rules protecting confined mental patients, was passed.

The hospital practitioner thus sees the question of admission and retention of patients in hospital under quite a different light to that projected by the press campaigns referred to earlier.

But there are cases which still cause scandal.

Here are two common examples.

The first is when a patient is admitted, in a dramatic and sometimes panic-stricken atmosphere, in an acute state of agitation: it might be delirium, pathological rage, pathological intoxication or some other condition. The crisis is normally resolved in a few hours or days, but during that interval the patient was a danger to himself and certainly to others. It is important to remember that these psychopathic outbursts generally occur in subjects with a predisposition for such, who have previously shown signs of instability and have had trouble with their environment and minor difficulties of adjustment; all this has taken its toll on those close to them, making them less tolerant. While the crisis lasts, measures will have to be taken against the patient's will. The logical solution is to compel him to go to a specialized institution. However, to detain a person, even for a few hours, renders one liable to an action for false imprisonment, unless the patient has been legally certified as insane. Clearly it would have been more advisable, in the case of a very brief outburst, to place the patient 'under observation' in a general hospital, keeping him there and treating him for the duration of the crisis with the consent of his family. If the patient had been sent to a general hospital or to the open part of a mental hospital there would probably not have been the opposition which is aroused by a formal confinement. But this, although becoming much more common, is still not always possible owing to the lack of the necessary psychiatric equipment.

There is another kind of patient who forms the subject of cases of arbitrary confinement: he is the lucid, raving or only obsessional paranoiac. The paranoiac is often intelligent and able to express himself perfectly in speech or in writing. He looks very convincing to a person who is not on his guard and even raises delicate problems for experienced psychiatrists. Until he has committed an act which clearly manifests his disease the public can only see a man who is defending his rights or a just cause. This is all the more so when the manifestations are reserved for certain persons or for one person alone as is the case with delusions of jealousy which are restricted to the husband and wife relationship. The illness may not be noticed by the rest of the family or the friends, and the patient's reaction may be perfectly comprehensible in the context of clear cases of marital infidelity. Moreover, in such cases it may be that the person who is asking for the patient's confinement or a group with conflicting interests may benefit from his confinement. A political group may thus find itself accused of being

responsible for the arbitrary confinement of an embarrassing opponent. Clearly even the most justified confinement medically speaking may, as in any other situation of incapacity through ill-health, benefit a competitor, opponent or unfaithful partner, although the latter may not be guilty of using the patient's confinement to serve their interests and the illness causing incapacity may be beyond question. As G. De Clerambault maliciously and penetratingly remarked in regard to a morbidly jealous patient who had been taken to the police station infirmary: 'What a blessing, Sir, if merely through being cuckold one could avoid all illness!' Even where unfaithfulness really exists jealousy can still be pathological.

When an alleged illness is in the interest of the 'patient' it is readily believed (diplomatic illness). But any genuine mental illness, when it serves the interest of others, is as readily questioned.

It should be pointed out that, as more knowledge is gained about mental illness, the psychiatrist's attitude to it changes. It does so increasingly quickly as progress in therapy is made and the period of treatment in mental hospitals is consequently shortened. It is perfectly normal for a doctor to admit a patient in January and recommend his release in February. Sometimes, medical opinion may change from one week to another. This seems to surprise those who still assimilate mental illness with incurable insanity.

In the past patients were compelled to enter hospital: today patients are being increasingly admitted with their consent and even at their request. If a patient cannot be treated outside hospital, he will be treated, as for any other illness, in the context of a rewarding doctor-patient relationship. Unless a patient has himself requested to go to hospital, the reason why it is necessary is explained to him. He is then invited to collaborate in his rehabilitation by integrating himself into a therapeutic community and occupying his time in such a way that every minute is a step towards his rehabilitation, release and social reintegration.

The stay in hospital for an increasingly short period of time is then seen in a totally different light to that of a patient who enters hospital against his will. For 80 per cent of the occupants of a mental hospital, who are voluntary patients, there is no longer any question of wrongful arrest or false imprisonment.

It would be unrealistic to ignore the minority of cases in which a patient is dangerous or unable to make the decision to undergo treatment. Really dangerous patients (such as sociopaths) should be the subject of special supervision. In any case, for both categories of patients it is desirable, in their own interests and in those of others, that compulsion should be used. The law must therefore clearly set out the conditions and safeguards that apply before treatment can be

given and action taken which would in normal circumstances be unlawful. In this way, the rights of the patient will be assured and the doctor's decision to treat him will be valid in law.

II. A JURIST'S VIEWPOINT

by

DANIEL MARCHAND *

The jurist sees the question of hospitalization of mental patients in terms of the freedom and dignity of the human person and the protection of the patient's property. The doctor thinks in terms of medical treatment, which is rather similar to that required for an infectious disease from which a patient's family has to be protected or to an emergency operation. The task of the law is to reconcile these two aspects by ensuring that mental patients receive the necessary care and treatment and by protecting them as well as society.

1. In order to safeguard freedom of the person, the law generally limits the conditions under which a person can be compelled to enter a mental hospital. Similarly, after the patient has been admitted to hospital there are procedures for appeal and the review of his case. However, in order to protect society, the law also limits the conditions under which a patient can leave hospital.

A. In many countries, before admission to a mental hospital can be secured numerous legal formalities have to be satisfied. Sometimes the patient must be arrested by the police and placed in gaol pending an appearance before a judge or magistrate who will certify him as insane. These proceedings are often surrounded by great publicity, and in one or two places trial by jury with a full report to the public takes place. Scarcely less unsatisfactory than an appearance before a judge is the system whereby only the administrative authorities are empowered to authorize the admission of a mental patient to hospital. In many other countries, a mentally ill person must be seen by more than one doctor and certified as insane by a judge before he can be admitted. Elsewhere, he or his relatives must sign a form or even several forms. Few countries make it possible for a mental patient to enter hospital on a truly voluntary basis and even fewer allow such provision for the mentally sub-normal.¹

The psychiatrist is eager that individuals whose judgment is disturbed by mental illness, and whose condition threatens their own

* Docteur en Droit.

¹ *Legislation affecting Psychiatric Treatment*, Fourth Report of the Expert Committee on Mental Health. World Health Organization, Technical Reports, Series 1955, 98, p. 5.

welfare or that of others, should receive treatment by means which avoid both a judicial pronouncement that they are of unsound mind and admission to hospital under the order of a judge, both of which are felt by a recovered patient, his relatives, and the general public to be serious and lasting stigmata.

Any law which deals with this matter has to attempt to recognize the needs of both medical treatment and legal safeguards.

Much existing legislation uses the intervention of a judicial decision before admission as the main safeguard, but this inevitably creates the type of stigma which the psychiatrist, the patient and the patient's relatives wish to avoid. In more recent years, however, there has been a growing tendency to authorize compulsory admission, at any rate in emergencies, at the joint request of a psychiatrist and a relative of the patient, or at the request of some specified non-judicial authority, subject to judicial review after admission.

The period after which review is necessary varies in different countries, ranging from one or two days to several months. In one recent law all compulsory admissions are made by a 'temporary' procedure of this type and are not subject to formal judicial determination of the patient's mental condition until twelve months have elapsed.

... certain countries have felt it possible to provide for compulsory admission without judicial intervention before admission or during a period of initial observation and treatment of variable length. In one country, judicial review has been entirely replaced by a special district board consisting of three members of which only one is a judge. That these changes in administrative procedure have occurred may be due to a growing belief that appeal facilities, inspection procedures and methods of discharge can provide safeguards to personal liberty as effective as a judicial determination before admission and much less prejudicial to the patient from a medical and social point of view.¹

Because of the different laws in each country, simple guide-lines should be laid down to assist the legislature and provide a basis for the jurist in promoting whatever reforms may be necessary in his country.

The three main points are that (*a*) the patient's consent to undergo treatment should not be necessary if he is unaware of his condition or dangerous; (*b*) there must be an authority to compel such patients to undergo treatment and (*c*) whether a patient should be sent to hospital or receive some other suitable treatment should be decided by a simple procedure, which will not prejudice the patient's mental condition, which is based on essentially medical considerations and which provides judicial safeguards for the freedom of the individual.

It should be emphasized that the number of patients unwilling to go to hospital is in inverse proportion to the quality of psychiatric

¹ *Idem* pp. 11 and 12.

treatment; consequently, every improvement in treatment will lessen the number of cases where compulsion is necessary. The need for compulsion and its corresponding safeguards will always be present, but will apply to fewer cases and above all will shorten the period of treatment.

- B. Once a patient is admitted to a mental hospital there must in many countries be frequent and often unnecessary reports sent to a central authority by those in charge of a hospital. Sometimes degrading and harmful limitations may, by law, be placed on a patient's liberty; terminology which is offensive to the patient may be employed; and civil rights may automatically be forfeited.¹

It is essential that a compulsory patient should have, at all times, an easy and practicable right of appeal. Such appeal could be to a judicial body or to a Commission consisting of a trained lawyer and a doctor, for instance, who might be joined by an administrative officer or even a lay person.

There should not necessarily be one authority to adjudicate both upon the legality of a patient's confinement in hospital and upon his mental condition. Indeed, in all too many cases, the certifying authorities are forced to rely exclusively on the report of the psychiatrist in charge of the patient, who is thus a judge in his own case. Another remedy that should be available to a patient is the inspection of mental hospitals. The inspectors should have studied psychiatry and, as a guarantee of their impartiality, should be directly attached to the general health services and not to the mental health administration. They must have complete freedom to inspect all mental institutions, public and private, and at as frequent intervals as possible.

- C. Discharge from hospital is commonly more difficult to secure than admission. In many countries it can be authorized only by the administrative authorities, which may disregard medical opinion. Neither the patient himself, nor his relatives, nor even the doctors in charge of the case have the power to effect release. Elsewhere there are cumbersome procedures which must be gone through.²

It is perhaps the conditions for release from mental hospital which best reflect the conflict between the safeguard of individual freedom and the protection of society. The patient or his family should be able to request the principal of a hospital to authorize a patient's release. The principal should only be allowed to refuse the request if he can prove that the patient is a danger to himself or to others. There should be the same right of appeal against refusal to release as there is against a decision to admit a patient.

¹ *Idem* p. 5.

² *Idem* p. 5.

2. It is a fundamental human right that no-one shall be subjected to degrading treatment (Article 5 of the Universal Declaration of Human Rights). This is particularly important in the case of the mental patient, since any action which tends to humiliate him merely aggravates his condition and impedes recovery.

The following passages are taken from a report received from a man detained in 1963-64 in a French mental hospital:

The regime to which captives are submitted is the best conceivable for convincing them of their downfall, debasing them and finally breaking their spirit.

Referring to his arrival at the hospital he gives the following details:

He was taken to a common ward, stripped of everything, including his ring and spectacles (it took three days to get these back), and given a coarse linen nightshirt ending at the waist. The night he passed in a dormitory with restless and delirious patients, whom the nurses constantly had to put back to bed, can easily be imagined.

The next morning, he drank a glass of milk, after which he was summoned to go to the doctor. He was then made to put on trousers of a coarse blue material which were far from clean. *Since he had no underclothes to protect him from the contact of the trousers, which had clearly not just returned from the laundry and had been used by several other people before him*, he refused to put them on but was compelled to do so. A coat of the same material and just as dirty was added and he went down to the doctor's consulting rooms looking like a scarecrow.

In the great majority of cases, it would seem unnecessary to deprive the patient in this way of his personal possessions and clothing or to impose rules that are so alien to normal life. Respect for human dignity is at the basis of the mental patient's treatment and even of his consent to be treated. (As a result of a French Circular, No. 148 of 21st August 1952, the treatment described above ought not to recur.)

It is particularly interesting to read an article on mental hospitals in the English *Sunday Times* which begins with the following words:

Many people are still ashamed or afraid to send members of their family for treatment in mental hospitals—or, of course, to go for treatment themselves.¹

This confirms what has been said earlier about admission to mental hospitals. Before a patient will voluntarily go to hospital, he must be sure that he will be cared for properly and treated with dignity. The 'birthright of man'² belongs as much to the mental patient as to all men.

¹ *The Sunday Times Magazine*, 29th September 1968, pp. 24-40.

² The title of a book prepared under the direction of Jeanne Hersch and published by UNESCO.

In nearly every country the mental patient is seen in two lights: as a member of the community who is in need of help and care, and as a lunatic who must be kept apart from the community in order to protect himself and others. The old conception of a mentally ill person thus lingers on—a man possessed by the devil, who was often ill-treated, cast out of society and even put to death. The first task of the law is to encourage the many people—even in highly developed countries—who hold these primitive ideas to abandon them. For only this will enable the mentally ill to be treated like any other patients and will facilitate their reintegration into society.

3. For the many patients, inside and outside hospital, who are unable to look after their property some kind of guardianship is indispensable. But this must be surrounded by strong safeguards, for there is probably some foundation in allegations that persons have been certified as insane so that others may administer their property. The guardian's administration should be subject to periodic review by a special Board under judicial control. The extent of administration should vary according to the mental condition of the patient: legal substitution of the guardian for the patient who is incapable of managing his property, assistance to patients who are at least able to make important policy decisions and advice to patients who have contractual capacity.¹

* * *

Any legislation on the admission to hospital and discharge of mental patients, the administration of patients' property, the organisation and management of mental hospitals and remedies against damage suffered in these fields must be acceptable to the psychiatrist, who is interested in the patient being properly cared for, and to the jurist, who is concerned for the individual's rights. As a first step in this direction, the law must show the man in the street that he has nothing to fear nor to be ashamed of in applying for treatment himself (or asking a member of his family to do so) at a mental hospital, where he will receive proper attention and his rights will be respected.

The patient will thus be encouraged to seek treatment at the beginning of his mental illness—as he would do for any other illness. When compulsory hospitalization is unavoidable, the provision of adequate safeguards and easily accessible remedies will prevent the periodic scandals connected with arbitrary hospitalization from ever recurring.

¹ See René Savatier, *Le risque pour l'homme de perdre l'esprit et ses conséquences en droit civil*, in connection with the recent French law (3.1.1968) on 'incapables majeures', Recueil Sirey Dalloz, 19th June 1968.

FREEDOM OF MOVEMENT WITHIN THE COMMON MARKET*

by

ANNA-JULIETTE POUYAT

The European Common Market came fully into force in July 1968, when the transitional period ended. There now exists an industrial, commercial and agricultural community in which the primary and secondary sectors will reap considerable benefits. The will to create such a community arose from the consequences of the Second World War and the need for reconciliation in order to heal the divisions brought about by nationalism. The differences were still too fresh in people's minds, antagonism still too close to the surface, national susceptibilities still too raw, for the leaders in Europe to have considered unification. The most they could hope to achieve were certain modest and limited objectives.

The first common undertaking of the capitalist countries of continental Europe was the European Coal and Steel Community, set up to solve the industrial problems of West Germany and France. The initiative came from Robert Schuman, who, on 9th May 1950, sounded the call for 'the first concrete foundations of a European Federation, as essential to the preservation of peace'. The two countries were joined by Benelux and Italy.

When the proposed European Defence Community received a mortal blow in the French Parliament,¹ it became clear that the problems that the six European countries could try to solve jointly were to remain economic problems; national susceptibilities were still very much alive and would have to be taken into account. Even so, the movement in favour of European unification continued to gain ground and when the Six met at Messina in June 1955 they had before them a memorandum by Benelux proposing a Common Market; on 25th March 1957 the Treaty establishing the European

* For a more general study of freedom of movement, see the article on the Bangalore Conference in *ICJ Bulletin* N^o. 33, pp. 8-19.

¹ On 30th August 1954 the National Assembly refused to discuss the EDC treaty although the Federal Republic of Germany and the Benelux countries had already ratified it.

Economic Community was signed at Rome. This was an ambitious but cautious project. It was chiefly the economy that was involved, and the industrial economy at that. The objective was the free movement of goods and of capital, for which a cautious period of twelve years was given. But there was, even from the beginning, a third aspect of the programme: the free movement of persons. The ambition of the co-signatories was thus to build a united Europe whose foundations were not to be purely economic. The progress made in ten years is a tribute to the hard work accomplished by the six States which make up this united Europe, work which is now bearing fruit. The steps to abolish frontiers within the Common Market were intended to lead to the free movement of goods and capital by 1970 only; for while the Treaty of Rome was signed in 1957 it became effective only on 1st January 1958. The parties to the Treaty can be satisfied at having lopped a year and a half off the twelve-year period allowed them and at having added to their programme the development of agriculture, which had been somewhat overlooked at the start.

Is it caution, however, that has carried the day and have the ambitions of the six been slightly watered down? What has become of the freedom of movement individuals were to enjoy among the six countries of the Community? Is Pierre Drouin right in speaking of the 'false hopes for free movement of labour' in his book, *L'Europe du Marché Commun*?

The 250,000 workers of the EEC who apply each year for a work permit in a Common Market country other than their own are now to be put on the same footing as nationals of that country under regulations adopted by the Council on 29th July 1968. (The date for adoption mentioned by the Commission¹ when it drafted the regulations was 1st July 1968; the timetable was thus closely adhered to.) But the position in regard to freedom to supply services and freedom of establishment is less definite, and the time when there will be a 'free exchange' of other than wage and salary earners within the Common Market is still some way off.

A. Free Movement of Workers

The Treaty of Rome, with an approach based less on interventionism than on economic liberalism, lays down simple and flexible principles. The workers of the Six are to be entitled to apply for jobs in another country and to enter and to take up temporary or permanent residence there. The Treaty also establishes the essential

¹ The Commission of the EEC is responsible for drafting EEC regulations for submission to the Council of Ministers. It supervises the application of the provisions of the Treaty and of measures adopted under the Treaty.

rules for abolishing all discrimination in relation to employment, remuneration and working conditions.

Application of the principles

Since 1958 the situation has developed to a point where it has now taken definite shape. An initial regulation—No. 15/61—and a directive for its application were in force for two years after 1961; then from 1st May 1964, regulation 38/64 and an accompanying directive carried freedom of movement for workers another step forward.

Regulation 38/64 laid down rules in relation to the following matters:

- equal access to employment;
- organization of the employment market;
- entry and residence facilities; and
- equal working conditions.

Equal access to employment applied to jobs actually offered; in other words, the provisions covered jobs for which a vacancy was notified to the labour bureau. However, these provisions contained an important reservation. A member State had an escape clause: if there was a surplus of labour in a particular occupation, it was entitled to give priority to its own nationals, though the nationals of other members of the Community had preference over those of outside countries (Turks, Spaniards, Portuguese). Regulation 38/64 stated that each State must 'as far as possible fill' vacant posts by giving priority to the nationals of the member States (Articles 29 and 30).

The employment market was organized by advertising and matching vacancies and applications. Each country had in principle to notify the others of its available manpower, and the others had fifteen days in which to communicate the jobs that were vacant (Article 30).

In regard to the facilities provided on the arrival and during the stay of workers from other Common Market countries, the host country automatically granted them and their families work and residence permits. The worker, however, had to be able to prove that he had found 'normal accommodation' in the host country. Lastly, the equal working conditions granted to the worker had to make him eligible to vote and stand for election in trade unions and works committees.

After the Council of Ministers of the Six had decided, on 10th and 11th May 1966, to bring the customs union into effect on 1st July 1968, the Commission undertook to submit proposals to the Council for the free movement of workers by the same date.

Accordingly, the Commission drew up a draft regulation¹ on the free movement of workers and a draft directive¹ on the abolition of restrictions limiting the movement and residence of workers of member States and their families within the Community. These texts, intended to lead to the full application of Articles 48 and 49 of the Treaty (which provide for the free movement of workers), came into force on 29th July 1968.² They are binding in every respect and directly applicable in every member State (Article 56 (new)). The provisions of regulation 38/64 issued by the Council in 1964 no longer apply.

The new regulation contains provisions relating to the employment of workers and their families, equal remuneration, matching of vacancies and applications for employment, the bodies responsible for assisting the Commission in this respect, and transitional and final arrangements.

The main advance of this regulation over the previous one (38/64) consists in the complete and definite elimination of priority for nationals in access to employment, by removing the escape clause mentioned above. The last vestiges of discrimination in favour of a State's own nationals have thus disappeared. However, a remedy is available in the final resort if there is a serious crisis in a given region, in which case the Commission may temporarily exempt certain national labour markets from the application of the Treaty. Its decision may be challenged by the other member States before the Council of Ministers, which must decide the dispute within a fortnight. This procedure prevents governments from unilaterally taking action as they had previously been able to do. Furthermore, since work permits have been abolished by the new regulation, the nationals of other member States are now on the same footing as the nationals of the country in which they work.

¹ Regulations and directives have the force of legislation within the Community. They are drafted by the Commission, submitted to the Economic and Social Committee and to the European Parliament for advisory opinions, and then transmitted to the Council of Ministers which alone has legislative power. The Council may reject, amend, or adopt the texts. Article 189 of the treaty of Rome reads: 'Regulations shall have a general application. They shall be binding in every respect and directly applicable in each Member State. Directives shall bind any member State to which they are addressed with respect to the results to be achieved, though national agencies shall be competent to determine the form and means used. Decisions shall be binding in every respect on those to whom they are addressed...'

² The drafts had been submitted to the Council of Ministers by the Commission and transmitted by the Council, in April 1967, to the European Parliament and the Economic and Social Committee. The Parliament had given a favourable opinion in October 1967, while suggesting some changes. The Economic and Social Committee had endorsed the drafts later in October. The drafts had then been revised by the Commission in the light of the views expressed and the revised texts submitted to the Council early this year.

Furthermore, the clause under which a worker had to have found normal accommodation for resettling his family has been dropped. Taxes and social benefits are now the same as for nationals. Allowance is made for some flexibility in applying the provisions in order not to impede the efficient operation of undertakings.

Member States had already withdrawn most of their measures protecting their own nationals. Germany, Italy and Luxembourg had lifted the restrictions that they had previously imposed on the free movement of workers and waived the priority granted to nationals in the employment market in certain areas and for certain occupations when regulation 38/64 had come into force, Article 2 of which provided an escape clause. France had reduced protective measures granting priority in employment to her nationals. On the other hand, the Netherlands had, under the escape clause, re-established priority for nationals on the employment market for all occupations in the province of Overijssel. Belgium had adopted a similar measure in the provinces of Hainaut, Liège and Limbourg for surface and underground miners. These measures were a retrograde step and though they may have been justifiable on economic and social grounds at the national or regional level, they were none the less unfortunate at a time when freedom of movement was to be fully applied. This state of affairs was all the more serious as it conflicted with the regulation and directive mentioned above, which had already been submitted to the Council for adoption.

B. Freedom of Establishment and Free Supply of Services

These rights are set out in Articles 52 to 66 of the Treaty of Rome and in two general programmes.

Establishment means settlement in a foreign country in order to carry on a non-wage-earning activity. There are two categories of establishment: principal and secondary. Examples of the latter are the establishment of an agency, a branch office or a subsidiary company.

Supply of services means that a service is supplied against payment by a person established in one country for the benefit of a person or body established in another country. This too is a non-wage-earning activity.

To be granted the right of establishment, the person concerned must be a national of a member State; in the case of services, the service must be supplied in a member State. Provision is made for certain restrictions: Article 55 of the Treaty excludes activities involving the exercise of public authority, and Article 56 (1) allows

measures to be taken submitting foreigners to special rules for reasons of public order, safety and health.

The two general programmes, issued by the Council in December 1961, established the timetable for the gradual relaxation of restrictions and set forth the Community's objectives. The right of establishment and the right to supply services can only be introduced by (a) eliminating discriminatory treatment in relation to nationals, (b) coordinating the legislation of the various countries, and (c) arriving at a mutual recognition of professional qualifications.

The elimination of discriminatory treatment means that rules discriminating against foreigners will be abolished, such as rules:

- making an authorization subject to additional conditions or to preliminary training in the host country;
- levying heavier taxes on foreigners;
- requiring foreigners to make a special deposit as surety;
- limiting the possibilities of obtaining supplies and the access to outlets;
- limiting participation in companies;
- limiting participation in social security schemes;
- establishing less favourable conditions in the event of nationalisation, expropriation or requisition;
- restricting the rights to enter into agricultural and commercial leases, to enjoy concessions, to participate in public contracts, to acquire, utilize or transfer real and personal property, intellectual property and rights, and to bring legal proceedings;
- restricting membership of professional organizations.¹

In some cases the Treaty itself makes the elimination of discrimination subject to the coordination of the legislation in the various countries in order to facilitate the exercise of certain activities in the Community as a whole; such a provision is made in Article 57 (3) for the medical, paramedical and pharmaceutical professions.

The general programmes are more flexible and provide that each non-wage-earning activity is to be examined so as to determine whether the elimination of restrictions should be preceded, accompanied or followed by a coordination of rules governing access to the occupation and its exercise. This is done according to the following scheme:

1. If the occupation is subject to strict regulations (e.g. direct insurance other than life insurance) measures of coordination are to be taken beforehand.

¹ Communication on the implementation of the general programmes for the right of establishment and free supply of services, 5th July 1967, p. 4 (French Text).

2. If the occupation is subject to moderate regulations, (e.g. wholesale or retail commerce), transitional measures are envisaged.
3. If the occupation is subject to simple regulations, *the elimination of discriminatory treatment* is to take place immediately.

It should be added that the coordination of national rules applicable to foreigners and justified solely by reasons of public order, safety and health, as mentioned in Article 56 (1) of the Treaty, will have to be undertaken in such a way as to ensure that such special measures will not be used as a means of evading the Treaty obligations. Moreover, since the reason for the mutual recognition of professional qualifications is to enable economic activities to be carried on, where there are discrepancies in training methods efforts must be made to establish a minimum joint programme to which the member States can adjust their educational system.

On 3rd July 1967, the Commission submitted to the Council a report on the application of the general programmes, reviewing the work accomplished up to 30th April 1967 with a view to eliminating discriminatory treatment and to coordinating the legislation of the member States. The Council approved the report on 11th and 12th December 1967, stating that 'the Council shares the Commission's view that the work for finalizing the directives not yet adopted should be quickly effected so that they can be adopted before the end of the transitional period.' Between 1st January 1958, when the Treaty came into force, and 31st December 1967, 18 directives had been issued by the Council and one recommendation adopted by the Commission; 13 directives were still pending before the Council and 33 were in the process of being drafted by the Commission.¹

From February 1964 onwards, the Council took action to settle a number of basic questions. The results are described below.

1. Persons carrying on a non-wage-earning activity who wish to settle or supply services in the territory of another member State should be entitled to join local professional bodies in order to benefit from the advantages of membership. They are to be eligible for office within such bodies except in cases where such office involves participation in the exercise of public authority.
2. For certain occupations (e.g. in industry or commerce) for which specific qualifications are required, proof of the possession of

¹ See the first general report on the Community's work, 1967, p. 85, timetable for abolishing restrictions on freedom of establishment and freedom to supply services for the nationals of other member States (between 1st January 1958 and 31st December 1967).

the necessary qualifications must be facilitated; the host country may require an additional examination only in particular cases in which the exercise of an occupation is subject to special conditions.

3. The problems relating to crafts and commercial activities were more difficult to solve since the organization of such occupations and the rules governing them vary from country to country. In the general programmes the Council accordingly provided for 'transitional measures' for these partially regulated occupations. These measures are intended to take the place of those for correlating qualifications or for ensuring coordination; they are adopted in certain circumstances and in some cases involve an additional examination. They apply only to nationals of other member States who have carried on their craft or commercial occupation in their home country. To be a fully-fledged dairyman in Germany, for example, one must have had seven years' apprenticeship in a dairy. The German regulations led the Commission to propose that the training of dairymen should be coordinated in the other five countries so that freedom of establishment could be granted to dairymen. As a first step, all will have to undergo seven years of training in their own country.

On 25th February 1964 the Council adopted three draft directives proposed by the Commission. The first applies to non-wage-earning activities in domestic wholesale commerce. A provision expressly stating that the directive applies to professional organizations was inserted by the Council at the suggestion of Parliament and the Economic and Social Committee.

The second directive relates to the activities of middlemen in industry, commerce and the craft trades, such as representatives, brokers, agents, and other commercial and industrial auxiliaries. The Council adopted the Parliament's proposal that all restrictions should be abolished.

The third directive sets out transitional measures in respect of the activities covered by the first two.

Continuing this trend, on 12th January 1967 the Council adopted a directive relating to non-wage-earning activities in the fields of estate agencies and services supplied to industry. Its purpose is to abolish the requirement of nationality of the country in which the activity is to be exercised and to guarantee the beneficiaries the right to join professional organizations on the same terms and with the same rights and obligations as nationals. The Commission has also made further proposals to the Council regarding retail commerce, restaurants, hotels, industry, warehousing and customs agents.

4. *The Liberal Professions*

About forty proposals on the liberal professions are now being drawn up. The work is advancing slowly because the regulations governing these professions in the various countries of the Community are strict and complex. Moreover, some liberal professions are automatically excluded from the benefit of freedom of establishment under special provisions of the Treaty; (Article 55, in particular, states that 'activities which... involve even *incidentally*, the exercise of public authority shall... be excluded from the application of the provisions' of the Treaty).

The technical professions

The preparation of European standards for architects is already at an advanced stage. Three draft directives concerning architects have been submitted to the Council by the Commission.

(a) The first relates to the ways and means of introducing freedom of establishment and freedom to supply services for non-wage-earning activities of architects; this directive will enable them to join professional associations and will entitle them to use the professional title of architect in the host country.

(b) The second provides for the mutual recognition of professional qualifications while limiting the list of qualifications recognised.

(c) The third specifies the rules whereby architects who have not been trained in one of the schools mentioned in the second directive may qualify, on the basis of their diplomas or certificates, by undergoing an additional examination.

These three directives are particularly interesting in that, taken together, they can be seen as the Commission's model for introducing freedom of establishment into a liberal profession.

Since the question of recognition of engineering qualifications is complex, transitional measures will be included in the directives to be drawn up by the Commission on this subject. The aim is to make a distinction between two categories of engineers: those who have a university degree or its equivalent (e.g. a diploma from one of the higher technical institutes in France) and those who have a diploma at a lower level, (e.g. as an upper-grade technician who nevertheless qualifies as an engineer, which often occurs in Germany and at times in France in such schools as the 'Ecole Breguet').

The medical, para-medical and pharmaceutical professions

The progressive elimination of restrictions, as already mentioned, will be subject to the coordination of conditions for the exercise of these professions in the various member States (Article 57 (3) of the Treaty).

(a) The elimination of restrictions for the medical professions raises the problem of the use of professional qualifications in the host country. The measures of coordination planned by the Commission in this respect will relate to the specialist level of training, medical ethics and the period of adaptation in the host country.

(b) For the para-medical professions (i.e. opticians, orthopaedists, nurses and chemists) who wish to open a dispensary or shop, the draft directives are at an advanced stage and provide for coordination, recognition of qualifications, and the abolition of restrictions.

The Legal Professions

Here, there are many problems. Persons who participate in the administration of justice, such as notaries, bailiffs and registrars are excluded from Article 49 of the Treaty on freedom of establishment by virtue of Article 55, since they take part in the exercise of public authority in their countries.

For practising lawyers there are difficulties of three kinds.

(a) In the opinion of some lawyers, Article 55 of the Treaty excludes nationals of the other countries from practising law, since the lawyer participates in the administration of justice and thus, incidentally, in the exercise of public authority.¹ Others believe that lawyers may be excluded under Article 56, which allows member States to make foreign nationals subject to special treatment; but they fail to cite the article in full and to add that such treatment must be justified on grounds of public order, safety or health. Article 56 would seem therefore to be irrelevant.

(b) A further problem of freedom of establishment for lawyers arises from the differences in their level of training. In the Netherlands, for example, a lawyer may practise when he has a bachelor's degree in law, whereas in France the lawyer must in addition have passed the certificate of aptitude for the legal profession. A further complication arises from the differences in

¹ Clearly, a lawyer could not—as sometimes happens in France for instance—be asked to sit on the Bench if he is not a national.

language and legal systems. An additional examination in the law of the host country will therefore have to be required of lawyers who wish to practise there.

(c) Freedom of establishment is more difficult to grant than freedom to supply services in that when a lawyer of a member State of the Community who is established and in practice in his own country appears in the courts of another State in a case relating to the law of his country, a service has been supplied but there is no question of establishment. Some lawyers in the host country try to protect themselves from this situation because it involves a loss of business for them. It should however, be pointed out that freedom to supply services in another country is equally available to them. In practice, a foreign lawyer has always been entitled to argue a case before a French court provided that he does so in French; French lawyers may also appear in Belgian and Luxembourg Courts. There is, however, a language problem in the case of Italian, German and Dutch lawyers.

Professional organisations that are corporate bodies will have to conform with Community directives when they are issued; on the other hand, professional associations that are unincorporated, such as those governed by the law of 1901 in France, may refuse to comply with the directives, provided that their refusal does not obstruct freedom of establishment for non-salaried members of their profession. This applies, for instance, to legal advisers who may practise their profession in their own country or in the host country they have chosen with complete freedom.

5. Mutual recognition of qualifications and coordination of training

Because methods of training and the weight attached to qualifications vary, progress in the mutual recognition of qualifications has been slow: a diploma may be required for a certain activity in one country and not in another; (this is especially true in the case of the crafts). This creates difficulties in coordinating access to non-wage-earning activities. However, some progress has been made in that when some form of qualification is required for a professional activity, member States have, in complying with directives on freedom of establishment, accepted a university or other degree as entitling the holder to practise a given occupation, without committing themselves as to the academic value of such a degree.

But the problem is broader than that. It is not enough merely to give workers an opportunity of using their qualifications in all the member States by improving the training offered; above all, efforts

must be made to coordinate methods of training, with a view to narrowing the differences between the various systems and thus gradually introducing a common educational policy within the Community. The work now under way is being carried out with the help of the universities, and the Commission would like to see a European university established.

Proposals for harmonizing university policy in the six countries are to be submitted by the Commission to the member States. Last July one of the members of the 'College of Fourteen', which directs the future policy of the Commission, Mr. Hellwig, German Vice-President, who is responsible for General and Nuclear Research, said that 'at the stage in which the Community and university teaching now stand, a minimum of Europeanization is urgent'. He advocated in particular the free movement of teachers, research workers and students as a step towards the mutual recognition of qualifications.

C. Harmonisation of Labour Legislation

It must be remembered that the degree of employment, the wage systems and levels, and the systems of social security and social benefits varied considerably in the six countries of the Community when they undertook to build a common market. In Italy there has since been an appreciable drop in unemployment. Although the situation was improving in the other countries until the first half of 1966, since then it has deteriorated seriously, particularly in France, though Belgium and Germany have also been hit by the upsurge in unemployment. As for the future, the need for skilled workers is likely to create tension in the labour market: while there are already many young graduates who are unable to find a job despite their qualifications, there is at the same time, a growing shortage of specialized technicians. To solve this problem, it will be necessary, though perhaps not enough, to create new jobs and to provide vocational guidance based upon the needs of the economy.

In general terms, the growing difficulties in certain regions and in certain sectors (e.g. the slackening demand in the French shipbuilding industry or the closing down of the Decazeville mines) will necessitate redeployment of labour. Faced with these problems, the Commission will have to procure information on labour trends for each sector, category, skill and region. Such research should be directed towards the adoption of measures to obviate existing or expected difficulties. If a person is completely unemployed, he is entitled to benefits at the rate and for the period specified in the legislation of the country in which he is unemployed. The scope of

activity of the European Social Fund should be expanded so that it can play a more effective role in this connection.

As for working and living conditions, wages in the six member countries increased by more than 50 per cent between 1958 and 1966. The difference in wages between the wealthier countries like Belgium and Luxembourg and the less wealthy like Italy have gradually been reduced over the past ten years, though standards of living have not yet reached the same level. Moreover, in some countries wages have been adjusted by granting additional benefits; France in particular, where wages are not among the highest, raises the living standards of its citizens by large-scale resort to the system of social benefits (such as family allowances of all kinds and housing allowances), which are a form of indirect wages for certain categories of workers; other countries, such as Germany, prefer a direct policy of high wages. In most of the countries working hours have been appreciably reduced, both on a weekly and a yearly basis; the extension of paid holidays is the yardstick by which the implementation of the workers' right to leisure—the complement of their right to work—can be measured.

In regard to the wages paid to women, the principle of equal remuneration was adopted at the end of December 1964, but the Commission's last report to the Council in August 1967 notes that discrimination still exists, mainly because women's work is undervalued in the job classification system; and this of course affects their wages. Despite the many inequalities that still exist, women's wages have increased in the last few years and the gap that separates them from men's wages has thus narrowed.

The six countries are also responsible for advances in the field of social security. A commendable effort has been made to raise the level and extend the scope of protection: medical and pharmaceutical expenses are covered to a larger extent, and the schemes are gradually being extended so as to include new categories of beneficiaries, such as farmers and other self-employed persons.

Moreover, so that migrant workers may preserve or accumulate the rights they have acquired, an attempt has been made to coordinate, if not to harmonize completely, the social security legislation of the six member countries in pursuance of Article 51 of the Treaty of Rome. In 1958, regulations 3 and 4, which had been prepared with the help of the ILO, were adopted; they became effective on 1st January 1959. Two years ago the Commission submitted a draft amendment to regulation 3, which relates to 'the application of social security schemes to wage-earners and their families who move from one country to another within the Community'. This amendment remained before the European

Parliament for a long time, where a detailed report on it was made by Mr. Troclet, member of the Commission of Social Affairs and Public Health. The new regulation is intended to provide migrant workers and their families with maximum benefits in the event of sickness, maternity, disability, old age, death, industrial injuries, occupational diseases, and unemployment, as well as family allowances. Its essential purpose is to ensure that workers who have worked in several countries and have come under the legislation of several member States will receive the benefits to which they are entitled without discrimination. This means that the insurance periods for which they have paid contributions under the various social security schemes must be taken into account. This regulation will be submitted shortly to the Council for examination.

In 1963, two regulations covering social security for seasonal workers and those living on one side of a frontier and working on the other were adopted. The extension of benefits has considerably increased social security costs and as a result contributions have also risen nearly everywhere.

Although, as a result of the Common Market, the living and working conditions of labour have been levelled 'in an upward direction' (in the words of Article 117 of the Treaty of Rome), progress in the social field is still piecemeal. Inquiries, statistics, surveys and comparative tables are an incentive to achieve real social advances in common. But without some degree of planning and the fixing of a timetable, which may if necessary be flexible, and without active—and not merely consultative—participation of the workers' representatives (the trade unions), it will be impossible to raise living standards within the Community so as to remove the disparities existing between member States.

1968 has seen the determination of the builders of the Community to move forward in several fields. On the same day as they signed the new regulation on the free movement of workers, the six Ministers for Social Affairs agreed to meet in the autumn to discuss problems relating to employment and the economic and social situation in the Community. At the request of France all the 'social partners' have been invited. For the first time French and Italian communist trade unions will be able to take part in the discussions. The trade unions' role will still only be consultative, but it will at least be more representative of the persons interested.

To make the 185 million persons of the Community into a single entity would have been too ambitious a dream. When countries have as rich a national heritage as the Six, their cultural values cannot be fused in a single melting-pot. The language, literature and history of each are too individual to disappear. There

is no question, then, of producing a 'European people'. The 'European spirit' must be born of a confrontation of the heritage, experience, customs and knowledge of the various peoples. The free movement of individuals, like the free movement of ideas, will contribute to enriching the potential of each nation. It is undeniable that people tend to stay at home more as their living standards rise. Generally speaking, the members of poor societies or societies that are oppressed, whether for economic, religious, ideological, political or racial reasons, emigrate more than privileged peoples who feel completely at home. But it would be absurd to maintain that Europe is inhabited solely by materially or spiritually privileged persons, who eat their fill, are well housed, aspire to nothing else and seek no further contact with outsiders.

The free movement of workers within the Community will bring to the men and women of these six countries greater benefits from the interplay of offer and demand; as workers will be able to take up employment anywhere within the Common Market, they will be able to seek and enjoy a better life, to the advantage of everyone.

But it will require long, careful and hard work to bring about freedom of establishment. Real achievements in this field will only be possible when attitudes have undergone a profound change, when there has been a real opening up of the people of each of the six countries to the others, and when all really wish to pool their efforts to enrich the common European inheritance. Then, a united Europe will be a positive contribution to the implementation of human rights in the economic and social fields.

LATIN AMERICAN PROCEDURES FOR THE PROTECTION OF THE INDIVIDUAL

by

HÉCTOR FIX ZAMUDIO*

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1. '*Individual Guarantees*': *Traditional and Contemporary Conceptions*

The term '*individual guarantees*' as traditionally used in many Latin American Constitutions, can be traced back to the charters promulgated during the French Revolution. As has been pointed out,¹ this concept is not found in Anglo-American Law, though United States Law in particular has had an influence on basic Latin American institutions.

The French revolutionaries adopted a common attitude that led to the somewhat romantic idea of writing into the Constitution the most essential human rights so that they should be known and respected by all in authority. These rights then had the status of '*individual guarantees*'.

Those idealists, who a little ingenuously embraced the belief that they had discovered the political principles of human happiness, thought that by identifying and defining the natural rights of man, regarded as the most important for his dignity, and by enshrining them

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¹ By the Argentine lawyer, Carlos Sánchez Viamonte in *Los derechos del hombre en la revolución francesa*, Mexico City, 1956, p. 68. See also Jorge Jellinek, *La Declaración de los Derechos del Hombre y del Ciudadano*, Mexico City, no date, especially pp. 45 *et seq.*

in the Constitution, they would make them known to the governors and the governed alike and thus ensure their effectiveness and their observance by all members of society, particularly the authorities.¹

More practical-minded, the Anglo-Americans, although they too recognized the fundamental rights of the individual as essential to enable men to live together, did not call them 'guarantees'; instead they drew up a declaration or bill of rights.² Indeed, with a great deal of common sense, the drafters of the first ten amendments to the Federal Constitution of the United States of 1787 (which, in its original version, lacked a real declaration of rights) considered that it would be useless to try to crystallize the essential rights of the individual in a constitution; and in one of the amendments adopted in 1791—the ninth—they specified that the list of rights given in the Constitution was not to be interpreted as impairing or detracting from the other rights enjoyed by the people.³

There is no need to labour the point, already sufficiently demonstrated elsewhere, that the Latin American Constitutions of the 19th century were the result of a threefold influence, more or less fused: the French Revolutionary Constitutions, the Federal Constitution of the United States of 1787 and the Basic Law of Cadiz of 1812. However, it is precisely in the parts devoted to human rights that the influence of the French texts is clearest.

Examples of this influence are to be found in the constitutional laws of Argentina, Uruguay, Chile, Brazil and, needless to say, Mexico, which follow the French term of 'individual' (sometimes 'constitutional') guarantees as meaning human rights enshrined in the Constitution.

The Argentinian and Uruguayan constitutional laws established the practice, which still exists, of calling fundamental human rights 'declarations, rights and guarantees'. This term was used not only in the Argentinian Constitution, whose original text was adopted in

¹ See Léon Duguit, *Traité de droit constitutionnel*, second edition, Vol. III, Paris, 1924, pp. 561 *et seq.*; A. Esmein, *Eléments de droit constitutionnel français et comparé*, Vol. I, Paris, 1921, pp. 556 *et seq.*; and Julien Laferrère, *Manuel de droit constitutionnel*, second edition, Paris, 1947, pp. 47 *et seq.*

² The declarations of rights contained in the local Constitutions of the States of the Confederation fighting for their independence from England that were promulgated between 1776 and 1787 may be found in the compilation by Richard L. Perry and John C. Cooper, *Sources of our Liberties*, third reprint, New York, 1964, pp. 301-397.

³ The scope of this provision is described in the brief but excellent account by Edward S. Corwin, *The Constitution and What it Means Today*, New York, 1964, pp. 234 and 235.

1853,¹ but also in the Uruguayan Constitution of 1918,² and even in the very recent Constitution of 1966 (*Section II, Articles 7-72*).

The present Chilean Constitution, adopted in 1925 and amended in 1943, lists the fundamental rights of citizens as 'constitutional guarantees' (Chapter II, Articles 10-23), a term which had already been used in the Constitution of 1833.³

The Constitution of the Empire of Brazil of 1824 used the traditional term 'guarantees of the civil and political rights of Brazilian citizens' (*Book VIII, Articles 173-179*). This term was taken up in subsequent Constitutions until that of 1946, when the term 'individual rights and guarantees' was adopted (*Book IV, Chapter II, Articles 141-144*).⁴ The same term has been used in the very recent Constitution of 24th January 1967 (*Book II, Chapter IV, Articles 150-151*).

In Mexico, the term 'individual guarantees' to designate the human rights laid down in the Constitution was already found in the Constitution for the Province of Yucatán of 1841 (*Articles 7-9*) owing to the influence of Manuel Crescencio Rejón, one of the originators of *amparo*.⁵ Used in various subsequent Constitutions, the term was definitively enshrined in Book I, Chapter I, of the Constitution of 1857 and used expressly as such in Book I, Chapter I, of the present Constitution dated 5th February 1917.⁶

Recently, however, the traditional meaning of the term has begun to lose some of its force. Contemporary jurists have pointed out, and the sad and tormented history of Latin America has repeatedly shown, that human rights cannot be effectively safeguarded merely by incorporating them in the Constitution.

Many constitutional lawyers today consider that human rights can only be effectively guaranteed by specific procedures for their

¹ See Carlos Sánchez Viamonte, 'El constitucionalismo a mediados del siglo XIX en Argentina', in *El constitucionalismo a mediados del siglo XIX*, Vol. I, Mexico City, 1957, pp. 128 *et seq.*

² See Héctor Cors Espiell, *Las constituciones del Uruguay*, Madrid, 1956, pp. 59 *et seq.* and 205 *et seq.*

³ See Alejandro Silva Bascañán, *Tratado de derecho constitucional*, Vol. II, Santiago, 1963, pp. 205 *et seq.*

⁴ See Pontes de Miranda, *Comentarios a Constituição de 1946*, third edition, Vol. XXIV, Rio de Janeiro, pp. 237 *et seq.*

⁵ Suprema Corte de Justicia de la Nación: *Homenaje a don Manuel Crescencio Rejón*, Mexico City, 1960, pp. 97 *et seq.* It should be noted that Articles 8 and 9 of the Constitution establish *amparo* as a procedure for ensuring the effectiveness of the human rights laid down in previous provisions.

⁶ Mexican law clearly follows the traditional conception, as established both in the Constitution of 1857 and in the present Constitution. See Isidro Montiel y Duarte, *Estudio sobre las garantías individuales*, Mexico City, 1873, Adalberto G. Andrade, *Estudio del desarrollo histórico de nuestro sistema constitucional en materia de garantías individuales*, Mexico City, 1958 (written in 1931) and Ignacio Burgoa, *Las garantías individuales*, fifth edition, Mexico City, 1968.

protection. Italian jurists have admirably developed the theory of constitutional guarantees in the strict sense, as meaning the procedures for ensuring the effective application of constitutional provisions,¹ and have gone so far as to incorporate them in the Constitution of December 1947, Book VI of which is in fact entitled *Constitutional Guarantees*. Quite rightly, these include the powers of the Constitutional Court (Articles 134-137).²

Jurists in Latin America, especially in Argentina³ and Panama,⁴ have also adopted an attitude similar in some respects to that of Italian jurists. Section 22 of the 1941 Constitution of Panama, which sets up remedial machinery, includes all the procedures by which the nation's inhabitants may secure protection for their fundamental rights.⁵

Consequently, as doctrine and even certain Constitutions in Latin America stand today, a distinction must be made between the human rights laid down in the Constitution and the guarantees provided for those rights, which are in effect the procedures to ensure their protection and effectiveness.⁶

Nor is it correct, strictly speaking, to refer to human rights as individual rights. One of the characteristics of contemporary times is precisely the social transcendence of such rights. In addition to those rights that have traditionally been granted to the individual, others have arisen that put him in a new dimension: his integration into the various social groups of which contemporary society is made up.

¹ See Serio Galeotti, *Introduzione alla teoria dei controlli costituzionali*, Milan, 1963, pp. 124 *et seq.*

² See, in particular, Ferruccio Pergolesi, *Diritto costituzionale*, eleventh edition, Padua, 1956, pp. 358 *et seq.* and Carlo Ceretti, *Corsi di diritto costituzionale italiano*, Turin, 1956, pp. 447 *et seq.*

³ See Carlos Sánchez Viamonte, *El constitucionalismo y sus problemas*, Buenos Aires, 1957, pp. 97 *et seq.* and, the same author, "Garantías constitucionales" in *Enciclopedia Jurídica Omeba*, Vol. XIII, Buenos Aires, 1960, pp. 15 *et seq.*; Rafael Bielsa, *La protección constitucional y el recurso extraordinario*, second edition, Buenos Aires, 1958, pp. 294 *et seq.*; Juan Casiello, *Derecho constitucional argentino*, Buenos Aires, 1964, p. 276; Segundo V. Linares Quintana, *Tratado de la ciencia del derecho constitucional argentino comparado*, Vol. V, Buenos Aires, 1956, pp. 335 *et seq.*; and Adolfo Rouzaut, *Las garantías constitucionales de la libertad civil (doctrina y jurisprudencia)*. Rosario, 1940, pp. 6 *et seq.*

⁴ J. D. Moscote, *El derecho constitucional panameño*, Panama, 1943, pp. 459 *et seq.*

⁵ See Carlos Bolívar Pedreschi, *El pensamiento constitucional del doctor Moscote*, Panama, 1965, pp. 115 *et seq.* and Victor F. Goytia, *Las Constituciones de Panama*, Madrid, 1954, pp. 675 *et seq.* Although the 1965 Constitution, which is now in force, does not devote a special chapter to remedial machinery, it retains the procedures for the protection of fundamental rights. The procedures are regulated by Act No. 46 on Petitions for Constitutional Review of 24th November 1956.

⁶ See Héctor Fix Zamudio, 'La defensa de la Constitución' in the *Revista de la Facultad de Derecho*, Sinaloa, Mexico, January-July, 1967, pp. 155-163.

In this respect, the Mexican Constitution of 5th February 1917, which is still in force, opened up new perspectives. It was more advanced than even the German Constitution of October 1919: two years previously, it had already established as constitutional a number of fundamental social rights,¹ thus setting an example that many of the Constitutions promulgated during the post-war period were to follow. In this context, Boris Mirkiné Guetzevitch maintained that in the 20th century the social purpose of law is not only a doctrine or a school of legal thought but the very essence of life.²

This development began after the first World War, but it was in the second and more bitter post-war period that social rights were written into the Constitution of nearly every country. To a greater or lesser extent, all of the Constitutions of Latin American countries have, alongside the traditional declaration of individual rights, recognized many social rights. All of these rights taken together may be regarded as human rights, for they are ultimately intended for the human person in his two essential dimensions, as an individual and as a member of society.³

Lastly, many Latin-American Constitutions have laid down the principle of 'implied rights and guarantees' as meaning those human rights that are not expressly mentioned in the Constitution but that must be regarded as an integral part of it.

As pointed out earlier, this principle was first laid down in the Ninth Amendment to the Constitution of the United States. It was later incorporated into various Latin-American Constitutions, including those now in force in Argentina (*Article 83*), Bolivia (*Article 35*), Brazil (*Article 150, paragraph 35*), the Dominican Republic (*Article 10*), Ecuador (*Article 28*), Guatemala (*Article 77*), Honduras (*Articles 52 and 145*), Paraguay (*Article 80*), Uruguay (*Article 72*) and Venezuela (*Article 50*).

To conclude, as the constitutional laws of Latin America now stand the term 'individual guarantees' can no longer be restricted to those human rights expressly or impliedly laid down in the Constitution. This traditional conception has been replaced by the notion of fundamental human rights as both individual and social rights. Moreover, the idea of 'constitutional guarantees' has now been extended to cover the procedures protecting human rights and, in general, all constitutional provisions.

¹ See Pastor Rouaix, *Génesis de los artículos 27 y 123 de la Constitución Política de 1917*, second edition, Mexico City, 1959, pp. 27 *et seq.*

² *Las nuevas Constituciones del mundo*, Madrid, 1931, p. 34.

³ The commentator, José Miranda, has pointed out that one of the present trends in Latin-American constitutional law is precisely to 'constitutionalize social rights'. See *Reformas y tendencias constitucionales recientes de la América Latina*, Mexico City, 1957, pp. 232, *et seq.*

2. The 'Constitutional Jurisdiction of Freedom'

This term has been used by the Italian jurist, Mauro Cappelletti, to embrace all the procedures or 'guarantees', in the strict sense of the word, that have gradually been established for the protection of human rights. He starts from the idea that such rights are 'rights to freedom' since they provide the governed with legal protection for the full development of their personality through respect for the equality and dignity of man.¹

This jurisdiction can be said to provide two kinds of remedies. The first are designed for the immediate and direct protection of human rights and the second, although not expressly so designed, may indirectly serve the same purpose.

The first group includes the procedures dealt with in this study, i.e. *habeas corpus*, action for a declaration of unconstitutionality, *amparo* in its various procedural forms, *el mandado de segurança*² etc., and in the second group are the various means which can be used in ordinary proceedings to protect human rights;³ of these, mention should be made of the right of a party to plead as a defence the unconstitutionality of a law, applicable to the case, which he considers to infringe his fundamental rights.⁴

Among the indirect means, mention may also be made of action under administrative law, known in Roman law countries by the incorrect but widely used term *contentieux administratif*.

It may be said in this respect that there is a wide range of procedures for protecting the rights of individuals against acts of the executive. These procedures are becoming ever more important because of the steady encroachment of governments on the economic and social life of the governed. This was one of the salient points of the discussions and conclusions of the 'Seminar on Judicial and Other Remedies against the Illegal Exercise or Abuse of Administrative

¹ In this respect, see the remarks on rights to freedom or 'constitutional freedom' by the commentators, Segundo V. Linares Quintana, *Tratado de la ciencia del derecho constitucional argentino y comparado*, Vol. III, Buenos Aires, 1956, especially pp. 208 *et seq.* and Carlos Sánchez Viamonte, *La libertad y sus problemas*, Buenos Aires, 1961, pp. 136 *et seq.*

² A special remedy, similar to *amparo*, peculiar to Brazilian Law, See Section 4, p. 71 below.

³ See Karl August Bettermann, 'Der Schutz der Grundrechte in der ordentliche Gerichtsbarkeit', in *Die Grundrechte. Handbuch der Theorie und Praxis der Grundrechte*, Vol. II, part 2, Berlin, 1959, pp. 779 *et seq.* and Eduardo J. Couture, 'Las garantías constitucionales en el proceso civil', in *Estudio de derecho procesal en honor de Hugo Alsina*, Buenos Aires, 1946, pp. 169 *et seq.*

⁴ For a clear account of this system, see Mauro Cappelletti, *El control judicial de la constitucionalidad de las leyes en el derecho comparado*, Mexico City, 1966, pp. 53 *et seq.*

Authority' held at Buenos Aires under the auspices of the United Nations from 31st August to 11th September 1959.¹

Nevertheless, without underestimating the importance of administrative law for protecting the individual against an ever more powerful executive, the writer believes that, contrary to the very authoritative views of Alberto Ramón Real² and those implicitly held by J. D. Moscote,³ such law cannot be regarded as a remedy specifically protecting fundamental rights—even when it may in fact protect them. The role of administrative law is to ensure legality and not constitutionality; its main purpose therefore is to protect the legitimate rights and interests of the governed under ordinary laws but not his civil rights under the Constitution. Consequently, the study will concentrate on the remedies in the first group, which have proved to be effective as rapid and sure means of protecting human freedom (in the broad sense of the term).

The point has often been made that procedure must adapt itself to its subject matter just as 'the spirit adapts itself to the body', to use the words of the German authority on procedure, Adolf Wach. Therefore, although it is true that the law of procedure forms a single whole, the diverse nature of the substantive rights it serves has led to the existence of directive principles⁴ peculiar to each of the branches forming what may be called 'the great procedural federation'.

If one speaks of a 'constitutional jurisdiction of freedom', then, the possibility may also be considered, at least for the purpose of its study, of a 'libertarian system of law' made up of the procedures adapted to the spirit of the fundamental human rights they are designed to protect. Such a system must have all the flexibility, speed and concentration necessary for the effective legal protection of human freedom.

In my opinion, and without prejudice to the remaining remedies,

¹ A most important resolution was adopted by the Seminar (a) condemning any Government which infringes the rights inherent in the human person and his freedom of conscience, which should be inviolable; and (b) stressing the need to strengthen the Rule of Law, on a basis of genuine democracy, as the only means of ensuring the subjection of the public authority to the principle of legality, and of preventing abuse of power; thus establishing the principle of liability of public officials and the State. United Nations Documents ST/TAO/HR/6, New York, 1960, p. 16.

² 'La acción de amparo en la jurisprudencia argentina y ante el derecho uruguayo' in *Revista de la Facultad de Derecho y Ciencias Sociales*, year XIV, No. 1, Montevideo, January-March 1963, especially pp. 139 *et seq.*

³ Who in effect classifies administrative law procedures as 'constitutional guarantees'. See *Derecho constitucional Panameño*, op. cit. pp. 472 *et seq.*

⁴ Regarding the concept of directive principles, see Roberto Wyness Millar, *Los principios formativos del procedimiento civil*, Buenos Aires, pp. 37 *et seq.* and Eduardo J. Couture in *Fundamentos del derecho procesal civil*, Buenos Aires, 1958, pp. 181 *et seq.*

only those mentioned above as belonging to the first group should be considered as adequate means of protecting human rights, i. e. *habeas corpus*, *amparo*, *mandado de segurança*, and the judicial review of the constitutionality of laws that conflict with those rights. An attempt will now be made to justify this attitude.

3. Habeas Corpus

This is a specific and traditional instrument for the direct protection of human rights, at least as far as freedom of the person is concerned, and it therefore forms part of the 'constitutional jurisdiction of freedom' in the strict sense.

It is hardly necessary to mention the well-known precedent that served the framers of Latin American Constitutions as a basis for introducing this remedy, the Habeas Corpus Act of 1671.¹ *Habeas corpus* has been expressly or impliedly adopted in virtually every Latin American Constitution.²

Habeas corpus exists in Argentina, for example, even though it was not expressly provided for in the original text of the national Constitution still in force. It was introduced in the 1949 revision (*Article 29*), repealed by the government that emerged from the 1955 revolution; however, it is regarded as implied, and is found, besides, in a large number of the provincial Constitutions.³ *Habeas corpus* is expressly laid down in the present Constitutions of the following Latin American countries: Bolivia (*Article 18*), Brazil (*Article 150 (20)*), Chile (*Article 16*), Costa Rica (*Article 48*), Cuba (*Article 29* of the revised 1959 text), the Dominican Republic (*Article 8 (g)*), Ecuador (*Article 28 (18) (h)*), El Salvador (*Article 164*), Guatemala (*Article 79*), Honduras (*Article 58 (2) (a)*), Nicaragua (*Article 41*), Panama (*Article 24*), Paraguay (*Article 78*), Peru (*Article 69*), Puerto Rico

¹ A specific attempt was made in Mexico to adopt *habeas corpus* in fundamental provision 31 of the Constitutional Elements drafted by Ignacio Lopez Rayón in 1811, as follows: 'The residence of everyone shall be respected as an inviolable sanctuary and the famous *Habeas Corpus Act of England* shall be applied to a greater or lesser degree according to circumstances'. See Felipe Tena Ramírez, *Leyes Constitucionales de México (1808-1964)*, second edition, Mexico City, 1964, p. 26.

² See the information given by the North-American commentator Phanor J. Eder on the introduction of *habeas corpus* as such in Latin-American Constitutions, 'Habeas Corpus Disembodied, The Latin-American Experience', in *Twentieth Century Essays in Honor of Hessel E. Yntema*, Leyden, 1961, p. 473. See also Carlos Sánchez Viamonte, *El habeas corpus, garantía de libertad*, second edition, Buenos Aires, 1965, pp. 85 *et seq.*

³ See Segundo V. Linares, *Tratado de la ciencia del derecho constitucional*, op. cit., Vol. V, Buenos Aires, 1956, p. 359.

(Article 13), Uruguay (Article 17), and Venezuela (transitional provision 5).¹

In Mexico, freedom of the person is not guaranteed under the traditional Anglo-American name of *habeas corpus* since it is covered by *amparo*, which is also designed to protect the individual against arbitrary arrest. *Habeas corpus* may therefore be said to exist in Articles 103 and 107 of the Federal Constitution, which govern *amparo*.

The order to produce the person, or *habeas corpus*, is clearly included in Article 17 of the Law regulating *amparo*, which lays down very liberal rules for the application of this procedure when used as a means of protecting a person's freedom. It clearly establishes that the judge granting *amparo* must take every necessary step to secure the *appearance* of the aggrieved party who, if prevented from applying for the remedy personally, may ask any other person to do so on his behalf.²

Although Article 16 of the Chilean Constitution does not use either of these terms as such, both legal writers and the courts speak of ' *amparo* ' when referring to the remedy against arbitrary or unlawful imprisonment. The remedy is governed by Articles 306 and 317 of the Criminal Procedure Code of 12th June 1906, revised on 30th August 1934, and by a decision of the Supreme Court of 19th December 1932 relating to *amparo*.³

¹ The 1964 Constitution of Haiti, now in force, is not very precise about the protection of personal freedom against arbitrary detention. Article 17 lays down fairly broad rules for detention but does not clearly establish a remedy similar to *habeas corpus*. It seems rather, following the French tradition, to adopt the principle of the criminal and civil liability of an official who infringes the rules governing arrests. The final part of that article provides that ' any violation of this provision shall be regarded as an arbitrary act against which the injured parties may, without authorization, appeal to the courts, prosecuting either the authors of the acts or the persons executing them, irrespective of their rank or the body to which they belong '.

² This provision reads: ' In the case of acts endangering life, *encroachments upon personal freedom outside judicial proceedings, deportation or banishment* or any of the acts prohibited by Article 22 of the Federal Constitution [prohibition of infamous and excessive punishment] and if the *aggrieved party is unable to bring an action for amparo himself*, any other person may do so on his behalf, including minors and married women. In this case, *the judge shall take every step to secure the appearance of the aggrieved party* and, if necessary, shall order that he be requested to approve the petition for *amparo* within three days; if the aggrieved party approves it, the suit shall be prosecuted; if he does not, the petition shall not be receivable and the orders issued shall become null and void '. This type of *amparo*, because of its similarity to *habeas corpus*, has been described as *amparo-libertad*. See Hector Fix Zamudio, *El juicio de amparo*, Mexico City, 1964, pp. 243 *et seq.*

³ The Chilean authority on constitutional law, Carlos Estévez Gasmuri, calls this remedy ' *amparo* or *habeas corpus* ' in his work *Elementos de derecho constitucional*, Santiago, 1949, pp. 143 and 144. See also Elena Caffarena de Giles, *El recurso de amparo frente a los regímenes de emergencia*, Santiago, 1957, especially pp. 152 and 187.

Various codes of criminal procedure in the Provinces of Argentina and particularly the code for the federal capital and the nation as a whole (*Articles 617, 640 and 645*) refer to *habeas corpus* under the name of *recurso de amparo de la libertad*;¹ similarly, the fifth transitional provision of the Venezuelan Constitution now in force provisionally establishes *amparo de la libertad personal* as a remedy against arbitrary or illegal detention; this is clearly another name for *habeas corpus* in its accepted sense.² Indeed the Ministry of Justice has recently drawn up a '*Habeas Corpus Bill*'.³

A brief review of the general law on *habeas corpus*, the production of the person and *amparo de la libertad personal* in Latin American laws shows that these procedures have certain characteristics in common. Each is a remedy specifically protecting the individual's right to freedom enshrined in the Constitution of the various countries; this remedy is used chiefly to challenge arbitrary or illegal detentions, particularly arrests made by administrative authorities, which unfortunately all too often infringe the provision contained in all Latin American Constitutions that a citizen may not be detained, save in periods of emergency, except by order of a court; the procedure must be rapid and must take precedence over any other ordinary procedure; the judge must order the immediate production of the person detained so as to examine the reasons for his detention; the procedure may be initiated by anyone on behalf of the person concerned; and the order to free him must be speedily obeyed and failure to do so severely punished.

The details of course vary. In some Latin American countries *habeas corpus*, like the traditional English institution, will issue against unlawful imprisonment by private individuals as well as by the authorities. Such a provision is contained in Articles 1 (4) and 32 *et seq.* of the Amparo Act of Nicaragua of November 1950, which also governs *habeas corpus*,⁴ and a similar rule has been established

¹ See Niceto Alcalá-Zamora y Castillo and Ricardo Levene, Jr., *Derecho procesal penal*, Vol. III, Buenos Aires, 1945, pp. 394 *et seq.* See also Carlos Viamonte, *El habeas corpus*, op. cit., pp. 157 *et seq.*

² See, *inter alia*, José A. de Miguel, 'Amparo y habeas corpus en la Constitución de 1961 in *Revista del Colegio de Abogados del Distrito Federal*, No. 130, Caracas, July-December 1965, pp. 29 *et seq.*

³ Caracas, 1965.

⁴ The first of the provisions mentioned states: 'The present law establishes the legal means of exercising the right to *amparo* (including *habeas corpus*) in order to maintain and restore the supremacy of the Constitution and the constitutional laws, which shall constitute the basis for deciding any questions arising from . . . (4) acts restricting the personal freedom of any inhabitant of the Republic by private individuals . . . '.

by El Salvador in Book IV, relating to *habeas corpus*, of the Law of Constitutional Procedure No. 2996, of 14th January 1960.¹

In the absence of other means of protecting fundamental rights, attempts have sometimes been made to extend the scope of *habeas corpus* to safeguard various other rights than that to freedom of the person. The most obvious example is the so-called 'Brazilian theory of *habeas corpus*', a proponent of which was the eminent jurist, Rui Barbosa. Under this, it was—at times successfully—maintained that *habeas corpus* (as provided for in the original text of Article 72 (22) of the Constitution of February 1881—before the 1926 revision) was the appropriate remedy for protecting other fundamental rights directly or indirectly related to freedom of the person.² This theory is considered to have paved the way for the *mandado de segurança*, examined below.

This wide interpretation of *habeas corpus* had a definite influence on theory and practice in Argentina³ and Bolivia⁴ before the remedy of *amparo* was adopted. It is also to be found in some provincial Constitutions in Argentina⁵ and, in particular, in Article 69 of the present Constitution of Peru, which states that a writ of *habeas corpus* may be issued in respect of all the individual and social rights recognized by the Constitution, though this provision has not been applied in practice to the extent permitted by the Constitution.

¹ Article 38 of which reads: 'Except where otherwise especially provided by law, everyone shall have full freedom of his person, free from subjection by others. When this right is infringed by the detention of a person against his will within a certain place, be it by threat, fear of injury, constraint or other obstacle, the person shall be regarded as imprisoned and in the custody of the authority or *private individual* who has made the detention. A person shall be considered to be in the custody of another when the latter, even without confining him within a certain place by force or threat, directs his movements and compels him against his will to go or stay where he instructs'.

² See, *inter alia*, Arnold Wald, 'El mandato de seguridad (historia y naturaleza)' in *Boletín del Instituto de Derecho Comparado de México*, No. 24, Septiembre-December 1955, pp. 35-45. See also by the same author, *O mandado de segurança na practica judiciaria*, Rio de Janeiro, 1958, pp. 25 *et seq.* and Themistocles B. Cavalcanti, *Domando de Segurança*, fourth edition, Rio de Janeiro and Sao Paulo, 1957, pp. 50 *et seq.*

³ See José Faustino d'Hers, 'Visión integral del amparo en el habeas corpus de Sánchez Viamonte', in *La Ley*, Buenos Aires, 7th April, 1966, pp. 1-6.

⁴ See Enrique Oblitas Poblete, *Lecciones de derecho procesal penal*, Vol. II, Sucre, 1961 pp. 323 *et seq.*, and, by the same author, *Recurso de amparo*, La Paz, 1967, pp. 27 *et seq.*

⁵ Article 16 of the Constitution of the Province of Chaco, of 1957, and Article 44 of the Constitution of Province of Neuquén, of 1957, provide the writ of *habeas corpus* as an instrument for protecting all human rights laid down in the Constitution, except for property rights.

4. Mandado de Segurança

The attempt made in Brazilian theory and practice to extend *habeas corpus* to protect all fundamental rights set out in the Constitution failed, and the 1891 Constitution was amended in 1926 in order to confine *habeas corpus* to its traditional limits. As a result, it was necessary to create another remedy, the *mandado de segurança*, introduced by Article 13 (33) of the 1934 Constitution. Since then, this new remedy has gained ground by leaps and bounds.

Even when the courts and legal writers refer (as is logical) to the institution as it was governed by Article 141 (24), of the former Constitution of 1946, their conclusions are still applicable since Article 150 (21) of the 1967 Constitution takes up the former text as follows:

For the protection of clearly defined rights not protected by *habeas corpus*, the *mandado de segurança* shall be granted, irrespective of the authority responsible for unlawful action or abuse of power.

The *mandado de segurança* is governed mainly by Act No. 1533 of 31st December 1951 amending the relevant provisions of the Code of Civil Procedure of 1939. Acts No. 2770 of 4th May 1966 and No. 4348 of 26th June 1964 are, as far as can be known from available information, also relevant.¹

It should be borne in mind that the *mandado de segurança* is directed essentially against acts and decisions of administrative authorities or administrative acts of other authorities since, in accordance with legislation, legal theory and practice, it is only in exceptional cases that this procedure may be used against laws or judicial decisions.

Most jurists consider that the procedure cannot be used to challenge a law in the abstract but only specific acts applying it, particularly acts by governmental authorities, on the argument that action cannot be brought against law-making bodies in their legislative capacity but solely in their administrative capacity.²

There is a tendency, however, to temper the rigidity of this principle, and the new bills drafted under the auspices of the *Instituto dos*

¹ See J. M. Othon Sidou, 'Lei 1,533 de 31 dezembro de 1951, que disciplina o mandado de segurança com as alterações em vigor' in *Boletim Instituto dos Advogados de Para*, Belem, Brazil, December 1967. pp. 33-35.

² See José Castro Nunes, *Do mandado de segurança*, sixth edition, Rio de Janeiro and Sao Paulo, 1961, pp. 117 *et seq.*; Cavalcanti, *Do mandado de segurança*, op. cit. pp. 136 *et seq.*; and Alfredo Buzaid, 'Juicio de amparo o mandado de segurança (contraste e confrontos)' in *Actas del primer Congreso Mexicano y Segundas Jornadas Latinoamericanas de Derecho Procesal*, Mexico City, 1960, p. 145. Prevailing case-law, particularly the decisions of the Federal Supreme Court, takes the same lines as writers: see Tito Galvao Filho, *Diccionario de jurisprudencia no mandado de segurança*, Curitiba, Paraná, 1960, pp. 156 *et seq.*

*Advogados Brasileiros*¹ and by the *Conselho Federal da Orden dos Advogados do Brasil*² provide that, in exceptional cases, laws may be challenged in the abstract on proof that they are likely to cause damage the redress of which will be difficult or uncertain.

Brazilian jurists are divided about the applicability of the *mandado de segurança* to judicial decisions. One group considers that the remedy is not available in such cases, another group is of the opinion that it is available but only in special cases, and a third group takes a more liberal approach, which is described in the excellent paper of its proponent, J. J. Calmon de Passos, submitted to the National Congress and Third Latin-American Seminar on Procedural Law held at São Paulo in September 1962.³

In line with the Constitution and with Articles 1 and 5 (2) of Act No. 1533,⁴ the courts have recognized that the *mandado de segurança* can be granted against judicial decisions in genuinely exceptional cases—that is, where any remedy available against a decision would not have the effect of suspending it and the consequent damage would be difficult or impossible to redress. It is restricted to such cases so that it will not become an ordinary procedural remedy.⁵

On the other hand—and this is its most relevant function—the *mandado de segurança* is a most effective safeguard of the fundamental rights of citizens against administrative acts and decisions. Although a literal interpretation of Article 141 (24) of the 1946 Constitution and Article 150 (21) of the 1967 Constitution would seem to indicate that individuals are protected only against unlawful action and abuse of power and not against unconstitutional acts, it must nevertheless be recognized, as writers and the courts have done, that the protection of constitutional rights is implied. The logical and systematic interpretation that has been given to those provisions is that the institution protects all fundamental rights laid down in the

¹ *Ante-Projeto de Ley do Mandado de Segurança*, introduction by Otto Gil, proposal by Celestino Sa Freire Basilio, Rio de Janeiro, 1960, and the other drafted by J. M. Othon Sidou, *Projeto de reforma da Lei 1,533 de 1951 sobre o mandado de segurança*, Curitiba, Paraná, 1960, pp. 156 *et seq.*

² 'A reformulação do Instituto do Mandado de Segurança' in *Revista da Orden dos Advogados*, São Paulo, Vol. 28, No. 167, especially p. 102.

³ 'Do mandado de segurança contra atos judiciais' in *Estudios sobre o mandado de segurança*, Rio de Janeiro, 1963, pp. 51-108.

⁴ These Articles provide that the *mandado de segurança* cannot be sought against a judicial decision if there is a means of having the decision altered under the ordinary law.

⁵ See Guilherme Estelita, 'Mandado de segurança contra acto jurisdiccional' in *Atti del Congresso Internazionale di Diritto Processuale Civile*, Padua, 1953, pp. 2237 *et seq.*; Casa Rui Barbosa, *O mandado de segurança e sua jurisprudencia*, Vol. I, Rio de Janeiro, 1961, p. 278; Tito Galvao Filho, *Diccionario de jurisprudencia no mandado de segurança*, op. cit., pp. 28 *et seq.*; Alfredo Buzaid, *Juicio de amparo e mandado de segurança*, op. cit. p. 145.

Constitution, with the exception of freedom of the person, which is protected by *habeas corpus*.¹

In this connection, a very important provision in the two Constitutions mentioned above should be borne in mind. Articles 141 (4) of the 1946 Constitution and 150 (4) of the 1967 Constitution provide that 'no law shall prevent the courts from entertaining questions of an infringement of individual rights'. This, together with the provisions mentioned above, shows the extensive protection provided by the *mandado de segurança* and explains the success it has met with in practice.

In this respect, the *mandado de segurança* must be regarded as a *constitutional guarantee*, as the commentators, José Castro Nunes² and Alfredo Buzaid,³ and a number of courts in Brazil⁴ have expressly stated. It is because of this characteristic that, in the chapter relating to individual rights, the Brazilian Constitution established it as one of the means (*habeas corpus* being the other) for the judicial protection of the basic human rights provided for in the Constitution. It may therefore be described as a *constitutional remedy*, not only because its general lines are laid down in the Constitution but above all because its chief objective is to protect constitutional rights.

An examination of the rules and regulations governing the *mandado de segurança* shows that in general terms, and except for some provisions that could stand improving, this procedure is based on directive principles of official action, concentration, speed, and ample powers of the courts to grant injunctions.⁵ Another very important factor is the equality of the parties. The authorities are in no better position than individuals, which means that this procedure is more a means of protecting human rights than a means of reviewing the legality of administrative acts. This explains the provision in Article 17 of Act No. 1533 of 1951 that 'the *mandado de segurança* shall have priority over all judicial acts except *habeas corpus* . . .', which would be absurd if it were only a question of minor infringements.

The Brazilian commentator, J. M. Othon Sidou, shares these views

¹ See Arnold Wald, *Do mandado de segurança*, op. cit., p. 160 and Castro Nune, *Do mandado de segurança*, op. cit., pp. 168 et seq.

² *Do mandado de segurança*, op. cit., p. 28.

³ *Juicio de amparo e mandado de segurança*, op. cit., p. 147.

⁴ See Tito Galvao Filho, *Diccionario de Jurisprudencia no mandado de segurança*, op. cit., pp. 170-174.

⁵ A court is normally able to grant a petitioner an interim injunction suspending a decision that he is challenging. However, by Article 2 of an Act of 26th June 1964, the right to an injunction may be withdrawn by the court, acting on its own initiative or on the demand of the Public Prosecutor, if the petitioner fails to take action within three days or abandons the case for more than twenty. This prescriptive rule is justified when the *mandado de segurança* is sought to challenge the legality of a decision, but not when it is a question of protecting constitutional rights.

and maintains that from the start the *mandado de segurança* was designed as a rapid procedure, a characteristic that is inherent in it because of the right it protects, the right to 'individual guarantees', in other words the minimum requirement for enabling men to live together in a particular society.¹

5. Action for a Declaration of Unconstitutionality

This remedy is not confined to the protection of human rights since it is also designed as a guarantee of constitutional provisions governing the operation of government bodies. However, it must be borne in mind that in making laws the legislature, like any other authority, is bound to observe the constitutional provisions protecting fundamental human rights. A number of remedies that may be grouped under the name of action (or petition) for a declaration of unconstitutionality have been devised for this purpose.

In this respect, most of the Latin American Constitutions have adopted the so-called American system of reviewing the constitutionality of laws. In principle, this consists in giving the judiciary—either the judiciary as a whole, a sector of the judiciary or solely the highest court—jurisdiction to decide questions relating to the constitutionality of laws, as opposed to the so-called Austrian or European system, under which a special court, separate from the ordinary judicial bodies, is given exclusive jurisdiction for determining constitutionality.²

The North American commentator, J. A. C. Grant, has remarked that it is a contribution of the Americas to political science to have empowered the courts to enforce the Constitution as a norm superior to the laws passed by the ordinary legislative bodies.³ By that he does not mean that it was a spontaneous and original creation of American law but rather the culmination of resolute efforts over several centuries to enforce the principle of the Constitution's supremacy.⁴

¹ 'Para proteger direito líquido e certo' in *Revista di direito procesuale civil*, year I, Vol. II, São Paulo, July-December 1960, p. 94.

² The difference between the two systems is clearly shown by Mauro Cappelletti in *El Control judicial de la constitucionalidad de las leyes en el derecho comparado*, op. cit., especially pp. 34 *et seq.*; see also Héctor Fix Zamudio, *Veinticinco años de evolución de la justicia constitucional (1940-1965)*, Mexico City, 1968, pp. 15-18.

³ *El control jurisdiccional de la constitucionalidad de las leyes. Una contribución de las Américas a la ciencia política*, Mexico City, 1963, p. 24.

⁴ Cappelletti significantly remarks in this respect that John Marshall's firm and courageous assertion that any provision contrary to the Constitution must be regarded as null and void was not an improvised gesture but an act that centuries of history—not only American but world history—had made possible. See *El control judicial de la constitucionalidad de las leyes en el derecho comparado*, op. cit., p. 33.

The 'American' system has been condensed in the United States by the term *judicial review* which, as is well known, was used very vaguely in the Constitution of 1787 (Article 3, section 2, paragraph 1).¹ In Latin America, it became known mainly through Alexis de Tocqueville's classic work, *Democracy in America*; the translation into Spanish by Sanchez de Bustamante, published in Paris in 1837,² was read throughout Latin America, which accounts for the introduction in many Latin American countries during the second half of the 19th century of the judicial review of the constitutionality of laws. The first to introduce it was the Mexican jurist and politician, Manuel Crescencio Rejón, one of the creators of *amparo*; he did so by means of *amparo* itself in the draft that served as a basis for the Constitution of the State of Yucatán, promulgated on 16th May 1841 (Article 62, (1)). It was designed specifically for the protection of fundamental rights.³

While adhering to the general conception of judicial review, the large majority of Latin American countries that adopted it introduced variations in a greater or lesser degree, ranging from the Argentinian system, which, while not following it strictly, is the closest to the United States model,⁴ to the innovation of the Constitutional Court in the Guatemalan Constitution of 1965. Besides the traditional *amparo* as protection against unconstitutional laws, that Constitution introduced

¹ In approving this provision, the intention of the Philadelphia Convention is clear from the classical explanations given by Alexander Hamilton in *The Federalist* regarding the power of the judicial department to deal with problems of the constitutionality of laws, although the scope of that power was not clearly defined. It should be borne in mind that Hamilton's work was known by the Latin American publicists early in the 19th century since, as mentioned by the Argentine commentator Enrique de Gandía, it was translated into Spanish and published in Caracas in 1826 (*Historia de las ideas políticas en Argentina*, Vol. I, Buenos Aires, 1960, pp. 249-250); and the Mexican jurist, Jesus Reyes Heróles, maintains that extracts from the work were published in various periodicals in Mexico City between 1827 and 1829 (*El liberalismo mexicano*, Vol. III, Mexico City, 1961, pp. 343 et seq.).

² Especially in Chapter VI on the Judiciary in the United States and its action on the body politic, which was the political gospel for the creators of the Mexican *amparo*, Manuel Crescencio Rejón, Mariano Otero and the Constituent Assembly of 1856-1857, especially Ponciano Arriaga, Melchor Ocampo and José María Mata. See, *inter alia*, Enrique Gonzalez Pedrero's introduction to *Alexis de Tocqueville y la teoría del Estado democrático* to the Spanish translation by Luis R. Cuéllar of de Tocqueville's classic, Mexico City, 1957, pp. XXVI and XXVII.

³ The Article reads: 'The Court [Supreme Court of Justice of the State], duly convened, shall (1) protect [*amparar*] in the enjoyment of his rights anyone who requests protection against laws and decrees of the Legislature that may be contrary to the letter of the Constitution. . . , ' Suprema Corte de Justicia, *Homenaje a Don Manuel Crescencio Rejón*, op. cit., pp. 111-112.

⁴ See, *inter alia*, Alejandro E. Ghigliani, *Del control jurisdiccional de constitucionalidad*, Buenos Aires, 1962.

the 'petition for a declaration of unconstitutionality' before the Constitutional Court. This procedure has many of the characteristics of the 'Austrian' system.

Another variation in the system of judicial review is the so-called *acción popular de inconstitucionalidad*, introduced in the Constitutions of Venezuela (1961 Constitution, *Article 215, paragraphs 3 and 4*), Columbia (1886 Constitution, revised in 1910, *Article 214* of the present Constitution, regulated by Act No. 96 of 1936), El Salvador (1962 Constitution, *Article 96*, regulated by the Act on Constitutional Procedure of 14th January 1960, Articles 6 to 11), Panama (*Article 167* of the present Constitution of 1st January 1946, regulated by the Act on Petitions for Constitutional Review of 24th October 1956), Cuba (*Articles 160, 161 and 172* of the 1940 Constitution, revised in 1959, regulated by Act No. 7 of 31st May 1949), and the Argentinian Province of Chaco (*Article 9* of the Constitution of 7th December 1957).

Under these basic provisions, any citizen, even though he is not directly affected, may appeal to the Supreme Court in each of the above-mentioned countries (or the High Court of the Province in the last case) to declare unconstitutional laws that he alleges to be contrary to the Constitution. If such a declaration is made by the Supreme Court, it becomes binding upon all persons.

A second sector is made up of those countries which, under the influence of Mexican law, have established a procedure for alleging the unconstitutionality of laws through *amparo*. The legal provisions challenged are, if the court allows the petition, held to be void but only in regard to the case at issue.

Such a provision is contained in Article 58 (1) of the Constitution of Honduras of 3rd June 1965, regulated by the Constitutional Act on Amparo of 14th April 1936; in Article 229 (11) of the Constitution of Nicaragua of 6th November 1950, regulated by the Constitutional Act on Amparo of the same date; and in Article 80 (2) of the Constitution of Guatemala of September 1965 as well as in the relevant part of the Constitutional Act on Amparo, Habeas Corpus and Constitutionality of 28th April 1966.

Mention may also be made of the so-called extraordinary writ provided for in Article 100 of the Argentinian Constitution and Article 114 (3) of the Brazilian Constitution whereby the question of the unconstitutionality of a law applicable to a specific dispute may be brought before the Supreme Court (Argentina) or the Federal Supreme Court (Brazil). These articles may be invoked by the parties to the dispute in order to secure a decision, applicable to the specific

case, establishing whether or not the provision impugned is unconstitutional.¹

It is also relevant to mention briefly the innovation (for American law) of the petition for a declaration of unconstitutionality, based on the Austrian model, which was introduced into the Guatemalan Constitution of September 1965 (*Articles 264 et seq.*) and is regulated by Articles 105 *et seq.* of the Constitutional Act on Amparo, Habeas Corpus and Unconstitutionality of 26th April 1966.

The innovation is that the petition (in reality, action) for a declaration must be brought before a special court modelled, with particular features of its own, on the constitutional courts of Europe. It is not an ordinary court but one set up exclusively to deal with questions of unconstitutionality.

This 'Court of Constitutionality' has twelve members. Five are appointed by the Supreme Court of Justice from among its members and the others are drawn by lot, also by the Supreme Court, from among judges of the Court of Appeals and administrative courts. The president is the President of the Supreme Court of Justice.

A petition may be brought before the Court by the Council of State, the Bar Association by a decision of its General Assembly, the Public Prosecutor by order of the President of the Republic adopted by the Council of Ministers, and any person or body directly affected and represented by ten practising lawyers.

As is logical, the declaration of unconstitutionality, as in the case of the Austrian model, is binding on all persons and annuls the law in question.

6. Amparo

Amparo is, in my view, the most effective remedy for the specific protection of the human rights set out in the Constitution.

Mexico is recognized to have been the first country in Latin America to establish *amparo*. As originally conceived by its creators, Manuel Crescencio Rejón, Mariano Otero and the Constituent Assembly of 1857, it was intended primarily for the protection of 'individual guarantees' and of the federal system of government, though always through the protection of an individual right.²

¹ On this subject see, in particular, Rafael Bielsa, *El recurso extraordinario*, second edition, Buenos Aires, 1958, especially pp. 117 *et seq.*; José Frederico Marques, *Instituições de direito processual civil*, Vol. IV, Rio de Janeiro, 1960, pp. 326 *et seq.*; and Alfredo de Araujo López da Costa, *Direito processual civil brasileiro*, second edition, Vol. III, Rio de Janeiro, 1959, pp. 410 *et seq.*

² See Ignacio Burgoa, *El juicio de amparo*, sixth edition, Mexico City, 1968, pp. 94 *et seq.* and Ignacio L. Vallarta, *El juicio de amparo y el writ of habeas corpus*, Mexico City, 1896, pp. 31 *et seq.*

It is also recognized that the Mexican *amparo* has directly or indirectly contributed to the establishment of remedies of the same name in various Latin American Constitutions, both because of the international prestige acquired by the Mexican institution and because of the deep roots of the term in Spanish law.¹

After Mexico, the first country to introduce *amparo* was El Salvador, in its Constitution of 13th August 1886. It was followed by Honduras, in its Constitution of 1894, Nicaragua on 10th November 1911, Guatemala on 11th March 1921, Panama on 2nd January 1941, Costa Rica on 7th November 1941, Argentina, in the Constitution of the Province of Santa Fé of 13th August 1921 and, more recently, Venezuela in its Constitution of 1951, and Bolivia, Ecuador and Paraguay in their Constitutions of 1967.

Amparo was also provided for in the federal Constitutions of Central America, i.e. the Political Constitution of the United States of Central America (Honduras, Nicaragua and El Salvador) promulgated in 1898 and in the Charter of the Central American Republic (Guatemala, El Salvador and Honduras) of 9th September 1921.²

To give a systematic picture of *amparo*, it is necessary to classify its various procedural forms according to the scope of protection provided.

(a) In some countries, *amparo* is regarded solely as an equivalent to *habeas corpus*, being only available to protect the individual from deprivation or restriction of his freedom resulting from unlawful acts or from irregularities in criminal proceedings. This is the meaning it has in Chile, as already noted, and the same holds true in some Argentinian codes of criminal procedure and in transitional provision 5 of the 1961 Venezuelan Constitution, which uses the term *amparo de la libertad personal* as a synonym of *habeas corpus*, as mentioned earlier.

(b) In Argentina, Venezuela, Guatemala, El Salvador, Costa Rica, Panama and, very recently, in Bolivia, Ecuador and Paraguay, *amparo* has come to mean an instrument for the protection of constitutional rights with the exception of freedom of the person, which is protected by the traditional *habeas corpus*. Consequently, it is either governed by a special law or laid down in a separate chapter in the regulations on constitutional procedure.

¹ See Felipe Tena Ramírez, *Derecho constitucional mexicano*, eighth edition, Mexico City, 1967, p. 458, note 412, and Hector Fix Zamudio 'Diversos significados jurídicos del amparo en el derecho iberoamericano', in *Boletín del Instituto de Derecho Comparado de México*, No. 52, January-April 1965, pp. 119-152; reproduced in *Rivista di Diritto Agrario*, Milan, July-September 1967, pp. 502-543.

² See César E. Romero, 'Acción de amparo de los derechos y garantías constitucionales', in *Revista jurídica de Buenos Aires*, April-June 1958, pp. 79-96.

In Argentina, *amparo* has been greatly expanded since it was introduced in Article 17 of the Constitution of the Province of Santa Fé in 1921¹ and was established in Article 22 of the Constitution of Santiago del Estero of 2nd June 1939, in Articles 673 and 685 of the Code of Civil Procedure of the same Province promulgated in 1944² and, later, in Article 33 of the Constitution of the Province of Mendoza of 31st May 1949.³

Indeed, since the 1955 Revolution, *amparo* has found a place in a large number of the Argentinian provincial Constitutions. It is expressly regulated by the following provisions:

(i) Article 145 (13) of the Constitution of the Province of Corrientes of 17th August 1960;⁴

(ii) Article 34 of the Constitution of the Province of Chubut of 26th November 1957;⁵

(iii) Article 20 of the Constitution of the Province of Formosa in force since 30th November 1957;⁶

(iv) Article 16 of the Constitution of the Province of La Pampa of 6th October 1960;⁷

(v) Articles 16, 17 and 18 of the Constitution of the Province of Misiones of 21st April 1958;⁸

(vi) Article 11 of the Constitution of the Province of Rio Negro of 10th December 1957;⁹

(vii) Article 15 of the Constitution of the Province of Santa Cruz of 6th November 1957;¹⁰ and

¹ See Phanor J. Eder, *Judicial Review in Latin America*, op. cit., pp. 571-572.

² See Antonio Castiglione, 'Recurso civil de amparo', in *Revista de Derecho Procesal*, year VI, Vol. II, Buenos Aires, 1946, pp. 48-58.

³ See Carlos R. Melo, 'Las Constituciones de la Provincia de Mendoza', in *Boletín de la Facultad de Derecho y Ciencias Sociales*, Cordova, Argentina, January-September, 1963, p. 143.

⁴ See Juan R. Aguirre Lanari, 'Algunos aspectos de las reformas introducidas en la Constitución de Corrientes', in *Revista Argentina de Ciencia Política*, Buenos Aires, July-December, 1960, p. 279.

⁵ See Segundo V. Linares Quintana, *Derecho constitucional de las nuevas provincias*, Buenos Aires, 1962, p. 132.

⁶ See César E. Romero, *Acción de amparo de los derechos y garantías constitucionales*, op. cit., p. 90.

⁷ See Segundo V. Linares Quintana, *Derecho constitución de las nuevas provincias*, op. cit. p. 184.

⁸ See Linares Quintana, op. cit., p. 201, and Romero, *Acción de amparo de los derechos y garantías constitucionales*, op. cit., p. 91.

⁹ See Linares Quintana, op. cit., pp. 268-269.

¹⁰ See Linares Quintana, op. cit., p. 292.

(viii) Article 17 of the Constitution of the Province of Santa Fé of 14th April 1962.¹

There are in addition two Constitutions which give *habeas corpus* sufficient scope to protect not only freedom of the person in accordance with the traditional concept but also all the other individual rights laid down in the basic laws. These are Article 16 of the Constitution of the Province of Chaco dated 7th December 1957 and Article 44 of the Constitution of the Province of Neuquén dated 28th November 1957.²

Besides, regulations on *amparo* have been issued in various of the Provinces mentioned above. The first was Act No. 2494 of the Province of Santa Fé passed on 1st October 1935.³ It was followed by Act No. 2582 on the petition for *amparo* of the province of Entre Ríos passed on 27th November 1946, though this law was revised and amended by Decree No. 1640 of 1963, which is now in force.⁴

Mention should also be made of Act No. 2355 of the Province of Mendoza, (7th October 1954), Act No. 11 of the Province of Santa Cruz (17th July 1958), Act No. 2596 of the Province of San Luis (30th July 1958), Act No. 146 of the Province of Misiones (14th November 1961), Act No. 2690 of the Province of La Rioja (7th September 1960— not published until 12th October 1962) and Act No. 7166 of the Province of Buenos Aires (10th December 1965).

Amparo, at the national level in Argentina, began its life in the courts, with two famous cases before the Supreme Court of Justice, the *Angel Siri* case of 27th December 1957⁵ and the *Samuel Kot* case of 5th September 1958.⁶ It was carried further by many later decisions

¹ The text of this Constitution was published in *Anales de Legislación Argentina*, Vol. XXII-B, Buenos Aires, 1963, pp. 1909-1921, Article 17 appearing on p. 1911. See Salvador Dana Montañó, 'La reglamentación del amparo jurisdiccional de los derechos y garantías' in *La Ley*, Buenos Aires, 8 December 1966, p. 1.

² See Linares Quintana, *Derecho constitucional de las nuevas provincias*, op. cit., pp. 49-54.

³ See Salvador Dana Montañó, 'La reglamentación del amparo jurisdiccional de los derechos y garantías', op. cit., p. 3.

⁴ See Eugenio Orlando, 'La acción de amparo en la Constitución de Entre Ríos' in *Jurisprudencia Argentina*, Buenos Aires, 12th September 1966, pp. 1-4, who also gives the revised text of the Amparo Act itself.

⁵ See Segundo V. Linares Quintana, 'Modificación de la jurisprudencia de la Corte Suprema sobre el amparo de la libertad' in *La Ley*, Buenos Aires, 7th March 1958, pp. 1-2, and Roberto Repetto, 'El recurso de amparo en la nueva interpretación de la Corte Suprema de la Nación in *Jurisprudencia Argentina*, Buenos Aires, 18th and 19th June 1958.

⁶ See Genaro R. Carrio, *Recurso de amparo y técnico judicial*, Buenos Aires, 1960, especially pp. 147-183; Abel Houssay, *Amparo Judicial. El caso Kot y su influencia en la jurisprudencia*, Buenos Aires, 1961, especially pp. 51 et seq.; and Carlos A. Tagle, 'El amparo judicial de los derechos fundamentales' *Jurisprudencia Argentina*, Buenos Aires, 4th November 1958, pp. 1-5.

of that Court and by many legal writers.¹ Various regulations have been drawn up on the subject, including in particular those drafted by the executive in June 1964, Article 1 of which gives it a scope similar to that given by the Supreme Court:

An action for *amparo* may be instituted against any public act, authority, official or employee or *act of a private individual* that, even though founded on law, does in fact, or is likely to, illegally or arbitrarily injure, restrict, alter or threaten the *rights or guarantees expressly or impliedly recognized by the National Constitution*, provided that no other judicial or administrative remedies exist whereby the same result can be obtained, or if they do exist, that they are not clearly appropriate for the immediate protection of the constitutional right or guarantee.²

Lastly, Act No. 16986 on the action for *amparo* was passed on 18th October 1966. This national law includes various aspects of the institution as formulated by the courts. It also includes others contained in the above-mentioned Act No. 7166 for the Province of Buenos Aires, which in turn was based on a national bill of 1964 but contains certain limitations that have been the target of severe criticism by jurists.³

The Venezuelan Constitution of January 1961 provides for *amparo* in Article 49:

The Courts shall protect [*ampararan* ' in Spanish] all inhabitants of the Republic in the exercise of the *rights and guarantees* established by the Constitution, in accordance with law. The procedure shall be brief and summary and the competent judge shall be empowered to restore immediately the former legal position.

¹ See, in particular, Genero R. Carrio, *Recurso de amparo y técnica judicial*, op. cit., and by the same author, *Algunos aspectos del recurso de amparo*, Buenos Aires, 1959; Segunda V. Linares Quintana, *Acción de amparo. Estudio comparado con el juicio de amparo de México y el mandato de seguridad del Brasil*, Buenos Aires, 1960, especially pp. 21 *et seq.*, Germán Bidart Campos, *Derecho de Amparo*, Buenos Aires, 1961; Abel Houssay, *Amparo Judicial* op. cit.; Alfredo Orgaz, *El recurso de amparo*, Buenos Aires, 1961; and Carlos Sánchez Viamonte, *Juicio de Amparo*, Buenos Aires, 1963.

² See, *inter alia*, José Luis Lazzarino, 'La acción de amparo y el proyecto del Poder Ejecutivo Nacional' in *La Ley*, Buenos Aires, 20th October 1964, pp. 1-4.

³ See Alberto F. Robredo, 'La acción de amparo y la reciente ley 16986' in *La Ley*, Buenos Aires, 3rd November 1966, especially p. 3; Bartolomé A. Fiorini, 'Acción de amparo. Graves limitaciones e inconsecuencias que la desnaturalizan' in *La Ley*, Buenos Aires, 24th November, 1966, pp. 1-3; Germán J. Bidart Campos, 'La nueva Ley de Amparo' in *Jurisprudencia Argentina*, Buenos Aires, 29th November, 1966, pp. 3-4; and Salvador M. Dana Montaña, *La reglamentación legal del amparo jurisdiccional de los derechos y garantías*, op. cit., pp. 1-7.

By its wording, which is close to that of the first paragraph of transitional provision 5 of the Constitution,¹ this Article would seem also to protect freedom of the person. However, both legal writers² and the explanatory memorandum to the bill on *habeas corpus* drafted by the Ministry of Justice consider that *amparo* as provided for by Article 49 of the Constitution is confined to the protection of all constitutional rights with the exception of freedom of the person, which is provisionally governed by transitional provision 5 mentioned above.

Article 84 of the Constitution of Guatemala of September 1965 departs from all the constitutional rules established since the introduction of *amparo* in the 1921 revision in that it makes a clear distinction between *amparo* and *habeas corpus*, by providing that ' *habeas corpus* and *amparo* shall be instituted by distinct proceedings '. Previously, *habeas corpus* formed part of *amparo* and freedom of the person was thus protected under the former Amparo Act of 8th May 1928.³

This more clear-cut distinction between *habeas corpus* and *amparo* is due mainly to the tendencies that emerged in this respect during the first two Guatemalan Legal Congresses held in September 1960 and October 1962.⁴ As a result, Article 80 (1) of the 1965 Constitution and Article 1 (1) of the Act on Amparo, Habeas Corpus and Constitutionality have now established that the fundamental purpose of *amparo* is to maintain or restore constitutional rights and guarantees.⁵

Article 89 (1) of the present Constitution of El Salvador of 8th January 1962, which is regulated by Articles 12 *et seq.* of the Act on Constitutional Procedure now in force, dated 14th January 1960,

¹ The relevant part of this provision states that ' *amparo de la libertad personal*, until the special law to regulate it in accordance with Article 49 of the Constitution is enacted, shall be governed by the following rules . . . '.

² See De Miguel, *El amparo y habeas corpus en la Constitución de 1961*, op. cit., pp. 46-47 and, for the opposite view, Morris Sierralta, *De los recursos de amparo y habeas corpus en el derecho constitucional venezolano*, Caracas, 1961, pp. 28 *et seq.*

³ For the regulations governing *amparo* and *habeas corpus* in the Constitution before the present one, see Ramiro Auyón Barneod, *El procedimiento de amparo* (thesis), Guatemala, 1955, pp. 88 *et seq.* and César Humberto de León Rodas, *El habeas corpus, garantía de libertad en la legislación de Guatemala* (thesis). Guatemala, 1960, pp. 93 *et seq.*

⁴ *Actas relativas*, Guatemala, 1960 and 1962, pp. 67 *et seq.* and pp. 41 *et seq.* respectively.

⁵ *Amparo* in Guatemala also lies against laws that violate fundamental rights but, as mentioned earlier, a grant of *amparo* merely annuls the law in relation to the petitioner, the court being also empowered to annul in relation to the petitioner a law or decision of Congress that is not purely a legislative act, on the ground of unconstitutionality. These provisions are contained in Article 89 (2) and (3) of the present Constitution.

establishes *amparo* as a separate remedy from *habeas corpus*, which is limited to the protection of freedom of the person.

Article 12 of the Act on Constitutional Procedure determines the scope of *amparo*, stating that

Everyone shall be entitled to bring an action for *amparo* before the Supreme Court of Justice alleging a violation of the rights granted by the Constitution. Such an action may be instituted against any act or omission by any authority, government official or decentralized government agency that violates those rights or obstructs their exercise.

Article 51 of the Constitution now in force in Panama, of March 1946, regulates the 'summary procedure of *amparo* for constitutional guarantees' independently of *habeas corpus*, which Article 24 limits to the protection of freedom of the person. The scope of *amparo* is limited to protecting any person 'against whom a mandatory order or injunction is issued by any public official in violation of the *rights and guarantees* laid down in this Constitution.'¹

This provision was implemented by Act No. 46 on Petitions for Constitutional Review of 24th November 1956, which regulates *habeas corpus* separately.

Article 48 (3) of the Constitution of Costa Rica, of 7th November 1949, lays down rules for *amparo* separate from those governing *habeas corpus*. The rules on *habeas corpus*, which are contained in paragraph 1 of that Article, confine it to the protection of freedom of the person. Paragraph 3 provides that

To maintain or restore the enjoyment of *other rights laid down in this Constitution*, everyone shall also have the right of *amparo* in such courts as the law may determine.

Article 48 (3) is regulated by Amparo Act No. 1161 of 2nd June 1950 (while *habeas corpus* is regulated by a special law, No. 35 of 24th November 1932), Article 2 of which, as amended by a decree of 9th August 1952, provides:

A writ of *amparo* may be issued for the purpose of maintaining or restoring the rights established in the Constitution [the original text referred only to 'individual rights'] and consequently against any provision, act or decision and, in general, against any action or omission that has violated or is likely to violate any of those rights.²

Along the same lines, *amparo* has recently been introduced into the latest Constitutions of Bolivia, Ecuador and Paraguay, promulgated in 1967. These countries had not previously accorded the remedy.

¹ See Bolívar Pedreschi, *El pensamiento constitucional del doctor Moscote*, op. cit., pp. 170 *et seq.*

² See Roberto Vinicio Alfaro Valverde, *El recurso de amparo* Costa Rica, 1959, especially pp. 49 *et seq.* (mimeographed thesis).

Article 19 of Bolivia's new Constitution, of 2nd February 1967, provides:

In addition to the right of *habeas corpus*, to which the preceding article refers, *amparo* lies against illegal acts or omissions of officials or private individuals that restrict, deny or threaten to restrict or deny the individual rights and guarantees recognized by this Constitution and the law.¹

The Constitution of Ecuador, of 25th May 1967, provides for *amparo* in Article 28 (15) in the following terms:

Without prejudice to other inherent rights of the individual, the State shall guarantee . . . the right to demand *judicial amparo* against any violation of constitutional guarantees, without prejudice to the duty of the public power to ensure the observance of the Constitution and the laws.

Lastly, the Constitution of Paraguay, of 25th August 1967, provides for *amparo* in Article 77:

Any person who considers that a right or guarantee to which he is entitled under this Constitution or under law has been or is in imminent danger of being seriously injured by an unlawful act or omission of an authority or private individual and who, because of the urgency of the case, cannot have recourse to the ordinary remedies may file a petition for *amparo* with any judge of first instance. The proceedings shall be short, summary, free and held in public, and the judge shall be empowered to safeguard the right or guarantee or to restore immediately the legal position infringed. Regulations governing the procedure shall be laid down by law.

(c) A third group of laws, more directly influenced by Mexican law in this field, gives *amparo* a broader scope than those described above. These are the laws of Honduras and Nicaragua, in which *amparo* has a threefold purpose. It has the object peculiar to it of protecting constitutional rights; but it is also designed to protect freedom of the person since *habeas corpus* forms part of it, though with certain special features; and lastly, it may also be used to challenge unconstitutional laws; the effect in this case of a grant of *amparo* is to invalidate the law that has been challenged but only in so far as the petitioner is concerned.

Article 58 of the Constitution of Honduras, of 3rd June 1965, departs to some extent from the general lines of the laws mentioned above and makes a partial distinction between *habeas corpus* and *amparo* in its two paragraphs. Paragraph 1 states that *amparo* may

¹ See Enrique Oblitas Poblete, *Recurso de amparo*, op. cit., especially pp. 27 et seq.

be sought by an aggrieved party or by any person on his behalf only for the following purposes:

(a) To maintain or restore the enjoyment of the *rights and guarantees* established by the Constitution; or (b) to have a law, decision or act of an authority declared in a specific case not to be binding on the petitioner if any of the rights guaranteed by the Constitution are contravened or restricted.

This Article is regulated by the Amparo Act of 14th April 1936, which has the same threefold aim of safeguarding the freedom of the person (by means of *habeas corpus*), protecting the other fundamental rights laid down in the Constitution, and enabling individuals to challenge laws and general provisions that they consider to violate those rights and to have them annulled in relation to specific cases.

(d) Lastly, proceedings for *amparo* can be instituted, with a broader scope than any of the procedures described above.

Amparo began—or at least was conceived by its creators—as a remedy for infringements of the rights in the Constitution; but by a process peculiar to Mexican legal and political history and stimulated no doubt by a need for more centralized judicial procedures, it also became (through a wide interpretation of Article 14 of the 1857 Constitution) a means of reviewing judicial decisions (including those of the Federal Court) in their application of the ordinary laws.¹

This interpretation was accepted by the Constituent Assembly of 1916-1917, as is clear from the wording of Article 14 of the Constitution now in force, which provides for the review of all judicial decisions on questions of law, as an ‘individual guarantee’.²

These developments culminated in the absorption by *amparo* of the *recurso de casación*, which still existed in local codes of procedure and was regulated at the national level by the Code of Commerce. This was finally enacted by Article 30 of the Amparo Act of 18th October 1919, resulting in an instrument peculiar to Mexican law that has been described as ‘*amparo-casación*’.³

¹ See Emilio Rabasa, *El Artículo 14. Estudio constitucional*, second edition especially pages 35 *et seq.*

² The third and fourth paragraphs of Article 14 read: ‘In criminal cases no penalty shall be imposed simply by analogy or by *a priori* considerations. The penalty must be provided for by a law specifically applicable to the offence. In civil suits, the final judgment must be in accordance with the letter or the legal interpretation of the law; in the absence of the latter it must be based on the general principles of law.’

³ See Héctor Fix Zamundio, *El juicio de amparo*, *op. cit.*, pp. 258 *et seq.* and, by the same author ‘Reflexiones sobre la naturaleza procesal del amparo’ in *Revista de la Facultad de Derecho de México*, No. 56, October-December 1964, pp. 93 *et seq.* Many studies have been written showing the similarities and links between *amparo* and the *recurso de casación*, the most complete is that by Alejandro Ríos Espinoza, *Amparo y casación*, Mexico City, 1960, especially pp. 175 *et seq.*

It should also be borne in mind that *amparo* in Mexico has been used as a substitute for action under administrative law, i.e. as a means of reviewing the legality not only of the acts and decisions of the Executive itself but also of the decisions of administrative tribunals, particularly the *Fiscal Tribunal of the Federation*. In this sense, then, it may be described as an 'administrative *amparo*'.¹

It should also be mentioned that two amendments to the Constitution and the law, of 30th October 1962 and 3rd January 1963, allow proceedings of *amparo* to be used to challenge decisions of agricultural authorities that affect the collective rights of farming centres coming under the agrarian reform system (i.e. organized as collective holdings) or of their members (known as *ejidatarios* or *comuneros* according to the type of holding). These provisions depart from the stricter rules on *amparo* for challenging administrative acts and decisions and make it easier for these agricultural groups and their members to institute *amparo* proceedings. This new category of *amparo* has been described as *amparo agrario ejidal y comunal*.²

In addition to the functions described above, *amparo* also serves a similar purpose to that of *habeas corpus* by protecting citizens against acts of authority, outside the judicial process, that jeopardize their life or freedom. All of this gives an idea of the great complexity and broad scope of the Mexican proceedings for *amparo*.

As can be seen from this brief description of its various forms in the Constitutions of Latin American countries, *amparo* is a procedure with many variations. The Seminar on Amparo, Habeas Corpus and Other Similar Remedies, held at Mexico City from 15th to 18th August 1961 under the auspices of the United Nations, reached the conclusion that the term *amparo* is used to describe remedies which are not necessarily identical.³

Nevertheless, all of these variations have a common basis, which, as will be seen below, makes it possible to envisage an *amparo* for the whole of Latin America. In all the laws in which it is to be found—and they tend to increase in number—*amparo* is designed primarily to protect the human rights set forth in the Constitution, with the exception of freedom of the person. Though this protection is also sometimes provided by *amparo*, the tendency is to assign it specifically to *habeas corpus* or *amparo de la libertad*.

¹ See especially Antonio Carrillo Flores, *La defensa jurídica de los particulares frente a la administración en México*, Mexico City, 1939, pp. 273 *et seq.* and Felipe Tena Ramírez, 'Fisionomía del amparo en materia administrativa' in *El pensamiento de México en el Derecho Constitucional*, Mexico City, 1961, pp. 111 *et seq.*

² See Ignacio Burgoa, *El amparo en materia agraria*, Mexico City, 1964, pp. 11 *et seq.* and Luis del Toro Calero, *El juicio de amparo en materia agraria* (thesis), Mexico City, 1964, pp. 129 *et seq.*

³ United Nations Documents ST/TAO/HR/12, New York, 1962, p. 12.

7. Human Rights in Periods of Emergency

This subject calls for a few remarks since, despite the existence of effective means for protecting fundamental rights, such protection is non-existent when it is engulfed by the upheavals that frequently occur in Latin America. Citizens are usually helpless and at the mercy of the authorities, particularly the administrative authorities.

The North American commentator, Phanor J. Eder, has already noted that *habeas corpus* is frequently suspended in Latin America by constant declarations of states of emergency or martial law. He remarks with considerable insight that there are two contradictory aspects of the Latin American character in conflict here: impassioned individualism and the cult of the strong man or *caudillo*.¹

Latin American constitutional law provides a variety of different 'states of emergency' and gives different authorities extraordinary powers for safeguarding the constitutional order; in Chile, for instance, a 'state of assembly' is provided for in Article 72 paragraph 17 (1) of the Constitution;² a 'state of siege' is to be found in most Latin American Constitutions³ and a 'suspension of guarantees' in Article 29 of the Mexican Constitution.⁴

The fundamental problem concerning states of emergency is to determine whether the courts can use such procedures which protect human rights, as *habeas corpus*, *amparo* and action for a declaration of unconstitutionality, to review and control the acts of the authorities whose task it is to deal with the emergency

This question was, of course, keenly debated at the Seminar on Amparo, Habeas Corpus and other Similar Remedies at Mexico City in August 1959. Most of the delegates agreed that it was desirable that the courts should be able to review the legality of measures adopted by the authorities during states of emergency.⁵

Though this would seem to be the right conclusion, it is not always applied in practice. Official bodies, particularly executive bodies, which are responsible for solving the problems created by the emer-

¹ *Habeas Corpus Disembodied*, op. cit., pp. 477-478.

² See Alejandro Silva Bascuñan, *Tratado de derecho constitucional*, op. cit., Vol. II, pp. 340 and 341. The Chilean Constitution also provides for 'states of siege'.

³ See Antonio Martínez Baez, 'Concepto general del estado de sitio' in *Revista de la Escuela Nacional de Jurisprudencia*, Nos. 25-28, Mexico City, January-December 1945, pp. 109 *et seq.*

⁴ See Felipe Tena Ramírez, 'La suspensión de garantías y las facultades extraordinarias en el derecho mexicano' in *Revista de la Escuela Nacional de Jurisprudencia*, Nos. 25-28, pp. 133 *et seq.*

⁵ United Nations Documents ST/TAO/HR/12, op. cit., p. 26; a summary of the discussions is found on pp. 97-109.

gency, are reluctant to accept the intervention of the courts, and the courts are also hesitant to take such action and confront the executive.

This has occurred, for example, in the case of the Chilean courts, which as a general rule have been unwilling to hear applications for *amparo* (confined to the protection of freedom of the person) during states of emergency, on the ground that they have no power to interfere with powers that are exclusively exercised by the executive or the legislature—a position that has been criticized by writers.¹

The Argentinian courts have taken no clear-cut position on this matter, though generally the attitude that an action for *amparo* will not lie during states of emergency has prevailed. The position regarding *habeas corpus* has been much the same, and jurists are also divided on this point.²

In the United States, however, the situation is different. Despite the fact that Article 1 (9) (2) of the Federal Constitution authorizes Congress to suspend *habeas corpus* in periods of emergency, in the middle of the second World War the Supreme Court adjudicated upon various cases, especially of *habeas corpus*, in which acts of the executive depriving citizens of their freedom on grounds of national defence were challenged.³

The Mexican Supreme Court has also taken a similar attitude. During the state of war against Germany, Italy and Japan, it heard various actions for *amparo* challenging laws that had been issued during that period and declared those laws to be unconstitutional since they were unrelated to the defence, sovereignty or dignity of the nation or to the maintenance of its fundamental institutions.⁴

This position was expressly adopted in Article 215 of the Brazilian Constitution of 1946 and repeated in Article 156 of the Constitution of January 1967:

Failure to observe any of the provisions governing the state of emergency shall render illegal any coercion exercised and shall enable *the party concerned to challenge such action in the courts.*

¹ See Guillermo Becerra Ferrer, 'Naturaleza y presupuestos del recurso de amparo' in *Jurisprudencia Argentina*, Buenos Aires, 6th October, 1959, p. 2; José Luis Amadeo, 'Interpretación jurisprudencial del amparo y su inclusión en las Constituciones provinciales' in *Jurisprudencia Argentina*, 20th April 1961, p. 6.

² See Elena Caffarena de Giles, *El recurso de amparo frente a los regimenes de emergencia*, op. cit. pp. 235 *et seq.*

³ See Carl Brent Swisher, *El desarrollo constitucional de los Estados Unidos*, Buenos Aires 1958, pp. 900 *et seq.*

⁴ Felipe Tena Ramírez, *La suspensión de garantías y las facultades extraordinarias en el derecho mexicano*, op. cit., pp. 145 *et seq.* and José Campillo Sainz, 'El juicio de amparo y la legislación de emergencia' in *Revista de la Escuela Nacional de Jurisprudencia*, Nos. 21-22, Mexico City, January-June 1944, pp. 39 *et seq.*

States of emergency normally entail some restrictions on human rights; however the courts, through *amparo*, *habeas corpus* and similar procedures, must be given the power to determine whether such restrictions are reasonable. The measures taken by the competent authorities must be such as to deal with the emergency quickly and effectively. Internal disorder must not, as has all too frequently happened, be used as an excuse for taking measures that are disproportionate to the actual emergency and infringe individual rights, thereby rendering meaningless the protection provided for such rights in the Constitution.

8. Uniform Bases for a Latin American Amparo

An examination of the various procedures for protecting fundamental human rights, shows, it is submitted, that no other institution has the prestige, roots and tradition of *amparo* (or its equivalent, the Brazilian *mandado de segurança*) to provide a coherent procedure with uniform bases for the protection of the fundamental human rights set forth in the various Latin American Constitutions.

A proposal based on this thesis was submitted by the Mexican delegation to the Ninth Inter-American Conference at Bogotá and unanimously approved on 2nd May 1948. As a result, Article XVIII of the American Declaration of the Rights and Duties of Man was worded to read:

Every person may resort to the courts to ensure respect for his legal rights. *There should likewise be available to him a simple, brief procedure whereby the courts will protect [‘ampare’ in Spanish] him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.*¹

Efforts have since been made by the various American countries to coordinate laws on this subject, which is essential to human freedom. This is clear from the studies carried out by the Inter-American Commission for Human Rights in 1961² and from the declaration made at Santiago de Chile in 1959 by the Fifth Meeting of Consultation of Ministers of Foreign Affairs, item 5 of which states:

The human rights embodied in the legislation of the American States must be protected by effective judicial means.³

¹ It was also on the initiative of the Mexican delegation that *amparo* was introduced into Article 8 of the Universal Declaration of Human Rights of 10th December 1948. See Felipe Tena Ramírez, ‘El aspecto mundial del amparo. Su expansión internacional’ in *México ante el pensamiento jurídico social de Occidente*, Mexico, 1955, pp. 129 *et seq.*

² *Legislation of the American States on the Judicial Protection of Human Rights*, Washington, March 1961.

³ *Inter-American Commission of Human Rights. Basic Documents*, OAS-Ser L-VII-4 Rev., Washington, 1963, p. 34.

This same tendency to coordinate judicial remedies for the protection of human rights has emerged in the international legal congresses held in Latin America. For example, the First Argentine and Uruguayan Seminar on Comparative Law held at Montevideo from 15th to 17th August 1962 approved certain proposals regarding the common bases for dealing with actions for *amparo* and similar procedures.¹ Along the same lines, the International Congress and Third Latin American Seminar on Procedural Law held at São Paulo in September 1962 recommended that a standard system of protection for fundamental rights based on the Mexican *amparo* and the Brazilian *mandado de segurança* should be established in the constitutional systems of Latin America.²

In the light of this recommendation, the Fourth Latin American Seminar on Procedural Law held at Caracas and Valencia (Venezuela) in late March and early April 1967 approved the suggestion that a project should be drawn up setting out uniform bases for devising effective judicial protection for fundamental human rights in all Latin American countries. The comparative studies carried out by these bodies have already provided elements that can easily be incorporated into the project.³

Commendable efforts have also been made by Latin American jurists in the academic field to formulate a standard system for the protection of human rights. Noteworthy work has been accomplished in this respect, for example, by the Argentinian jurist, Carlos Sanchez Viamonte, who has advocated the adoption of an American *habeas corpus*. The term here is used in a very broad sense, similar to that accepted in Brazil before the *mandado de segurança* was established, i.e. as a procedure for the protection of all constitutional rights and not only freedom of the person.⁴

Also, a remarkable effort has been made by the Brazilian commentator, J. M. Othon Sidou, in drafting uniform regulations not only

¹ The conclusions of the Seminar on this subject are contained in the study by Alberto Ramón Real, *La acción de amparo en la jurisprudencia argentina y ante el derecho uruguayo*, op. cit., pp. 146 et seq.

² See Otto Gil, 'Introdução a coletanea de estudos sobre o mandado de segurança' in *Estudos sobre o mandado de segurança*, Rio de Janeiro, 1963, pp. 24 and 25. Item 3 of the recommendation reads: 'The Congress considers it suitable that the institutions of procedural law in Latin America should undertake studies for a draft system of rules to promote in all the countries the protection suggested in the previous motion [Judicial protection of fundamental human rights and freedoms against arbitrary action by State authorities]'.

³ The relevant conclusions were published in *Revista Iberoamericana de Derecho Procesal*, Madrid, 1967, pp. 323-327.

⁴ This writer has proposed a constitutional provision relating to *habeas corpus* for the American nations, *El habeas corpus garantía de libertad*, second edition, Buenos Aires, 1956, pp. 66 et seq.

for an American *amparo* but also for a universal *amparo* based on Article 8 of the Universal Declaration of Human Rights (which in turn has an antecedent in Article XVIII of the American Declaration, adopted a few months earlier).¹

Lastly, the writer, in a proposal submitted to the Fourth Latin American Seminar on Procedural Law at Caracas and Valencia (Venezuela) in March-April 1967, briefly sketched out the essential principles on which uniform regulations might be based. His proposal was approved by the assembly.²

9. Amparo as an International Remedy

Amparo, as already suggested, is an adequate instrument for the protection of human rights in the Constitution. It has slowly but surely gained ground in the various Constitutions of Latin America and has recently been raised to the international level by its inclusion in Articles XVIII and 8, respectively, of the American Declaration and the Universal Declaration of Human Rights.

Human rights have also gone beyond national frontiers and are ever more forcibly being incorporated in international declarations, already quite numerous. On the American continent, this trend is illustrated both by the American Declaration of the Rights and Duties of Man and by the Inter-American Charter of Social Guarantees, both approved at Bogotá on 2nd May 1948.

It may then be asked whether *amparo*, which has already become an international procedure for protecting constitutional rights, could not be used as a means of protecting the rights in international instruments which, like the declarations of rights made during the French and American revolutions, have confined themselves to enumerating human rights without establishing effective procedures for putting them into practice.

There is no ready answer to this question. We are going through a transitional period in this respect, particularly since the second World War, and many postulates that were once thought untouchable are now being reconsidered. One of them is precisely the conception of the individual as a subject of international law; traditionally, the individual could only bring an action against the State in its national courts, since under classical international law only the State had legal personality and private individuals could not appeal to supranational

¹ 'A tutela judicial dos direitos fundamentais' in *Estudos sobre o mandado de segurança*, op. cit., pp. 111 *et seq.*

² See Héctor Fix Zamudio, 'La protección procesal de las garantías individuales en América Latina', in *Boletín del Colegio de Abogados de Guatemala*, Guatemala, July-August 1967, pp. 17-18.

bodies for the protection of their rights. However, this postulate is now gradually, if hesitantly, being revised and little by little individuals are being granted access to those bodies, including those with international jurisdiction.¹

Brought about by the events of this century, this new idea of the ordinary individual as a subject of international law has logically led to the establishment, even if on a limited scale, of international procedures for the protection of human rights, rights which are also recognized in international instruments.

It is primarily in Europe that these instruments have received positive recognition. Articles 19 *et seq.* of the European Convention on Human Rights, signed at Rome on 4th November 1960, set up two bodies for ensuring the observance of the fundamental rights established in the Convention, the European Commission of Human Rights and the European Court of Human Rights. This protection was also extended to the rights established in its Protocol, signed at Paris on 20th March 1952.

Article 25 of the Convention allows any person, non-governmental organization or group of individuals claiming to be the victims of a violation by a State Party of the rights set forth in the Convention, to petition the European Commission of Human Rights (provided the defendant State has recognized the Commission's competence to receive such petitions). After being sifted by a series of procedures, the complaint may be referred indirectly, through the Commission, to the European Court of Human Rights. It should be noted that this means of individual action came into force on 4th July 1955 and the first complaint was decided by the European Court on 14th November 1960.²

The European Court drew up its own Rules of Procedure in February 1960 in pursuance of Article 55 of the Convention. They contain a number of procedural defects, however, and various decisions of the Court have been regarded as excessively restrictive by commentators.³ Despite these drawbacks, which are bound to occur in any new system, this procedure is a step forward and marks the beginning of a new period in which instruments for the protection of human rights will transcend national boundaries. Thus, side by side with 'con-

¹ See Enrico Vescovi, 'Il concetto del diritto subjettivo e la realtà contemporanea, in *Rivista Internazionale di Filosofia del Diritto*, year XXXVIII, foglio 5, Milan, September-October 1961, pp. 417 *et seq.*

² See Council of Europe, *L'Europe et la défense des droits de l'homme*, Strasbourg 1961, pp. 22 *et seq.*

³ See Egon Schwelb, 'The Protection of the Rights of Property of Nationals under First Protocol to the European Convention on Human Rights', in *The American Journal of Comparative Law*, Vol. 13 No. 4, Ann Arbor, Michigan, Autumn 1964, pp. 518-541.

stitutional guarantees', the foundations have been laid for 'international guarantees' of human rights set forth in international instruments.

In Europe, owing to a large measure of coordination between the laws of the various countries, it has been possible to arrive at a process of integration. This is demonstrated by the existence of the European Community. It has a Court of Justice to hear disputes relating to this new European law—which has been called 'Community' law—including actions brought by private individuals. Thus an international system of protection for human rights is being formed. Latin America is behind Europe in this respect because of a number of political, economic and social factors which make it extremely difficult to implement such international protection.

This does not mean that the process has not begun. In the not too distant future it will perhaps be possible to give international protection to the fundamental rights set out in the American Declarations. It has already been proposed to set up an Inter-American Court of Human Rights modelled largely on the European system. The Tenth Inter-American Conference held in Caracas in 1954 approved Resolution XXIX recommending that the possibility should be studied of establishing such a court. Various draft Conventions, following by and large the model of the European Court, have been drawn up for that purpose.¹

As a first practical step in this direction, the Inter-American Commission on Human Rights was set up under Resolution VII of the Fifth Meeting of Consultation of Ministers of Foreign Affairs held at Santiago de Chile in August 1959. This Commission is governed mainly by the Statute approved by the Council of the Organization of American States on 25th May 1960 (revised the same year and in 1965). The Commission acts as an advisory body recommending to Governments, in the words of Article 9 (b), appropriate measures to further the faithful observance of human rights.²

Such international protection will be established in the end, but it will not be effective unless the domestic procedures are coordinated beforehand on a uniform basis. This will also require a deep community awareness, as has been achieved in Europe. In Latin America the

¹ See Carlos Garcia Bauer, *Los Derechos humanos, preocupación universal*, Guatemala 1960, pp. 221-225; Pedro Pablo Camargo, *La protección jurídica de los derechos humanos y de la democracia en América*, Mexico, 1960, pp. 223-334; Ann & A. J. Thomas, 'The Inter-American Commission on Human Rights', in Vol. 20, No. 2, Dallas Texas, June 1966, pp. 282-409; and Karel Vasak, *La Comisión Interamericana des Droits de l'Homme*, Paris, 1968, pp. 175-200.

² The Commission has its own Rules of Procedure, which were modified in 1961, 1962, 1966 and 1967. See *Comisión Interamericana de Derechos Humanos. Documentos Basicos*, op cit., pp. 9 et seq. and Karel Vasak op. cit., pp. 222-232.

incipient Latin American Free Trade Association is a step in that direction.

Without such preparations, any attempt to establish an international jurisdiction for the protection of human rights set forth in the American Declarations would be premature. For one thing, national remedies have not yet been coordinated. For another, there is a deep-rooted principle in Latin America arising from the painful experience of the past, a principle which, aided by recent events, has unfortunately preserved its traditional meaning; it is that of non-interference. In itself, it is vital to the freedom of Latin American countries. As affirmed in Article 13 of the Charter of the Organization of American States:

Each State has the right to develop its cultural political and economic life freely and naturally . . .

The acts of intervention to which Latin American peoples have been subjected has created a sense of mistrust towards regional bodies that might interfere in domestic affairs, such as an Inter-American Court. There is therefore in practice an apparent antagonism against a system of international protection of human rights—though in theory it is possible to reconcile the principle of non-interference with the establishment of such a system.¹

Consequently, it is only by gradual and constant efforts to achieve coordination and mutual respect that a 'community awareness' can be created that will lead to an effective international system of protection. The first step in this direction would seem to be the establishment of uniform bases, particularly in the case of *amparo*, for the protection of fundamental rights at the national level since, logically, no action can be brought before an international court of this nature until domestic remedies have been exhausted, as is expressly provided for in Article 26 of the European Convention on Human Rights. It is proposed to include the same provision in Articles 50 and 32, respectively, of the two draft conventions on human rights now under study in Latin America (the articles which provide for the establishment of an Inter-American Court).² A uniform system for the domestic protection of fundamental rights would serve to sift out efficiently at the national level claims arising from a violation of the rights set out in international declarations and, as has occurred in the case of the European bodies, only those actions that have proved to be of exceptional importance would reach the proposed Inter-American Court.

¹ See Marco Antonio Guzman Carrasco, *No intervención y protección internacional de los derechos humanos*, Quito 1963, pp. 197 et seq.

² See Karel Vasak, *La Commission Interaméricaine des Droits de l'Homme*, op. cit. pp. 183-186, 196-198 and 261.

Until the time, now beginning to emerge on the horizon, when there is a community awareness in Latin America, until the time when Article XVIII of the American Declaration of the Rights and Duties of Man becomes a reality and every Latin American citizen has available to him a ' simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights ', an international court should be envisaged; and it is my firm conviction that *amparo*, with its long experience, its broad scope of protection and its flexible principles, should serve as a basis for the international protection of human rights, both individual and social rights.

It is firmly hoped that the future will bear out the trust many men place in the development of constitutional justice and freedom in Latin American nations, whose peoples have shed so much blood for the defence of human rights and fundamental freedoms.

THE SUPREME COURT OF CEYLON

by

JOSEPH A.L. COORAY*

INTRODUCTION

For over two thousand years of Ceylon's long history the Courts of Law have occupied a unique place in the Island's system of government. One of the dominant characteristics of the ancient Sinhalese kingdom, which existed unbroken until the British occupation of Kandy in 1815, was its hierarchical system of judicature. Under that system the *Maha Naduwa* or the Great Court not only had an original jurisdiction but also acted in an advisory capacity to the King.

Shortly after the British occupation of the Maritime Provinces of Ceylon, there was established by the Charter of Justice of 1801 a *Supreme Court of Judicature in the Island of Ceylon* and an independent judiciary. The Supreme Court consisted of the Chief Justice and one other judge called the *Puisne Justice*. It is significant that in addition to its ordinary civil and criminal jurisdiction, the Court had, from its inception, power to issue mandates in the nature of writs of *mandamus*, *certiorari*, *procedendo*¹ and error² directed to certain public authorities with a view to the prevention of an excess or abuse of their legal powers.

A Charter of 1810 introduced into Ceylon the English system of *trial by jury*. In fact some of the principles of this mode of trial had for a long time previously been observed in the Sinhalese courts of the *Maha Naduwa* and the *Gamsabhawas* or Village Councils.

By the Charter of Justice of 1833, the Crown revoked all earlier Charters and reorganised the judicial system of Ceylon. By Clause 4 of that Charter, the entire administration of justice both civil and criminal, was vested exclusively in the courts of law set up under it. The Clause further provided that it should not be competent for the Governor, by any law or ordinance, to establish any court for the administration of justice save as expressly provided by the Charter.

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¹ See footnote 1 on p. 106 below.

² An ordinary writ enabling the citizen to impugn the record of an inferior tribunal. It has a narrower scope than *certiorari*.

Clause 5 established one Supreme Court, to be called *The Supreme Court of the Island of Ceylon*.

Under the terms of the Charter, the Supreme Court was to be a Court of appellate jurisdiction for the correction of all errors in fact or in law committed by the District Courts. It was to exercise an original jurisdiction for the trial of all charges for offences committed throughout the Island; and the civil and criminal sessions of the Court were to be held by one judge in each of the circuits into which the Island was to be divided. The criminal sessions were to be held before a Judge and a jury of thirteen men. The Charter empowered the Supreme Court to issue, in addition to the writs of the old Supreme Court, writs of *habeas corpus*, which were intended to secure the release of persons illegally or improperly held in custody.

The Judicial Power

The Charter of Justice of 1833 in effect separated the judicial power from the legislative and executive powers and vested it in the judicature, that is in the Supreme Court and the other established courts of the country.¹ Later statutes, particularly the Courts Ordinance of 1889, continued the jurisdiction and procedure of these established courts. This Ordinance enacts that there shall continue to be within Ceylon one Supreme Court called *The Supreme Court of the Island of Ceylon* and that it shall continue to be the only superior court of record.² The Courts Ordinance further declares that the Supreme Court shall enjoy all powers, privileges and jurisdictions not specifically mentioned therein which were conferred upon it by the Royal Charter of 1833 or of any subsequent date and which are not inconsistent with the Ordinance or with the Civil Procedure Code.³ As De Sampayo J. has observed: 'The Charter (of 1833) is the foundation of the judicial system and the parent of the Administration of Justice Ordinance 1868, and of the present Courts Ordinance 1889, which must be read in the light of that Charter'.⁴

The grant of independence to Ceylon and the enactment of the Constitutions of 1946 and 1947 necessitated changes in the legislative and executive powers. So far as the judicial power was concerned, since it had already been vested in the Judicature and was being wielded by the Supreme Court as well as the other

¹ *The Queen v. Liyanage and others* (1962) 64 New L.R. 313 at 350; *Liyanage and others v. The Queen* (1965) 68 New L.R. 265 at 281.

² Legislative Enactments of Ceylon, Chap. 6, ss 6 and 7.

³ Section 41.

⁴ (1915) 18 new L.R. 334 at 338.

established Courts in their daily process under the Courts Ordinance, there was no compelling need to make any specific vesting of it under the new Constitution.¹ It remained 'where it had lain for more than a century, in the hands of the judicature'.² At the same time the importance of securing the independence of the judges and of maintaining the dividing line between the judiciary, the executive and the legislature was appreciated by those who framed the Constitution, which was significantly divided into separate parts: Part 3 of the Constitution headed *The Legislature*; Part 5, *The Executive* and Part 6, *The Judicature*.³

The judicial power cannot be taken away from the established courts or eroded in the course of ordinary legislation enabling the executive to appoint new tribunals exercising various aspects of that power.⁴ Nor can the legislature itself exercise the judicial power which is vested in the courts. Where, for example, an Act amounts to a legislative judgment having the aim of inflicting punishment on named individuals and depriving judges of their normal discretion in that regard, the Act can be declared invalid as being tantamount to an unwarranted exercise of judicial power.

THE ORGANISATION OF THE COURT

The Appointment of Judges

The Supreme Court consists of eleven judges, namely, the Chief Justice and ten other judges called *Puisne Justices*. The judges are appointed by the Governor-General by Letters Patent issued under the Public Seal of the Island. Appointments to the Supreme Court are made from other ranks of the judiciary as well as from the Bar. In the exercise of this power of appointment, the Governor-General acts on the advice of the Prime Minister. This system has so far worked very satisfactorily, as in practice this advice is given with due regard to the views of the Bench and the Bar.

Under some Commonwealth Constitutions, appointments can only be made after consultation with the judges of the Supreme Court. It has been suggested that, despite the satisfactory working of the present system, the complete isolation of the judiciary from the executive in the matter of appointments would logically require the introduction of some such provision into the Ceylon Constitution.

¹ *Liyanage and others v. The Queen (supra)* at 281.

² *Ibid.* at 282.

³ *The Bribery Commissioner v. Ranasinghe* (1964) 66 New L.R. 73 at 74-75.

⁴ *The Bribery Commissioner v. Ranasinghe (ante)* at 76. See also *Asiz v. Thondaman* (1959) 61 New L.R. 217 at 222-223.

Judicial Tenure and Independence

The Constitution provides that a judge of the Supreme Court holds office until he reaches the age of sixty-two, but that the Governor-General may permit a judge who has passed that age to continue in office for a period not exceeding twelve months.¹ This power of extension of the retiring age of judges has been criticized on the ground that it is not in conformity with the principle of judicial independence. The power has, however, not been exercised in the past several years and is unlikely to be exercised in the future. Judges of the Supreme Court hold office during good behaviour and cannot be removed except by the Governor-General on an address of the Senate and the House of Representatives.² No procedure under the above provision for the removal of judges has been laid down by law. Nor has there been any occasion on which an address for the removal of a judge has been made. It would seem however, that the address would have to be introduced in the House of Representatives and that the judge would be entitled to be heard.³

The Constitution also provides that the salaries of the judges of the Supreme Court shall be determined by Parliament, charged on the Consolidated Fund and that they cannot be diminished during their term of office.⁴

THE JURISDICTION AND POWERS OF THE SUPREME COURT

The judges of the Supreme Court, as indeed the whole judiciary, perform the important function of deciding disputes, not only between citizens but also between citizens and the State. Although the Supreme Court in theory only applies the law, as the numerous reported cases reveal, it does, subject to certain limits, make law through judicial interpretation. The decisions of the Supreme Court are binding on all other courts in Ceylon.

Judicial Review: The Guardian of the Constitution

Under Ceylon's written Constitution the Judiciary, particularly the Supreme Court, acts as the guardian of the Constitution. The

¹ S. 52 (3).

² S. 52 (2).

³ See Keith, *Responsible Government in the Dominions*, II, pp. 1073-1074.

⁴ S. 52 (4) and (6). The result is that the salaries are not debated, and voted annually by Parliament.

Court maintains the supremacy of the Constitution by declaring void any laws passed by Parliament which are repugnant to the Constitution. Under section 29 (1) of the Constitution, Parliament has the power, subject to the provisions of the Constitution, to make laws for the peace, order and good government of the Island. Section 29 (2) states in effect that no such law shall prohibit or restrict the free exercise of any religion or alter the constitution of any religious body without the consent of its governing authority or discriminate between persons of different communities or religions. Where a religious body is incorporated by law, no such alteration can be made except at the request of its governing authority. Section 29 (3) makes void any law made in contravention of section 29 (2), to the extent of such contravention. Section 29 (4) provides that no Bill for the amendment or repeal of any of the provisions of the Constitution shall be presented for the Royal Assent unless it has endorsed on it a certificate by the Speaker that the number of votes cast in its favour in the House of Representatives amounted to not less than two-thirds of the total number of members of the House, including those not present.

As the great Chief Justice of the United States, John Marshall, did in the famous case of *Marbury v. Madison* in 1803,¹ the Judges of the *Supreme Court of Ceylon too have, in the absence of express provision, assumed the power of judicial review of the constitutionality of laws.*² It has been said in favour of judicial review that unless the courts can intervene in cases where the provisions of the Constitution are violated, the principle of the supremacy of the fundamental law becomes but as 'sounding brass or a tinkling cymbal'.³

When a statute is impugned before the Supreme Court, it is examined by the Court to ascertain its pith and substance or its true nature and character for the purpose of determining whether it is legislation which is *ultra vires* the Constitution.⁴ The Court acts also on the principle that a legislature may not do indirectly what it cannot do directly. Where legislation, though framed so as not to offend directly against a constitutional limitation of power of Parliament, indirectly achieves the same result, it would be declared by the Court to be *ultra vires* and void.⁵ But where the invalid part

¹ 1 Cranch 137 (U.S.).

² *Mudanayake v. Sivagnanasunderam* (1951) 53 New L.R. 25; *Kodakan Pillai v. Mudanayake* (1953) 54 New L.R. 433.

³ Bernard Schwartz, *American Constitutional Law* (1955) at II, citing the phrase used in *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 161 F. 2d 798, 804 (5th Cir. 1947).

⁴ *Kodakan Pillai v. Mudanayake* (ante) at 439. *Mudanayake v. Sivagnanasunderam* (ante) at 39-40.

⁵ *Kodakan Pillai v. Mudanayake* (ante) at 438.

of a statute is really distinct and separate in its operation from the other parts and is not inseparably connected with them, the doctrine of severability applies and only the 'offending' part will be declared to be bad in law.¹

Although the power of judicial review has been criticised by some European jurists as 'government by judges', in Ceylon as well as in certain other countries where this power exists, the Court acts on the 'presumption of constitutionality' of parliamentary legislation and with a remarkable degree of judicial self-restraint. It has been authoritatively stated:

The maxim *omnia praesumuntur rite esse acta* is at least as applicable to the Act of a legislature as to any other acts and the Court will not be astute to attribute to any legislature motives or purposes or objects which are beyond its power. It must be shown affirmatively by the party challenging a statute which is upon its face *intra vires* that it was enacted as part of a plan to effect indirectly something which the legislature had no power to achieve directly.²

Moreover, in the exercise of its power of judicial review of the constitutionality of parliamentary legislation, the approach of the Supreme Court is positivist rather than 'purposive' or 'policy making'. As the Court has stated:

It is not for the Court to say that a law passed by two-thirds of the whole number of members of the House does not conduce to peace, order and good government. The Court is not at liberty to declare an Act void because it is said to offend against the spirit of the Constitution though that spirit is not expressed in words.³

Again, with regard to legislation which has been challenged as being retrospective, the Court has observed:

We share the intense and almost universal aversion to *ex post facto* laws in the strict sense, that is laws which render unlawful and punishable acts which, at the time of their commission, had not actually been declared to be offences. And we cannot deny that in this instance we have to apply such a law... Nevertheless it is not for us to judge the necessity for such a law.⁴

¹ *Thambiayah v. Kulasingham* (1948) 50 New L.R. 25 at 37; *The Queen v. Abeysinghe* (1965) 68 New L.R. 386 at 399.

² *Kodakan Pillai v. Mudanayake* (*ante*) at 438.

³ *Kariapper v. Wijesinghe* (1966) 68 New L.R. 529 at 537.

⁴ *The Queen v. Liyanage and others* (1963) 65 New L.R. 73 at 84. Although the order of conviction by the Supreme Court was set aside on appeal to the Privy Council, the view of the Supreme Court that the retrospective legislation was valid was upheld, and the contention that the Ceylon Parliament was limited by an inability to pass legislation contrary to fundamental principles of justice was rejected: (*Liyanage and others v. the Queen* (1965) 68 New L.R. 265 at 278-280. See, also *The Queen v. Buddharakkita Thera* the Bandaranaike assassination case (1962) 63 N.L.R. 433.

... If any retroactive legislation is abhorrent to the generally accepted standards of morality and justice the remedy lies in the hands of the people themselves, whose representatives are responsible for the legislation. It is not the function of the courts to declare such legislation invalid so long as the legislation which embodies such provisions has been duly passed by the sovereign Parliament. It is the province of the legislature to decide on the existence or otherwise of any special circumstances, which call for any special legislation of a type that may be even out of place under normal circumstances.¹

However, in the exercise of its power of review of administrative action, particularly where it is alleged that there is a curtailment of the Rule of Law and the personal rights of the citizen, the Court adopts a more liberal approach to the interpretation of the law. Abrahams C.J. stated in the *Bracegirdle* case:

We have heard this case with most anxious care, and I approach the question of our decision with equally anxious consideration as must always be done by Judges where the liberty of the subject is concerned.²

It [the jurisdiction of the Judges] is now frequently the only refuge of the subjects against the unlawful acts of the Executive, the higher officials, or more frequently the subordinate officials. I hope it will always remain the duty of the Judges to protect those people.³

In the *Bracegirdle* case, the Supreme Court held that the power of the Governor to issue an order for arrest, detention and deportation under an 1896 Order in Council was not absolute and could be exercised only in a state of emergency contemplated by the preamble to an amending Order in Council of March 1916. The Court held that in Ceylon no person could be deprived of his liberty except by judicial process, and accordingly ordered the release of *Bracegirdle*. More recently the Supreme Court has observed that no unreasonable restrictions should be placed by the Executive on a person's freedom of movement and that the holder of a valid Ceylon passport and a return ticket to travel abroad has the right to leave the Island and return without hindrance.⁴

¹ *The Queen v. Abeysinghe* (1965) 68 New L.R. 386 at 401.

² (1937) 39 New L.R. 193 at 205.

³ *Ibid*, citing Scrutton L.J. in *R v. Superintendent of Chiswick Police Station, ex parte Sacksteder* (1918) 1 K.B. 578 at 589. On the desirability of recognising the Universal Declaration of Human Rights in the Courts, see Justice T.S. Fernando: *Human Rights as a Tradition of the East*, *Ceylon Daily News*, 10th December 1964.

⁴ *Aseerwatham v. Permanent Secretary, Ministry of Defence and External Affairs and Others* (Lucian G. Weeramantry, *Digest of Judicial Decisions*, *Journal of the I.C.J.*, Vol. VI, pp. 319-320), per T.S. Fernando J. See also *Gooneratne v. Permanent Secretary, Ministry of Defence and External Affairs and Another* (Weeramantry, *supra*, p. 320).

Original Criminal Jurisdiction of the Supreme Court

The Supreme Court has an original criminal jurisdiction over all crimes and offences committed throughout Ceylon. This jurisdiction is exercised at criminal sessions of the Supreme Court held as prescribed in the Criminal Procedure Code and the Courts Ordinance. Criminal sessions of the Supreme Court are held by one of its judges or by a Commissioner of Assize appointed by the Governor-General for each of the five circuits for the trial of prosecutions. The Chief Justice first chooses the circuit on which he intends to proceed and the Puisne Justices then make their choice according to the priority of their appointment.

A judge, before or on holding any criminal sessions of the Supreme Court, issues his mandate directed to all Fiscals and other keepers of prisons within the limits of the circuit for which the sessions are held, to furnish him with certified lists of the persons in their custody charged with offences.

Criminal sessions of the Supreme Court are held before a judge and jury in the manner prescribed in the Criminal Procedure Code. The Chief Justice may in his discretion direct that an accused committed for trial before the Supreme Court be tried before three judges at Colombo with a jury. The right to trial by jury, although it was embodied in the Charter of 1833, is not an entrenched provision of the Constitution and may be restricted or repealed by Parliament in the course of ordinary legislation.¹ In the case of sedition and certain other offences against the State, the Minister of Justice may direct that the trial shall be held before the Supreme Court at Bar by three Judges without a jury.²

If a prisoner committed for trial before the Supreme Court is not brought to trial at the first criminal session after the date of his commitment at which he might properly be tried, the court must, if twenty one days have elapsed between the date of commitment and the first date of the sessions, admit him to bail unless good cause is shown to the contrary or unless the trial is postponed on the application of the prisoner. If he is not brought to trial at the second sessions after his commitment, unless it be by reason of his insanity or sickness or his application for a postponement of the trial, the judge must, unless good cause is shown to the contrary, order his discharge from imprisonment, provided that six weeks have elapsed since the close of the first sessions and six months have elapsed between the date of commitment and the commence-

¹ *The Queen v. Abeysinghe* (1965) 68 New L.R. 386 at 399.

² Criminal Procedure Code (Legislative Enactments of Ceylon, Chap. 20) s. 440 A.

ment of the second sessions. As the Supreme Court has observed, the above provisions of the law contain an important principle safeguarding the liberty of the subject, who has a right to be brought to trial with reasonable dispatch.¹

Appellate Jurisdiction of the Supreme Court

The appellate jurisdiction of the Supreme Court is ordinarily exercisable only in Colombo. It extends to the correction of all errors in fact or in law committed by a judge of the Supreme Court sitting alone on circuit by any District Court, Court of Requests, Magistrate's Court or Court of a Municipal Magistrate. Although the Supreme Court has jurisdiction to review on appeal the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand, this jurisdiction is exercised with caution.²

On the hearing of any case in appeal or in revision from any original court, the Supreme Court may affirm, reverse, correct or modify any judgment, sentence, decree or order or give such directions to the court below or order a new trial or a further hearing upon such terms as it thinks fit. The Supreme Court, if need be, may receive and admit new evidence additional to, or supplementary of, the evidence already taken in the court of first instance touching the matters at issue, as justice may require. In the exercise of its appellate jurisdiction the Court must, in regard to substantive rights, apply the law which was in force during the earlier proceedings.³

Appeals in civil cases from the decision of a single judge as provided in section 37 of the Courts Ordinance and appeals from judgments of District Courts in civil and criminal cases must be heard by at least two judges of the Supreme Court. Appeals from Courts of Requests and Magistrates' Courts can be heard by any one judge of the Court.

In the event of any difference of opinion between two judges, the decision of the Court is suspended until three judges are present. The decision of two judges when unanimous or of the majority of the three judges in case of any difference of opinion is

¹ *Premasiri v. The Attorney-General* (1967), see *Digest of Judicial Decisions* at pp. 146-147 below. See also *De Mel v. The Attorney-General* (1940) 47 New L.R. 136 at 137; *Leon Singho v. Attorney-General* (1959) 62 New L.R. 222.

² *Munasinghe v. Vidanage* (1966) 69 New L.R. 97 at 103.

³ *Nawadun Korale Cooperative Stores Union Ltd v. Premaratne* (1954) 55 New L.R. 505 at 507, *Guneratne v. Appuhamy* (1906) 9 New L.R. 90.

deemed to be the judgment of the Supreme Court. A judge of the Supreme Court sitting alone in appeal may also reserve any appeal or question for the decision of more than one judge of the Court. Any appeal or question so reserved must be decided by a Bench of two or more judges of the Court constituted in accordance with an order made by the Chief Justice. The latter may also order in writing that any case brought before the Supreme Court by way of appeal, review or revision shall be heard by all the judges of the Court or by any five or more of the judges named in the order, including himself.

An appeal to the Judicial Committee of the Privy Council lies as of right from any final judgment of the Supreme Court where the matter in dispute or the question involved in the appeal is of the value of 5000 rupees or upwards, or at the discretion of the Court from any other judgment. In criminal cases the Privy Council will not interfere unless substantial or grave injustice has been done by the deprivation of a fair trial or the violation of the principles of natural justice.¹ It has been held that the jurisdiction of the Privy Council to entertain appeals from Ceylon was not affected by any of the instruments that conferred independence, although it is within the legislative competence of the Parliament of Ceylon at any time to modify or terminate appeals to the Privy Council.² Under section 82B (5) of the Ceylon (Parliamentary Elections) Order in Council, the decision of the Supreme Court on any appeal from an election judge is declared to be final and conclusive and no appeal lies to the Privy Council.³

General Powers of the Supreme Court

Power to Issue Writs

With increasing governmental regulation of the economic life of the people and the resulting grant of legislative and judicial powers to administrative authorities, the judicial remedies for the review of improper administrative action have assumed an added importance. Among the most popular of the remedies for the redress of abuses of administrative powers are the writs issued by the Supreme Court. By this machinery of review the Court, whilst not seeking to interfere with the freedom of the administration to carry on its functions efficiently and in accordance with its policy, ensures that the powers conferred on administrative officials and bodies are exercised in accordance with the principles of law and the funda-

¹ *King v. Attygalle* (1936) 37 New L.R. 337.

² *Indralebbe v. The Queen* (1963) 65 New L.R. 433.

³ *Senanayake v. Navaratne* (1954) 56 New L.R. 5.

mentals of fair procedure. The writs which the Supreme Court is authorised to issue under the Courts Ordinance are those of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, *procedendo*¹ and *prohibition*. Disobedience to these writs is treated as contempt of court and is punishable by fine or imprisonment.

1. *Habeas Corpus*

The writ of *habeas corpus* has almost from the inception of the Supreme Court been regarded as the most important safeguard of personal freedom. The writ, available against any person detaining another without legal justification, is used to secure the detainee's release from unlawful confinement. As far back as 1864 it was stated by the Supreme Court:

The right to issue a writ of *habeas corpus* was one of the most sacred functions entrusted to a judge and unless a cause, and sufficient cause, was shown at once for a person's detention he was entitled to his liberty.²

The power to issue the writ of *habeas corpus* is at present conferred upon the Court by section 45 of the Courts Ordinance.³ Under the provisions of that section the Supreme Court or any judge thereof, whether at Colombo or elsewhere, is authorised to issue mandates in the nature of writs of *habeas corpus* to bring up before the Court or judge (a) any person who is to be dealt with according to law (b) any person illegally or improperly detained in custody, and to discharge or remand the person so brought up, or otherwise deal with him according to law.

The judge may direct the District Judge, Commissioner of Requests or Magistrate of the nearest court to inquire into and report upon the cause of the alleged imprisonment or detention and may make appropriate provision for the interim custody of the person produced. Upon the receipt of the report, the Supreme Court or judge makes an order discharging or remanding the person detained or otherwise deals with him according to law.

The question whether a writ should issue under the above-mentioned section 'to bring up before the Court the body of any person' must be determined in the same manner as it would be by

¹ This writ is addressed to an inferior tribunal directing it to proceed forthwith to deliver an order or remitting to it a matter which has been removed on insufficient grounds to the Supreme Court by writ. This writ is of little practical importance in Ceylon.

² *In the matter of McSweeny* (1864) Legal Miscellany 58 at 61, per Creasy C.J. See also *Re Shaw* (1860-62) Ramanathan's Rep. 116 at 119.

³ Legislative Enactment of Ceylon, Chap. 6.

a Court in England.¹ The Supreme Court has power to review by the issue of this writ the legality of arrests and detentions under the ordinary naval and military law.²

The writ of *habeas corpus* is not used exclusively as a method of testing the legality of detentions by public authorities. It is frequently used in the domestic sphere as well. Since the Court is authorised to issue the writ and deal with any person according to law, the Court grants the writ to determine also the custody of minor children. In settling such custody in relation to the right of parents, the Court is guided by Roman Dutch Law, being the common law of Ceylon, and, in the case of Kandyan Sinhalese, Muslims and persons under the *Thesawalamai*,³ by their own personal laws.⁴ In the exercise of this power, the Court has the discretion to override the fundamental right of a parent to the custody of his child if such a course is necessary in the interests of the child's health, welfare and happiness.⁵

Habeas corpus is not available against an order of committal of a Commissioner of Assize or other superior court or against a committal by any court acting within its jurisdiction, even though it has come to a wrong decision on the facts or upon the law.⁶

Closely allied to its power under section 45 of the Courts Ordinance to issue writs of *habeas corpus* is its power under section 46 of the same Ordinance to direct:

- (a) that a prisoner detained in any prison be brought before a court-martial or any Commissioners acting under the authority of any commission from the Governor-General for trial or to be examined touching any matter pending before such court-martial or Commissioners respectively;
- (b) that a prisoner be removed from one custody to another for the purpose of trial; or
- (c) that the body of a defendant be brought in on the Fiscal's return of *cepi corpus* to a writ of *attachment*.

Application to the Supreme Court for *habeas corpus* may be made by the person detained or by another on his behalf. The procedure is by way of petition and affidavit setting out the

¹ *Gooneratnenayake v. Clayton* (1929) 31 New L.R. 132 at 133.

² *In re W.A. de Silva* (1915) 18 N. L.R. 277.

³ The personal law applicable to the Jaffna Tamils.

⁴ *In re Wappu Marikar* (1911) 14 New L.R. 225; *Junaid v. Mohideen* (1932) 34 New L.R. 141; Walter Pereira, *Laws of Ceylon* (1913), 116.

⁵ *Ran Menika v. Paynter* (1932) 34 New L.R. 127; *Ivaldy v. Ivaldy* (1956) 57 New L.R. 568. See also Thompson, *Laws of Ceylon*, Vol. 1., 214.

⁶ *Re Thomas Perera alias Banda* (1926) 29 New L.R. 52. *In re Liyane Aratchie* (1958) 60 New L.R. 529.

allegations relating to the unlawful confinement. *Habeas corpus* is a writ of *right* and will be issued when the applicant has satisfied the court by affidavit that his detention is unlawful.¹ Successive applications for the writ may be made to every judge of the Supreme Court, and each judge is bound to hear the application, notwithstanding the fact that another judge has refused a similar application.²

2. *Mandamus*

It is by the writ of *mandamus* that the Supreme Court commands a person or body of persons to perform an existing public duty which has been imposed by law. By this writ the Court can also order the restoration of a person to a public office of which he has been unlawfully dispossessed³ or compel the exercise of a jurisdiction of an inferior court which it has refused to exercise.⁴ The validity of local government elections which are void, the proceedings being only colourable, may also be questioned by *mandamus*.⁵ Although the Supreme Court does not issue the writ of *mandamus* against the servants or agents of the Crown (Government), if a public duty for the benefit of the subject is directly imposed on them by statute as *personae designatae*, the Court will enforce its performance by the issue of the writ.⁶

Even where a discretionary power is given to a person or body by law, the Supreme Court will issue a *mandamus* to enforce the exercise of the discretion by that person or body one way or the other, where the circumstances calling for its exercise arise. Where, for example, a discretion has been exercised upon some wrong principle of law or capriciously or on extraneous or improper considerations, the writ will be granted in order to secure its proper exercise.⁷

Unlike the writ of *habeas corpus*, *mandamus* is not available from the Supreme Court as of right. Its grant, like that of

¹ *In re Liyana Aratchi* (1958) 60 New L.R. 529 at 531.

² *In re P.C. Siriwardene* (1929) 31 New L.R. III.

³ *Perera v. Sockalingam Chettiar* (1946) 47 New L.R. 265 (where the Secretary of an Urban Council was restored to office); *Wijesinghe v. The Mayor of Colombo* (1948) 50 New L.R. 87 (where the Charity Commissioner of the Municipal Council of Colombo was restored to office).

⁴ *Pillai v. Dewanarayana* (1932) 34 New L.R. 334; *Orr v. District Judge, Kalutara* (1948) 49 New L.R. 204.

⁵ *Application for a Writ of Mandamus on the Government Agent, Northern Province* (1927) 28 New L.R. 323.

⁶ *City Motor Transit Ltd v. Wijesinghe* (1961) 63 New L.R. 156.

⁷ *Re S.E. Fernando* (1924) 26 New L.R. 211; *Noordeen v. Chairman, Village Committee, Godapitiya* (1943) 44 New L.R. 294; *Wijesuriya v. Moonesinghe* (1959) 64 New L.R. 180.

prohibition, certiorari and *quo warranto*, is a matter of discretion for the Court. This discretion is, however, governed by certain settled principles. The writ will be refused, for example, if there is an equally convenient and effectual remedy provided by law¹ or if it will be futile or there has been delay or acquiescence on the part of the applicant or because the Court is not convinced of the propriety of his motives.² On the other hand, as the Supreme Court has stated, in the exercise of its discretion it will not be astute to discover reasons for not applying 'this great constitutional remedy for error and misgovernment'.³

3. *Prohibition and Certiorari*

The principles governing the issue of these two writs by the Supreme Court are in most respects similar. The main point of difference between them is that *prohibition* is sought at an earlier stage, namely, before a final order is made by an inferior court or tribunal, while *certiorari* is used to quash an order already made.

There are many cases in the court records where the Supreme Court through the writ of *prohibition* has prohibited inferior courts and tribunals from proceeding any further with judicial matters, on the ground that they have exceeded their jurisdiction or have otherwise acted in contravention of law. There have been even more cases where the Supreme Court has commanded inferior courts or tribunals by writs of *certiorari* to send up records of specific proceedings and orders so that the Courts might inquire into their legality and quash them if they have been made in excess of jurisdiction or have otherwise been contrary to law.

These writs have been issued by the Supreme Court on the following grounds:

(a) Excess of jurisdiction. The Court has taken the view that there is an excess of jurisdiction not only where there is an illegal or improper constitution of the tribunal, but also where the tribunal has exercised its power for an improper purpose, unreasonably, in bad faith or on irrelevant considerations.

(b) Error of law apparent on the face of the record.⁴

(c) Denial of natural justice. The Supreme Court invalidates the

¹ *Samynathan v. Whitehorn* (1934) 35 New L.R. 225; *Dankoluwa Tea Estates, Ltd v. The Tea Controller* (1940) 42 New L.R. 36.

² *Madanayake v. Schrader* (1928) 29 New L.R. 389; *Inasitamby v. Government Agent, N.P.* (1932) 34 New L.R. 33; *Sumangola Maha Nayake Thero v. Registrar General* (1941) 42 New L.R. 25.

³ *Madanayake v. Schrader (supra)* at 393.

⁴ *Mudanayake v. Sivagnanasunderam* (1951) 53 N.L.R. 25; *Hayleys Ltd v. Crossette Thambiah* (1961) 63 New L.R. 248 at 257-9 per Tambiah J.

proceedings of a tribunal which has been guilty of bias or if there has been a real likelihood of bias. The Court has adopted the English legal principle that 'it is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.¹ The Court has also upheld the other principle of natural justice that a party must be given notice of the case against him and afforded a fair hearing or opportunity of correcting or controverting any relevant statement brought forward to his prejudice.² The Supreme Court has observed that the mere giving of a notice of objection or even a written explanation by a party in regard to charges made against him may not constitute a sufficient hearing of that party's case where an inquiry has also been demanded by him.³

The court issues *prohibition* and *certiorari* only against 'persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially'.⁴

Although these writs will not issue to a person or body exercising merely advisory or recommendatory functions under a statute, yet if the advice or recommendation will in fact be acted upon and become final on confirmation or approval by some superior authority, the proceeding will be subject to the issue of the writs. The writs would issue, for example, where an adverse finding against a person by a Commissioner appointed under the Commissions of Inquiry Act would, under existing legislation, have the effect of depriving that person of his civic rights.⁵ The Court may issue these writs even to domestic tribunals such as committees of clubs which under their rules exercise power to expel members and are under a duty to act judicially.⁶

Even in the case of the exercise of a discretionary power by an administrative authority under a statute, the Court may issue the

¹ *The Queen v. Liyanage (ante)* at 359.

² See *University of Ceylon v. Fernando* (1960) 61 New L.R. 505; *Shareef v. Commissioner for Registration of Indian and Pakistani Residents* (1965) 67 New L.R. 433 and Weeramantry, *Digest of Judicial Decisions, Journal of the I.C.J.* Vol. IX, No. 1 pp 120-121.

³ *Vadamaradchy Hindu Educational Society Ltd v. Minister of Education* (1961) 63 New L.R. 322; *Munasinghe v. The Auditor-General* (1961) 64 New L.R. 474, 478.

⁴ *Dankoluwa Estate Co. Ltd v. The Tea Controller* (1941) 42 New L.R. 197, at 205-206, citing Atkin L.J. in *R v. Electricity Commissioners* (1924) 1 K.B. 171 at 204-205. See also *Fernando v. The University of Ceylon* (1956) 58 New L.R. 265 at 276.

⁵ *De Mel v. M.W.H. de Silva* (1949) 51 New L.R. 105; *Dias v. Abeywardene* (1966) 68 New L.R. 409.

⁶ *Fernando v. The University of Ceylon* (1956) 57 New L.R. 265, 279; *Tennekoon v. The Principal Collector of Customs* (1959) 61 New L.R. 232 at 234.

writs where it holds that the authority is under a duty to act judicially. The circumstances in which the writs will issue will depend on the statutory or other provisions under which the matter arises.¹ Where power is statutorily conferred on an authority to make a decision on proof of certain facts, the Court will issue the writs when it is clear that further investigation into the facts and evidence must be made in order to determine whether sufficient grounds for the issue of the writ did in fact exist.² The Court will not, however, go into questions of policy or expediency. As long as there is a duty to act judicially, the Supreme Court may even inquire into the validity of an Order made under the provisions of a statute which 'on publication in the Gazette, has the force of law'.³

4. *Quo Warranto*

Unlike the other writs of the Supreme Court, *quo warranto* was provided by the legislature many years after the establishment of the Supreme Court and 'only after the judges [of the Supreme Court] had repeatedly deplored the fact that it was not competent for them to grant the writ and so question disputed Municipal [local] elections'.⁴ The writ was introduced into Ceylon's legal system by Ordinance No. 4 of 1920, which amended the Courts Ordinance for this purpose.

The Supreme Court issues the writ of *quo warranto* in order to determine whether the holder of a public office is legally entitled to it. The writ is granted only where the office which is usurped is of a public nature and a substantive office, that is, one which is independent in title as opposed to that occupied by a deputy or servant employed at the will and pleasure of others.⁵ The Court must also be satisfied that the person concerned is in actual possession of the office.⁶

In the absence of any other procedure, such as by way of election petition, which is available only in regard to parliamentary elections, the Court issues the writ to determine whether a person

¹ *Sugathadasa v. Jayasinghe and the Minister of Local Government* (1958) 59 New L.R. 457, 466.

² *Vadamaradchy Hindu Educational Society Ltd v. Minister of Education* (*supra*) at 327, per H.N.G. Fernando J.

³ *Subramaniam v. Minister of Local Government and Cultural Affairs* (1957) 59 New L.R. 254.

⁴ *Piyadasa v. Goonesinghe* (1941) 42 New L.R. 339 at 342-343.

⁵ *Deen v. Rajakulendran* (1938) 40 New L.R. 25 at 28; *Perera v. Amerasinghe* (1953) 54 New L.R. 477, 479.

⁶ *Ukku Banda v. Government Agent, Southern Province* (1927) 29 New L.R. 168, 170; *Wijegoonewardene v. Kularatne* (1950) 51 New L.R. 453.

who has been elected *de facto* at a local government election and has assumed office is legally entitled to it.¹

Exclusion or Restriction of the Supervisory Jurisdiction of the Court

Certain statutes have purported to provide for the finality of administrative action by the exclusion of the supervisory jurisdiction of the Courts and even that exercised by the Supreme Court by way of the writs.² It has however been laid down by the Supreme Court that under the law of Ceylon every person has the right of access to the Courts of law for the determination of his legal rights even against the executive authorities and 'to none will the Courts deny that right if their powers are invoked in appropriate proceedings'.³

In this connection the question has been asked whether a statute can abolish the jurisdiction of the Supreme Court to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari* and *prohibition*, which is conferred by sections 42 and 45 of the Courts Ordinance. Since the judicial power together with the power to grant writs were conferred on the Supreme Court by the Charter of Justice of 1833 and this power was continued in later Ordinances, in particular the Courts Ordinance, it is certainly doubtful whether judicial review of administrative action by the Supreme Court can be excluded by abolishing its power to grant writs.⁴

Other Powers of the Court

The Supreme Court has power to grant injunctions to prevent any irremediable mischief which might ensue before the party making application for such injunction could prevent it by bringing an injunction in any original court. In a fit case it may even grant an injunction after only *ex parte* hearing and without prior notice to the opposite party.⁵ Apart from these special powers conferred by the Courts Ordinance, the Supreme Court has no inherent power to issue injunctions.⁶

¹ *Piyadasa v. Goonesinghe (supra)*; *Gunasekera v. Wijesinghe* (1963) 65 New L.R. 303.

² See, for example, the Assisted Schools and Training Colleges (Supplementary Provisions) Act, No. 8 of 1961, s.9, and the Criminal Law (Special Provisions) Act, No. 1. of 1962, s.8.

³ *Modera Patuwata Cooperative Fishing Society Ltd v. Gunawardena* (1959) 62 New L.R. 188 at 192.

⁴ See the doubts expressed by H.N.G. Fernando S.P.J. in *Anthony Naide v. The Ceylon Tea Plantation Co. Ltd* (1966) 68 New L.R. 558 at 570.

⁵ *Arnolis Silva v. Tambiah* (1961) 63 New L.R. 228.

⁶ *Mahamadu v. Ibrahim* (1895) 2 New L.R. 36.

The Courts Ordinance also empowers the Supreme Court to admit and enrol as advocates or proctors¹ of the Court persons of good repute and of competent knowledge and ability. This power must be exercised subject to the rules set out in the Ordinance constituting the Council of Legal Education. Any three judges of the Supreme Court sitting together may suspend from practice or remove from office an advocate or proctor who is guilty of any deceit, malpractice or criminal offence.

The Court may also take cognizance of and punish any offence of contempt committed against itself or any other court which has no jurisdiction to punish for contempt. On conviction the offender may be committed to gaol until he has purged his contempt or for such period as it may seem fit. He may also be sentenced to pay a fine not exceeding five thousand rupees.

The judges of the Supreme Court or any five of them, of whom the Chief Justice must be one, may frame general rules and orders of court for regulating any matters relating to the practice and procedure of the courts and other matters specified in the Courts Ordinance, so long as such rules and orders are not inconsistent with the provisions of the Courts Ordinance or any other enactment.

CONCLUSION

The Supreme Court of Ceylon occupies a high position of power, prestige and importance in the life of the nation. But the judiciary is only one of the three branches of Ceylon's democratic system of government. The Court, as the dicta earlier cited in this article illustrate, does not consider it a part of the judicial function to remedy every kind of injustice or abuse in the complex governmental process nor to enter the province of the legislature.

Nevertheless, in the mixed and changing society of Ceylon, the Supreme Court has quite justly come to be regarded as a symbol of the reconciliation between the expanding powers of government and the basic rights of the citizen under the law and the Constitution. Within the limits of its power and jurisdiction, the Court performs a dynamic role as the guardian of the Constitution and the fearless upholder of the principle of equal justice under the Rule of Law.

¹ A proctor is the equivalent of an English solicitor.

DIGEST OF JUDICIAL DECISIONS

by

SUPERIOR COURTS OF DIFFERENT COUNTRIES

on

ASPECTS OF THE RULE OF LAW

Compiled and Annotated

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(G.R. No. L-16487)

At an administrative investigation, party against whom complaint was made not allowed to cross-examine complainant's witnesses, not permitted to call one of his own witnesses and not given full opportunity to present his other witnesses—manner in which administrative investigation was conducted thus amounted to virtual denial of due process—such denial constitutes exception to rule requiring exhaustion of administrative remedies before recourse to court.

Decided on July 31, 1964.

Acting on a complaint filed against the petitioner for removal of a dam constructed on his property, the respondent Secretary conducted an investigation and gave a decision in which he declared the dam to be a public nuisance and ordered its destruction.

Petitioner appealed to the courts against the declaration and order on the grounds that the respondent had not allowed the petitioner's counsel to cross-examine the complainant's witnesses, that the respondent had arbitrarily denied the petitioner's request to call one of his witnesses, and that the investigation had been terminated without giving the petitioner a full opportunity to present his other witnesses. The petitioner's contentions were established and the court that heard the appeal declared the respondent's ruling void. The respondent then appealed to the Supreme Court of the Philippines contending that the petitioner had not exhausted all other remedies available to him before having recourse to the courts.

The Supreme Court held that the manner in which the administrative investigation had been conducted was a virtual denial to the petitioner of due process, and that in the circumstances the case represented one of the exceptions to the rule requiring the exhaustion of administrative remedies before recourse to the courts might be had.

Supreme Court of India

DUTY TO COMPLY WITH RULES OF NATURAL JUSTICE IN
MAKING DETENTION ORDER

LAKHANPAL v. UNION OF INDIA

(AIR 1967 Supreme Court 1507)

Detention order made under Defence of India Rules (1962)—function of making such order, as distinguished from power to make it, is quasi-judicial—hence, in performing such function, rules of natural justice should be complied with—in certain cases disclosure of materials in possession of government may be embarrassing and detrimental to larger interests of country—such cases, however, are few—proper remedy against such embarrassing or detrimental consequences is not to deny elementary right of person detained to present his case, but to provide rule that privilege against disclosure of materials in possession of government may be claimed in suitable cases.

Before Hidayatullah, Shelat and Mitter JJ.

Decided on March 7, 1967.

The petitioner was arrested by order dated December 10, 1965, made under Rule 30(1)(b) of the Defence of India Rules (1962) and detained in jail in New Delhi. On January 24, 1966, he filed a petition in the Supreme Court and unsuccessfully challenged his detention on the grounds, *inter alia*, that Rule 30(1)(b) was *ultra vires* the Defence of India Act.

On June 11, 1966, the petitioner was served with another order passed by the Central Government under Rule 30-A(9) stating, *inter alia*, that 'the said detention order has been reviewed by the Central Government and upon such review the Central Government hereby decides that Shri P. L. Lakhnupal (the petitioner) should continue to be detained with a view to preventing him from acting in any manner prejudicial to the defence of India and civil defence'.

Rule 30-A(9) provides as follows:

Every detention order made by the Central Government or the State Government shall be reviewed at intervals of not more than six months by the Government who made the order and upon such review that Government shall decide whether the order should be continued or cancelled.

The petitioner filed application for a writ challenging the validity of the original order of detention and the subsequent order dated 11.6.66, but that application too was dismissed.

On February 2, 1967, a further order was made directing further detention. The order set out that 'the said detention has been further reviewed by the Central Government and upon such review the Central Government hereby decides that the order for the detention of the said Lakhnupal should be continued'.

The petitioner challenged the validity of that order on the grounds that:

- (1) the said order was a mechanical and casual one passed before all the relevant facts and circumstances had been considered.
- (2) it was passed in utter disregard of the duty of the Government to act judicially, implicit in the power conferred on it under Rule 30-A(9) to continue detention, both the function to review and the decision thereon being judicial or quasi-judicial.
- (3) the order was *ultra vires* para. 44 of the Act whereby the Government is required to decide whether detention is the minimum action necessary on the facts and circumstances of the case.
- (4) the order was made *mala fide* and was motivated by punitive rather than preventive considerations.

The Supreme Court, in allowing the application, said that the petitioner had not been given an opportunity to represent his case or to correct or contradict the evidence on which the Government was going to rely and on which it admittedly relied. The answer to the contention that disclosure of materials in the possession of the Government would be prejudicial to the national interest was a simple one. In some cases, though such cases would be few, such disclosure would perhaps be embarrassing and detrimental to the larger interests of the country. But the proper remedy against such a consequence was not to deny the person whose liberty was being deprived the elementary right of representing his case, but to provide a rule whereunder the authorities in suitable cases could claim privilege against such disclosures. (Such a rule is in fact made under Art. 22 of the Constitution under the Prevention of Detention Act. There does not appear to be any reason why such a rule cannot be made under the Defence of India Act or the rules made thereunder).

Dealing with the duty to comply with the rules of natural justice, the Supreme Court observed:

' To say therefore that, because a function is in its inception executive in character, it retains its executive character throughout, would not with respect be correct. Besides, the function under R 30(1)(b) and that under R 30-A(9) is not one and the same. The former is complete as soon as an order of detention is made, the latter is independent of the former and is to be exercised after detention has gone on for a period of six months. In our view, whereas the function under 30(1)(b) is executive, the one under 30-A(9) is quasi-judicial and therefore in exercising it the rules of natural justice have to be complied with.'

Conseil d'Etat of France

RIGHT TO NOTICE OF CHARGE AND
RIGHT TO PRESENT DEFENCE

ALLEGRETTO v. THE CHIEF PORT ENGINEER OF L'HERAULT

(Recueil Dalloz Sirey, 1968, 3^e Cahier pp. 47-51)

Under Book IV of Maritime Ports Code, cards are issued to professional dockers prescribing conditions of service and penalties for breach of such conditions—in event of serious breaches administration has power to withdraw such cards—withdrawal of card amounts to removal of docker's name from list of persons entitled to work at the port—such step cannot be legally taken without person affected having received prior notice of grounds of complaint against him and without his having had opportunity to present his defence.

Decided on July 13, 1967.

According to the administrative system in ports, which is governed by Book IV of the Maritime Ports Code, as modified by a Decree of January 7, 1959, the handling of work in the port is entrusted to professional dockers holding cards issued by the port authorities. Holders of such cards are given priority in the matter of employment. These cards are issued under certain conditions determined by the administration which dockers are expected to conform to with penalties for breach of such conditions. In the event of serious breaches, the administration has the power to withdraw the cards.

On June 29, 1964, the Chief Port Engineer of l'Hérault made an order to the effect that the professional cards of the petitioner and six other dockers would not be renewed as from August 1, 1964, as their output of work was unsatisfactory. The petitioner canvassed the decision of the Chief Engineer before the Administrative Tribunal of Montpellier, but the Tribunal considered that it was not competent to take cognizance of the matter. He thereupon moved the Conseil d'Etat of France.

The Conseil d'Etat held that the step of withdrawing the professional card, which constituted in reality the removal of a docker's name from the list of persons entitled to work at the port, could not under any circumstances be legally taken without the person affected having received prior notice of the grounds of complaint against him and also without his having been given an opportunity to present his defence. As the proper procedure had not been followed, the decision attacked was set aside. In the circumstances of the case the State was ordered to pay the costs of the proceedings before the Administrative Tribunal of Montpellier as well.

CROWN PRIVILEGE**House of Lords, England****POWERS OF COURT IN CLAIMS OF
CROWN PRIVILEGE****CONWAY v. RIMMER AND ANOTHER**

(1968 2 Weekly Law Reports, pp. 998-1053)

Where Crown claims privilege in respect of official documents which a party in a case wants disclosed and which are admittedly material to the action, such documents should be produced for the inspection of Court—if it is found that disclosure would not be prejudicial to the public interest or that any such possible prejudice would not be so great as to justify their being withheld, disclosure should be ordered—Court should balance the two interests involved, namely the interests of the State and the interests of justice—where a man's reputation or fortune is at stake, this factor must be weighed against any possible prejudice to the State—it is only where possible injury to the State or Public Service is so grave that no other interest should be allowed to prevail over it, that disclosure should be refused—courts will not follow earlier practice of upholding a plea of privilege without question on the bare certificate of a Minister stating that a document fell within a class of documents which must be kept secret, being 'necessary for the proper functioning of the Public Service'.

Before Lord Reid, Lord Morris of Borth-Y-Gest, Lord Hodson, Lord Pearce and Lord Upjohn.

Decided on February 28, 1968.

The appellant, Mr. Conway, became a probationer constable in 1963. In December 1964 another probationer constable lost an electric torch. He found a torch in the appellant's locker which he claimed was his and reported it to his superiors. The complaint was investigated by the first respondent, Mr. Rimmer, then a superintendent in the force. The appellant asserted that the torch was his.

During the investigation the first respondent informed the appellant that his probationary reports were adverse and urged him to resign, which the appellant refused to do. The first respondent then submitted a report to the Chief Constable,

which was apparently sent to the Director of Public Prosecutions for an opinion as to whether the appellant should be charged with theft. The advice received is not known, but a short time afterwards the first respondent was instrumental in bringing a charge of larceny against the appellant. The appellant was tried at Quarter Sessions and the first respondent's evidence was recorded. At the close of the prosecution's case the jury stopped the proceedings and recorded a verdict of not guilty. Shortly afterwards another probationary report was prepared and the appellant was dismissed. The appellant then sued the first respondent for damages for malicious prosecution saying that as a result of these events he had found it impossible to get suitable employment. During discovery of documents, the existence of five documents was disclosed—two probationary reports on the appellant, a report on him by a district police training centre, the first respondent's report to the Chief Constable, and the final probationary report. None of the contents had been disclosed to the appellant.

Although both parties to the action wanted the documents produced and they were admittedly material to the action, the Home Secretary objected to their production on the ground that four of them (probationary reports) were within a class of documents comprising 'confidential reports by police officers to chief officers of police relating to the conduct, efficiency and fitness for employment of individual officers under their command' and that the fifth (the first respondent's report to his chief constable) fell within a class comprising 'reports by police officers to their superiors concerning investigations into the commission of crime' and that their production would be injurious to the public interest.

The matter came up before the Court of Appeal which upheld the claim of Crown Privilege in respect of the five documents in question. The appellant then lodged an appeal to the House of Lords against the decision of the Court of Appeal.

The House of Lords allowed the appeal and in doing so over-ruled its own opinion, expressed in 1942 in the *Thetis Submarine Disaster Case*,¹ an opinion which had been followed by the Crown and the Courts since 1942.

The House held that the documents in question should be produced for inspection by the House and, if it were found (1) that the disclosure would not be prejudicial to the public interest, or (2) that any possible prejudice to the public interest would not be so great as to justify their being withheld, disclosure should be ordered. Where the possible injury to the State or the public service was so grave that no other interest should be allowed to prevail over it, disclosure would be refused; but where the possible injury was not so grave, it was proper for the Court to balance the two interests involved, namely the interests of the State and the interests of justice. Where a man's reputation or fortune was at stake, this factor must be weighed against any possible prejudice to the State.

When the Minister's certificate suggested that the document belonged to a class which ought to be withheld, then, unless his reasons were of a kind that judicial experience was not competent to weigh, the proper test was not whether a document belonged to a class in respect of which it was customary to claim privilege, but whether the withholding of a document of that particular class was really necessary for the functioning of the public service. If on a balance, the court considered that it should probably be produced, it should generally examine the document before ordering production.

¹ *Duncan v. Cammell Laird & Co. Ltd.* [1942] A.C. 624: 58 TLR 242.

In the present case it was improbable that any harm would be done to the public service by the disclosure of the documents in question, which were documents likely to prove vital to the litigation.

* * *

In the past a certificate issued by a Minister stating that a document fell within a class of documents whose non-disclosure was 'necessary for the proper functioning of the public service', was accepted by the courts without question and the plea of privilege was upheld. The result of the present judgment is that courts can hereafter examine documents in respect of which privilege is claimed in order to determine whether, on a balance of the interests involved, production should or should not be ordered.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Supreme Court of Austria

RIGHT OF INDIGENT ACCUSED TO FREE LEGAL DEFENCE

IN RE ARTICLE 6, PAR. 3(c), OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

(12 OS. 54, 55, 56/67-4)

European Convention on Human Rights provides that accused with insufficient means to pay for his defence has right to free legal advice when interests of justice so require—Austrian Criminal Procedure Code contains similar provision—primary object of Austrian provision is to give effect internally to provision of European Convention—Austrian provision aims at giving practical effect to the right through concrete action in individual cases.

Decided on April 26, 1967.

Article 6, (3) of the European Convention on Human Rights states:

'Everyone charged with a criminal offence has the following minimum rights:
(c) to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;'

Article 41, Par. 2 of the Austrian Criminal Procedure Code has a similar provision.

In this case the Supreme Court of Austria held that the primary object of Article 41, Par. 2, of the Criminal Procedure Code is to give effect to Article 6, (3) (c), of the European Convention on Human Rights within the framework of the internal juridical structure of Austria. The provision of the European Convention guarantees on a constitutional level the right of an indigent accused to free legal defence. The object of Article 41, Par. 2, of the Austrian Criminal Procedure Code is to give practical effect to the right in the form of concrete action in individual cases.

Supreme Court of Cyprus

RIGHT TO LIBERTY AND SECURITY OF PERSON

PSARAS v. THE POLICE

((1968), 2 J.S.C. pp. 96-101)

Articles 8 and 11 of the Constitution of Cyprus prohibit the infliction of 'inhuman or degrading punishment or treatment' and safeguard 'the right to liberty and security of the person'—their object is protection of these human rights, which rights are also guaranteed by the European Convention on Human Rights, to which Cyprus is a signatory—in the civilised world of today courts have duty and responsibility to sustain and enforce internationally accepted human rights—offences involving violation of these rights by persons in authority must therefore be treated with severity.

Before Vassiliades, President, Triantafyllides, Josephides JJ.

Decided on January 11, 1968.

The appellant, a policeman, compelled a young student who was walking with some of his friends on a public road to enter a police car against his will; in doing so the appellant had acted without a court warrant. The student was then taken in the police vehicle to the Central Police Station of the town, outside the entrance of which the car stopped for a while. The student was in such a state of fear that he did not even attempt to ask for help either from any policeman there or from any civilian on the road. The appellant then drove the police vehicle to a non-frequented place where he used violence on the student causing him grievous injuries. The motive for this assault appeared to be that the student had been seen earlier in the day talking to a school girl who was the daughter of a police officer. It is not clear whether, in acting as he did, the appellant was acting on his own or under instructions from superiors. Having, however, taken upon himself the entire responsibility for the incident, he was convicted and sentenced to twelve months' imprisonment.

He appealed against the sentence to the Supreme Court, which dismissed the appeal but enhanced the sentence to one of eighteen months' imprisonment from the date of the dismissal of the appeal.

In giving the reasons of the Court for enhancing the sentence, Vassiliades, P., in his judgment observed:

‘ The offence of which the appellant stands convicted is punishable, under Section 231 of the Criminal Code (Cap. 154), with imprisonment up to seven years. It moreover constitutes a violation of the human right of the victim to corporal integrity, safeguarded by Article 7 of the Constitution of the Republic of Cyprus. It is a flagrant violation by a police officer of the provisions of Articles 8 and 11 of the Constitution which prohibit any “ inhuman or degrading punishment or treatment ” and safeguard the “ right to liberty and security of person ”. The object of these provisions is the protection of these human rights, established in the contemporary world by international agreements like the European Convention on Human Rights, and the relevant Covenant of the United Nations to which the Republic of Cyprus is a signatory.

‘ In the civilised world of to-day, the courts have the duty and responsibility to sustain and enforce the internationally accepted human rights, whenever these are involved or violated in a case before them.

‘ With these considerations in mind this court has now to decide whether the sentence of twelve months imprisonment imposed on the appellant by the trial judge is manifestly excessive, as contended on his behalf; whether it is the proper sentence in the circumstances; or whether it is manifestly inadequate.

‘ There can be no doubt, in our view, that such conduct on the part of a police officer towards a young schoolboy in the circumstances under which the offence was committed, is not only illegal; it is completely unacceptable. This must be reflected in the punishment. Only severe sentences can check and effectively discourage abuse of power by police officers so inclined. We have thus reached the conclusion, not without regret, that the sentence imposed by the trial court, is insufficient to meet the case. We found considerable difficulty in deciding the extent of the increase which has to be made to the sentence. In view of the serious disciplinary, financial and other consequences which are bound to follow the conviction and sentence in this case, we have decided to confine the increase to six months in addition to the term imposed; in other words to increase the sentence to eighteen months’ imprisonment from to-day. We would, however, add a clear warning that offences involving violation of human rights by persons in authority may have to be treated with more severity, if this case fails to have the intended deterrent effect.’

*FUNDAMENTAL RIGHTS
AND FREEDOMS*

German Federal Constitutional Court

EQUALITY BEFORE THE LAW

IN RE REGULATION 11 OF THE STATE CITIZENSHIP LAW (1941)

(2 BvR 557/62)

Legal provisions so obviously inconsistent with fundamental principles of justice that their application would result in injustice instead of justice, cannot be regarded as valid law—Regulation 11 made under State Citizenship Law of 1941 purported to take away German nationality from several persons on grounds of race and religion—Regulation in conflict with Article 3 of Basic Law—its inconsistency with justice had reached such intolerable proportions that it had to be considered void ab initio—fact that it had been applied for a number of years did not change position—established injustice does not become law through being followed and applied.

Decided on February 14, 1968.

Article 3, sub-sections (1) and (3) of the Basic Law provides as follows:

- (1) All persons are equal before the law
- (3) No-one shall be subjected to disabilities or granted privileges on account of his or her sex, descent, race, language, place of origin, belief or religious or political views.

Regulation 11 made under the State Citizenship Law of November 25, 1941, purported to deprive certain classes of persons of their German nationality on the basis of race and religion.

The Second Senate of the German Federal Constitutional Court decided in this case that the Regulation in question was null and void and that those affected by it had not lost their German citizenship. The grounds for the decision were as follows: nazi legal provisions cannot be regarded as valid law when they are so obviously inconsistent with the fundamental principles of justice that the judge seeking to apply them and to give legal effect to them would be administering injustice instead of justice. The Regulation in question was contrary to Article 3 of the Basic Law and its inconsistency with justice reached such intolerable proportions that the Regulation had to be considered void *ab initio*.

The Court added that the fact that the Regulation had been applied for a

number of years did not change the position; for established injustice does not become law through being followed and applied.

The result of this decision is that persecuted persons who had been deprived of their German nationality between January 30, 1933, and May 8, 1945, on racial or religious grounds still retain in principle their German nationality provided they do not manifest any wish to the contrary.

Court of Appeal, England

FREEDOM OF SPEECH — FAIR COMMENT

SLIM AND OTHERS v. DAILY TELEGRAPH LTD. AND ANOTHER

Letters were published in a newspaper undoubtedly defamatory of plaintiff—however they related to a matter clearly of public interest—a citizen troubled with things going wrong must be free to ‘write to the newspaper’—newspapers should be free to publish letter—this is often only way to get things put right—if matter has been of public interest, and writer has been factually true and has honestly stated his opinion, both he and newspaper should be clear of liability—it would be an evil day for free speech if controversies relating to matters of public interest were discouraged through fear that every word written would be subjected to minute linguistic analysis.

Before the Master of the Rolls, Lord Justice Diplock and Lord Justice Salmon.
Decided on January 17, 1968.

The plaintiff was awarded damages against the defendant company and another for libel. The defendant company appealed against the judgment to the Court of Appeal. The Court of Appeal in allowing the appeal observed that the right of fair comment on matters of public though local interest is one of the essential elements which go to make up the right to freedom of speech, a right which must always be maintained intact and which must not be whittled down by legal refinements.

In this case the *Daily Telegraph* had published two letters from a reader which were undoubtedly defamatory of the plaintiff, but which related to a matter which was clearly one of public interest. In the circumstances the defendant would be protected if the letters were fair comment, but would otherwise be liable in damages.

In dealing with the scope of fair comment and its vital relationship to freedom of speech, the Master of the Rolls, who delivered the main judgment, said:

‘When a citizen is troubled by things going wrong, he should be free to “write to the newspaper”: and the newspaper should be free to publish his letter. It is often the only way to get things put right. The matter must be

of public interest. The writer must get his facts right and must honestly state his real opinion. That being done, both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions.'

Lord Justice Diplock, in a concurring judgment, observed:

'It would be an evil day for free speech if that kind of controversy were discouraged by the fear that every word written to be read in haste should be subject to minute linguistic analysis in a court of law. As the law of libel now stands it is not easy to avoid it.'

On the ground that the letters represented fair comments on a matter of public interest, the Court allowed the appeal.

Supreme Court of the United States of America

RESTRAINT ON FREEDOM OF THE PRESS IN INTERESTS OF FAIR TRIAL

SEYMOUR v. UNITED STATES

(373 F. 2d 629)

Standing order made by court prohibiting taking of photographs in connection with judicial proceedings on same floor of building in which court rooms are located—television news photographer took photographs in violation of standing order—on being cited for contempt he pleaded that enforcement of order would amount to prior restraint upon freedom of the press—held, however, that in interests of judicial decorum and fair trial, court had power to issue standing orders which reasonably prohibited taking of photographs in connection with judicial proceedings.

Fifth Circuit, 1967.

While an accused was being led out of the court room at the termination of arraignment proceedings against him, Seymour, a television news photographer, took photographs of him and his attorney in violation of a standing order of the Federal District Court, Northern District of Texas, which prohibited the taking of photographs in connection with any judicial proceedings on or from the same floor of the building in which court rooms were located. Seymour, who was cited for criminal contempt, contended that enforcement of the order as promulgated represented an unconstitutional prior restraint upon the freedom of the press. The trial court, however, found Seymour guilty of criminal contempt and fined him \$25.

In appeal, the finding of the trial court was affirmed on the ground that federal courts have the power, in the interests of maintaining judicial decorum and the preservation of an atmosphere essential to a fair trial, to issue standing orders which reasonably prohibit the taking of photographs in connection with any judicial proceeding.

German Federal Constitutional Court**RIGHT NOT TO BE PUNISHED MORE THAN ONCE
FOR SAME ACT****IN RE JEHOVA'S WITNESSES**

(No. 2 BvR. 354/66 u.a.)

Article 103 (3) of the Basic Law stipulates that no-one may be punished more than once in respect of the same act— person accepted as conscientious objector to military service and who has been convicted and sentenced for refusal to perform substituted service cannot be convicted and sentenced once again for subsequent refusal to perform such service—' the same act ' is involved when repeated non-compliance with a summons to report for substituted service is inspired by a conscientious decision made once and for all and which continues to operate in mind of objector.

Decided on March 7, 1968.

Article 103(3) of the Basic Law of the Federal Republic of Germany reads as follows:

No-one may be punished more than once on the basis of the general criminal laws, in respect of the same act.

Certain members of the Jehova's Witnesses, who had been accepted as conscientious objectors to military service, had refused to perform substituted service and had once been convicted and sentenced for such refusal.

The Second Senate of the German Federal Constitutional Court held that a second conviction and sentence of the same persons for a subsequent refusal to perform substituted service was unconstitutional in that it offended against Article 103(3) of the Basic Law. The Court observed that ' the same act ' within the meaning of Article 103(3) was involved when the repeated non-compliance with a summons to report for substituted service was inspired by a conscientious decision made once and for all and which continued to operate in the mind of the person concerned.

German Federal Constitutional Court**RIGHT TO CITIZENSHIP****IN RE REGULATION 11 OF THE STATE CITIZENSHIP LAW (1941)**(See pp. 129-130 above)

Supreme Court of the United States of America**RIGHT TO EQUAL PROTECTION OF THE LAW****COLEMAN v. ALABAMA**

(389 U.S., 22)

No Negro had ever served on a grand jury panel and few, if any, on petit jury panels in the county—no Negro served on grand jury which indicted accused or on petit jury which convicted—these facts established prima facie case of denial of equal protection of the laws—mere statement that disparity 'can be explained by a number of other factors' insufficient to rebut this prima facie case.

Per Curiam.

Decided on October 16, 1967.

The accused, who had made an allegation of 'systematic exclusion of Negroes from the grand and petit juries sitting in his case', was afforded an evidentiary hearing on his allegations. At the hearing it transpired that no Negro served on the grand jury which indicted the accused or the petit jury which convicted him. It was also pointed out that up to the time of the petitioner's trial, no Negro had ever served on a grand jury panel in the county and few, if any, had served on petit jury panels. It was held that 'this testimony in itself made out a *prima facie* case of the denial of equal protection which the Constitution guarantees', and that the *prima facie* case so made out could not be rebutted by the mere statement of the State Supreme Court that the acknowledged disparity could be explained by a number of other factors, viz., by the Negroes moving out of the county and some being disqualified for felony convictions. Such factors were totally insufficient to rebut the petitioner's *prima facie* case.

In the circumstances the judgment of the Alabama Supreme Court was reversed and the case was sent back to that court for further proceedings not inconsistent with the opinion of the Supreme Court.

Supreme Court of the United States of America**RIGHT TO EQUAL PROTECTION OF THE LAW****JONES v. GEORGIA**

(389 U.S. 24)

Systematic exclusion of Negroes from grand and petit juries cannot be explained merely by presumption that public officials are presumed to have properly discharged their

sworn official duties—raises prima facie case of discrimination—burden on State to explain disparity between percentage of Negroes on tax digest and those on venires.

Per Curiam.

Decided on October 16, 1967.

The petitioner was convicted of murder. He appealed against the conviction to the Georgia Supreme Court on the ground, *inter alia*, that the systematic exclusion of Negroes from the grand and petit juries drawn in the county established a *prima facie* case of the denial of equal protection under the law. The Georgia Supreme Court affirmed the conviction because 'public officers are presumed to have discharged their sworn official duties. . . Under the testimony in this case we cannot assume that the jury commissioners did not eliminate prospective jurors on the basis of their competence to serve rather than because of racial discrimination'.

The petitioner then appealed to the Supreme Court of the United States which reversed the judgment of the Georgia Supreme Court and remanded the case for further proceedings not inconsistent with its opinion. The court held that the burden was upon the State to explain 'the disparity between the percentage of Negroes on the tax digest and those on the venires'.¹ Therefore the petitioner's point of systematic exclusion of Negroes from grand and petit juries could not be met by reliance on the presumptions stated by the Georgia Supreme Court.

Editor's Note: See also *Whitus v. Georgia*, 385 U.S. 545.

Court of Appeal of Paris

RIGHT TO INTEGRITY OF PERSON INCLUDES RIGHT NOT TO BE HARASSED

MINISTÈRE PUBLIC ET DR. JUD v. DAME JOFFRE

(Gazette du Palais April 24-26, 1968)

Article 311 of French Penal Code prescribes penalties for intentional hurt, assault or violence on another—object of Article is protection of the human person and prevention of any infringement of his integrity—therefore form in which damage is done to that integrity, whether through actual physical force or acts of annoyance, of little importance—respondent harassed a doctor with repeated telephone calls made with great frequency and at most inconvenient times and which were accompanied by threats and insults resulting in mental equilibrium of addressee being com-

¹ Venires i.e. the jury list.

pletely upset—in the circumstances, an offence within the meaning of Article 311 of Penal Code was committed.

Decided on March 13, 1968.

Madame Joffre was charged before the Tribunal Correctionnel of Seine with an offence under Article 311 of the Penal Code. Under this Article a person who, with premeditation, hurts, assaults or commits any other act of violence on another resulting in the incapacity of that person for a period not exceeding eight days shall be guilty of an offence punishable with imprisonment for a period of not less than two months and not exceeding five years and with a fine of between 500 and 10,000 francs.

It was established in this case that Madame Joffre had on several successive days in 1964, and both by day and night in the early part of 1965, put in several telephone calls to the civil party, Dr. Jud, a gynaecologist who had, for good reason and in adherence to professional rules, refused to continue giving her medical attention. These repeated telephone calls, made with regular frequency and at most inconvenient times, had as their sole object the annoyance of Dr. Jud. On September 11, 1964, between 3 and 5.30 p.m. there were as many as thirty-six calls from Madame Joffre's number to the two telephone lines of Dr. Jud and his father, and on September 30, 1964, and July 22, 1965, there were 22 and 15 such calls respectively.

The medical experts commissioned by Court to examine Madame Joffre were of the view that at the time when these telephone calls were made she was not of unsound mind within the meaning of Article 64 of the Penal Code.

The Tribunal Correctionnel of Seine delivered judgment in the case on April 27, 1966, discharging Madame Joffre and dismissing the claim of the civil party, Dr. Jud.

An appeal was lodged in the Court Appeal of Paris which reversed the judgment of the Tribunal Correctionnel of Seine and sentenced Madame Joffre to four months imprisonment and a fine of 2,000 francs. The Court of Appeal of Paris took the view that the acts of violence contemplated by Article 311 of the Penal Code contemplated not only acts which offended against the sense of sight but also those which offended against the sense of hearing of a person. It might be that a single telephone call, even though inspired by a malicious intention, could not in itself constitute an act of violence forbidden by the Penal Code where it did not result in a serious and sudden shock to the person to whom it was made. However, in a case like the present one, where the calls were very frequent, were made at inconvenient times and were accompanied in addition by threats and insults to the person addressed resulting in his mental equilibrium, which was originally normal, being completely upset, there could be no doubt that an offence had been committed within the meaning of Article 311 of the Penal Code.

The Court took the view that the object of the Article in question was to protect the human person and to prevent any infringement of the integrity of the human person. Therefore the mode by which the damage was done to that integrity, whether it was through actual physical force or annoyance caused, was of little importance.

Supreme Court of Cyprus

RIGHT TO LIBERTY AND SECURITY OF PERSON

PSARAS v. THE POLICE

(See pp. 127-128 above)

Supreme Court of the Philippines

RIGHT TO PRIVACY OF COMMUNICATION
AND CORRESPONDENCESTONEHILL AND OTHERS v. HON. W. DIOKNO
AND OTHERS (GOVERNMENT OFFICERS AND JUDGES)

(No. L-19550)

Search warrants of a general character which do not allege a specific offence or offences are null and void—inadequate and improper to refer generally to a violation of Bank, Tariffs and Customs Laws, Internal Revenue Code and Penal Code without reference to any determinate provision or provisions of those Laws or Codes—to uphold validity of such warrants would amount to wiping out completely one of the most fundamental rights guaranteed by the Constitution of the Philippines—it would place the sanctity of the home and the privacy of communication and correspondence at the mercy of peace officers who might act according to their own whims, caprices or prejudices.

Decided on June 19, 1967.

Upon application by the respondent officers, the respondent judges issued several search warrants against the petitioners and the corporations of which they were officers to search the persons of the petitioners and their offices, warehouses and residences and to seize and take possession of the following personal property belonging to them, namely:

‘ Books of accounts, financial records, vouchers, correspondence, receipts, ledgers, journals, portfolios, credit journals, typewriters, and other documents and papers showing all business transactions including disbursements receipts, balance sheets and profit and loss statements and bobbins, as “ subject of the offence, stolen or embezzled and proceeds or fruits of the offence or used or intended to be used as the means of committing the offence ” in violation of the Central Bank Laws, Tariff and Customs Laws, Internal Revenue Code and the Revised Penal Code.’

On an application of the petitioners, the Supreme Court issued a Writ of Preliminary Injunction restraining the respondents from using the effects seized in evidence in certain deportation cases which had been filed against them, but the injunction was partially dissolved insofar as the papers, documents and things seized from the offices and warehouses were concerned. The injunction, however, was maintained in regard to the papers, documents and things found and seized in the residences of the petitioners.

The questions which came up for decision before the Supreme Court in the present action were, *inter alia*,

- ' (1) whether the search warrants issued against those documents and papers seized in the residences of petitioners herein are valid or not; and
- (2) if they are not valid, whether said documents and papers may be used in evidence against them.'

In resolving these issues, the Supreme Court observed:

' To uphold the validity of the warrants in question would be to wipe out completely one of the most fundamental rights guaranteed in our Constitution, for it would place the sanctity of the domicile and the privacy of communication and correspondence at the mercy of the whims, caprice, or passion of peace officers. This is precisely the evil sought to be remedied by the constitutional provision—to outlaw the so-called general warrants. It is not difficult to imagine what would happen, in times of keen political strife, when the party in power feels that the minority is likely to wrest it, even though by legal means.'

Commenting on the fact that the applications for search warrants made no allegations of specific offences, the court said:

' As a matter of fact the applications involved in this case do not allege specific acts performed by these petitioners. It would be a legal heresy of the highest order to convict anybody of a "violation of Central Bank Laws, Tariffs, and Customs Laws, Internal Revenue Code and Revised Penal Code"—as alleged in the aforementioned applications—without reference to any specific provision of the said laws or codes.'

Supreme Court of the United States of America

RIGHT TO PRIVACY OF TELEPHONE CONVERSATIONS

KATZ v. UNITED STATES

(389 U.S. pp. 247-374)

F.B.I. agents overheard petitioner transmitting wagering information by interstate telephone calls—conversations recorded by electronic device—on evidence of these conversations being led, petitioner convicted—conviction reversed on ground that Government's eaves-dropping activities,

without warrant, violated privacy upon which petitioner justifiably relied by using telephone booth—such violation amounted to a ‘ search and seizure ’ within meaning of Fourth Amendment—Fourth Amendment governs not only seizure of tangible items but extends to recording of oral statements as well—in essence it protects people rather than places—its reach cannot therefore turn on presence or absence of physical intrusion into any given place—obtaining of a warrant through proper procedure a constitutional prerequisite of electronic surveillance,

Before Stewart, Douglas, Harlan, White and Black JJ.

Opinion of Court delivered by Stewart J., Douglas, Harlan and White JJ. concurring and Black J. dissenting.

Decided on December 18, 1967.

The petitioner was convicted in the District Court for the Southern District of California for transmitting wagering information by telephone from Los Angeles to Miami and Boston in violation of a Federal Statute. Evidence of the petitioner's end of the conversations, which had been overheard by F.B.I. agents who had attached an electronic listening and recording device to the outside of the telephone booth from which the calls were made, was led at the trial. The conviction was confirmed by the United States Court of Appeals, which took the view that there was no Fourth Amendment violation since there had been ‘ no physical entrance into the area occupied by ’ the petitioner.

On an application for a writ of *certiorari* to the Court of Appeals, the Supreme Court of the United States of America held that:

- (1) the Government's eaves-dropping activities, without a warrant, violated the privacy upon which the petitioner justifiably relied by using the telephone booth and thus constituted a ‘ search and seizure ’ within the meaning of the Fourth Amendment. The Fourth Amendment governs not only the seizure of tangible items but extends to the recording of oral statements as well. In essence, it protects people rather than places and therefore its reach cannot turn on the presence or absence of a physical intrusion into any given place or area; and
 - (2) although it is clear that the surveillance in this case was so narrowly circumscribed that a duly authorised magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorised it in advance, it was not in fact conducted pursuant to the warrant procedure, which is a constitutional prerequisite of such electronic surveillance.
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JUDICIARY AND COURTS**House of Lords, England****POWERS OF COURT IN CLAIMS OF CROWN PRIVILEGE****CONWAY v. RIMMER AND ANOTHER**

(See pp. 124-126 above)

PUBLIC PROSECUTORS**Supreme Court of Turkey****OBJECTIVITY IN JUDICIAL PROCEEDINGS REQUIRES
THAT PUBLIC PROSECUTORS BE FREE
FROM MINISTERIAL CONTROL****STATE COUNCIL, 5TH CHAMBER, v. MINISTRY OF JUSTICE**

(E. 1966/31 — K. 1967/45, published in Official Gazette of April 18, 1968)

Turkish Constitution of 1961 guarantees independence of judiciary—also contains article enabling provisions of guarantee to be made regarding public prosecutors and performance of their duties—Minister of Justice, purporting to act under certain provisions so made, transferred a public prosecutor from one place of employment to another—provisions under which he purported to act declared unconstitutional inasmuch as under them right of appointment and removal of public prosecutors was vested in Minister of Justice—effect of this decision was not to confer on public prosecutors the same immunity enjoyed by judges, but to ensure objectivity in administration of justice—if a Minister, who is a political figure, were given power to appoint and remove public prosecutors at will, spirit of the Constitution, which requires objectivity in the administration of justice, would be infringed—public prosecutor plays a very important role in Turkish penal system as only he can bring a criminal case before courts—

he should therefore be free to decide whether he should initiate a case in court or ask a judge for an acquittal or conviction at the end of a case—such freedom would be endangered if right of removal left to discretion of a political figure—such a situation would enable a Minister, should a step taken by a public prosecutor be unpalatable to him, to replace the prosecutor with one ready to toe his line—if this were permitted, fairness and objectivity in the administration of justice would no longer be possible.

Decided on December 18, 1967.

The Turkish Constitution of 1961 contains clear-cut provisions relating to the independence of judges and of the Courts: no organ, authority, agency or person may give any order or instruction to the courts or to judges affecting their jurisdiction or power, nor can they send out any circulars or directives relating to them. The appointment, removal and other related matters pertaining to judges is handled by a High Council of Judges. In fact, the machinery of justice runs according to the provisions of the Constitution.

As against these clear and detailed guarantees of the independence of the judiciary and the courts, the Constitution contains only a single Article (Article 137) relating to the position of public prosecutors. According to this Article ' a Statute shall stipulate provisions of guarantee as regards public prosecutors in matters relating to their persons and the performance of their duties '.

The Ministry of Justice, purporting to act under the provisions so made, transferred Mr. Feyyat, a public prosecutor, from one place of employment to another. The public prosecutor applied to the State Council claiming that his transfer and the provision of the law under which his transfer was purported to have been made were unconstitutional. The State Council referred the matter to the Constitutional Court.

It was argued for the State Council that there was no truth in the idea that a judge was impartial while a public prosecutor was a party to the case. So long as there was no personal conflict in the matter, it could not be suggested that a public prosecutor was a party to the case. Both judges and public prosecutors were public officials to whom specific duties had been assigned. A public prosecutor was, above all, a person in charge of initiating criminal suits. The criminal procedure law clearly stipulated that the duty of bringing a criminal action was incumbent upon the public prosecutor. This meant that as a rule the public prosecutor was the only government official authorised to initiate a criminal action. Where he failed to do so, some offence or other would remain without punishment. It was therefore essential in the interests of the administration of justice that public prosecutors should be independent. In fact, it was the intention of Article 137 of the Constitution to confer that independence on public prosecutors.

The Constitutional Court considered the impugned provisions and declared that these provisions were unconstitutional inasmuch as under them the right of appointment and removal of public prosecutors was vested in the Minister of Justice. It held that they would no longer have the effect of law from June 18, 1968, that is six months from the date of the decision.

The reason why the law was declared unconstitutional only as from six months after the date of the decision was to give time for the promulgation of a new law replacing the provisions declared to be unconstitutional.

The motivation of this decision was not an attempt to confer on public prosecutors the same sort of immunity enjoyed by judges, but to ensure objectivity in the administration of justice. It was considered that if a Minister, who is a political figure, were to be given the power to appoint and remove public prosecutors at his own free will, the spirit of the Constitution, which was objectivity in the administration of justice, would be infringed.

The Court agreed that under the Turkish penal system, the public prosecutor played a very important role as it was only he who could bring a criminal case before the courts. The Minister of Justice might request a public prosecutor to make an investigation on any matter, but the public prosecutor should be free to decide whether he should initiate a case in court or to use his discretion to ask the judge for an acquittal or conviction at the end of a case. The Constitutional Court considered that this freedom of the public prosecutors would be endangered if the right of removal was left to the discretion of a political figure. It was felt that such a situation would enable a minister, should a step taken by a public prosecutor be unpalatable to him, to remove or transfer the public prosecutor responsible for the decision and to appoint in his stead one who would be ready to toe his line. This would give rise to a situation where fairness and objectivity in the administration of justice would no longer be possible.

Editor's Note: The Commission wishes to express its thanks to Mrs. Seniha Yazicioglu for having translated from Turkish into English the very lengthy judgment delivered in this case by the Constitutional Court.

TRIALS AND APPEALS

Supreme Court of Cyprus

NATURAL JUSTICE NOT NECESSARILY VIOLATED WHERE JUDGE EXPRESSES OPINION IN CHAMBERS

MICHAEL AHAPITTAS v. ROC-CHIK LTD.

(1968) 3 J.S.C. pp. 147-149

Appellant, the defendant in a civil suit, gave his evidence-in-chief in Court—thereafter there was discussion in judge's chambers with a view to settlement—in course of discussion judge alleged to have expressed an opinion on appellant's credibility—in doing so judge was not referring at all to appellant's credibility as derived from demeanour in witness box, but merely pointed out that in view of past correspondence it would be difficult to give credit to a material part of his version—when discussion failed to achieve its purpose, hearing proceeded as usual in open court without appellant's counsel taking formal objection on

ground of judge's bias—parties called all their evidence and addressed Court as usual—judgment reserved and delivered three weeks later in open court—claim and counter-claim carefully considered and evidence sufficiently analysed—nothing in judgment to lend support to allegation of violation of rules of natural justice—practice of advocates swearing affidavits in support of their client's case undesirable and should be deprecated.

Before Vassiliades P., Triantafyllides, Josephides JJ.

Decided on January 12, 1968.

This was an appeal from the judgment of the District Court, Nicosia, awarding the respondent company its claim for the value of goods sold and delivered and dismissing a counter-claim by the appellant.

The appeal was taken on the ground of violation by the trial judge of the rules of natural justice in that he expressed himself regarding the appellant's credibility after hearing his evidence-in-chief and before the conclusion of the case.

The appellant's advocate filed an affidavit to the effect that, after his client's examination-in-chief, a discussion followed in the judge's chambers with a view to settlement during which the judge expressed his opinion as to the appellant's credibility.

Commenting on the practice of advocates swearing affidavits in support of their client's case, Vassiliades P., who delivered the judgment of the court, said that the Supreme Court of Cyprus had had occasion to deprecate more than once the practice of advocates swearing such affidavits. The reasons why such affidavits were undesirable, unless indispensable, are so obvious that it was unnecessary to re-iterate them. Such reasons were demonstrated once more by the present case.

Commenting on the allegations made against the trial judge, he observed that when the judge, allegedly, expressed an opinion on the appellant's credibility, he was not referring at all to the appellant's credibility as derived from his demeanour as a witness, but merely pointed out that in view of past correspondence it would be difficult to give credit to a material part of the appellant's version; and he did so in chambers in the course of a discussion with a view to settlement. When this discussion failed to achieve its purpose, the hearing proceeded as usual in open court, without counsel for the appellant taking any formal objection on the ground that the judge was biased. The parties called their evidence and addressed the court thereon as usual. The trial judge then reserved judgment *sine die* and delivered a considered judgment about three weeks later, which he read in open court. Both the claim and the counter-claim were carefully considered and the evidence adduced on both sides was sufficiently analysed and duly assessed. There was nothing in the judgment to lend support to the contention of irregularity.

For the reasons stated, the court was unanimously of the opinion that there were no merits whatsoever in the appeal and dismissed it with costs.

Supreme Court of the United States of America**RESTRAINT ON PRESS FREEDOM IN
INTERESTS OF FAIR TRIAL****SEYMOUR v. UNITED STATES**

(See p. 131 above)

**Supreme Court of the Russian Socialist
Federative Soviet Republic****RIGHT OF ACCUSED TO COUNSEL OF HIS CHOICE****N. v. DAGESTAN AUTONOMOUS SOVIET SOCIALIST REPUBLIC**

(Sotsialisticheskaya Zakonnost No. 3, 1968)

N. was refused permission to entrust his defence to M., the lawyer of his choice—no objective reasons whatsoever for such refusal—refusal amounted to gross infringement of accused's rights in respect of his defence—Criminal Procedure Code of Russian Socialist Federative Soviet Republic imposes upon investigator, procurator and court duty of ensuring accused's right to defence, which right includes right to assistance of defence counsel selected by him—investigator obliged to explain to accused nature and scope of this right both before preliminary investigation and before trial.

Passed for publication on March 6, 1968.

N., exercising the right to choose his defence counsel, petitioned the Supreme Court of the Dagestan Autonomous Soviet Socialist Republic to have his defence entrusted to M., the lawyer of his choice. He stated in his petition that the agreement in respect of his defence would be concluded by his relatives with the lawyers' collective of the town of Makhachkali. Notwithstanding the fact that N.'s relations deposited within the prescribed time the requisite fee for his defence to be conducted by lawyer M., the Court Collegium of the Supreme Court of the Dagestan ASSR refused to permit N. to have the benefit of the services of M., the counsel of his choice, and entrusted his defence to lawyer D.

The accused then appealed to the Supreme Court of the Russian Socialist Federative Soviet Republic (RSFSR) which annulled the sentence passed on N. on the ground that the refusal to permit the accused to be represented and defended by the counsel of his choice was a gross infringement of the rights of the accused in respect of his defence. The Court also held that there were no objective reasons whatsoever which should have prevented the Court from permitting the accused to be defended by counsel M. and that such refusal amounted to an infringement of Articles 48 and 251 of the Criminal Procedural Code of the RSFSR. These

Articles, *inter alia*, impose on the investigator, the procurator and the court the duty of ensuring to the accused his right to defence, which right included the right to the assistance of defence counsel selected by him.

Y. Stetsovsky comments on this judgment in *Sotsialisticheskaya Zakonnost* (Socialist Legality), No. 3 of 1968, and points out that an investigator is obliged to explain to the accused the nature and scope of his right to have defence counsel both during the preliminary investigation and during the trial.

Editor's Note: The Soviet Union is a federation of fifteen union republics and twenty autonomous republics making a total of thirty-five Soviet Socialist Republics. Of these thirty-five, thirty-four are unitary states and one, the Russian Socialist Federative Soviet Republic, is itself a federal state. Each unitary republic has a Supreme Court from which, under certain circumstances, an appeal lies to the Supreme Court of the USSR (the Soviet Union). In the case of the Russian Socialist Federative Soviet Republic, the only federal republic, appeals lie from the Supreme Courts of its different state units to the Supreme Court of the Federative Republic and from there to the Supreme Court of the USSR.

Supreme Court of India

RIGHT OF ACCUSED TO COUNSEL OF HIS CHOICE

STATE OF MADHYA PRADESH v. SHOBHARAM

(A.I.R. 1966 Supreme Court, p. 1910)

Right to be defended by counsel of one's choice not limited to trial in which accused is in jeopardy of sentence of death or imprisonment—if accused is exposed to any penalty whatsoever he must enjoy this right—right is not lost because accused person is released on bail.

Article 22, Clause (1), of the Indian Constitution states, *inter alia*:

No person shall be denied the right to consult, and to be defended by, a legal practitioner of his choice.

Article 21, which deals with the protection of life and personal liberty, provides that:

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

In this case it was sought to argue that the right conferred by Article 22 should be given a restricted interpretation in the light of Article 21 which relates to the deprivation of life or liberty.

The Supreme Court held, however, that there was no warrant for giving the right to be defended by counsel of one's own choice a restricted interpretation and

for saying that this right was limited only to a trial in which the accused was in jeopardy of being sentenced to death or of being deprived of his liberty by a sentence to a term of imprisonment. The court held that, if a person were exposed to any penalty whatsoever, even if it be short of imprisonment, he enjoyed the right to be defended by counsel. The court added that the right was not lost because the person accused was released on bail.

Supreme Court of Austria

**RIGHT OF INDIGENT ACCUSED TO
FREE LEGAL DEFENCE**

**IN RE ARTICLE 6, PAR. 3(c), OF THE EUROPEAN
CONVENTION OF HUMAN RIGHTS**

(See pp. 126-127 above)

Supreme Court of the United States of America

**RIGHT OF INDIGENT APPELLANT TO
FREE COPY OF TRANSCRIPT**

ROBERTS v. LaVALLEE, WARDEN

(389 U.S., 40)

Application of a New York Statute providing for furnishing of a transcript of proceedings for a fee constitutes, when applied to an indigent appellant or petitioner, denial of equal protection—it creates a difference in access to instruments needed to vindicate legal rights—such difference, based on a defendant's financial situation, contrary to Equal Protection Clause of Fourteenth Amendment.

Per Curiam.

Decided on October 23, 1967.

The petitioner, an indigent, was charged in the New York courts with robbery, larceny and assault. He made an application for a free copy of a preliminary hearing transcript, but his application was refused. A New York statute provided for the furnishing of such a transcript for a fee. Petitioner was convicted, his conviction was affirmed, the New York Court of Appeals denied review, and the Supreme Court of the United States denied *certiorari*.

Thereafter, at each proceeding petitioner raised the constitutional issue involving denial of the transcript. His subsequent petition for *habeas corpus* was

denied by the District Court. Thereafter, in *People v. Montgomery*,¹ the New York Court of Appeals held that the statutory requirement of payment for a transcript, as applied to an indigent, constituted a denial of equal protection.

The Supreme Court, on the basis of the *Montgomery* doctrine, granted a subsequent petition for *certiorari* and held that the New York statute resulted in a difference in access to instruments needed to vindicate legal rights; this difference, based upon a defendant's financial situation, was contrary to the Equal Protection Clause of the Fourteenth Amendment.

Supreme Court of Ceylon

RIGHT TO BE BROUGHT TO TRIAL WITH REASONABLE DESPATCH

PREMASIRI v. THE ATTORNEY GENERAL

(S. C. Appln. 401 of 67/MC Colombo 37693/C)

Section 31 of Court's Ordinance provides for granting of bail to persons not brought up for trial at first criminal sessions after their commitment—this provision is based on important principle safeguarding the liberty of the subject—liberty of the subject an important personal right enjoyed in democratic communities observing Rule of Law—custody pending trial being an infringement of that liberty, courts must be vigilant in ensuring that infringement is restricted to limits set down by legislature—object of Section 31 is to prevent imprisonment for unduly long periods of accused persons awaiting trial—person has right to be brought to trial with reasonable despatch—liberty of the subject not a slogan but valuable right of citizen—courts must be vigilant to ensure that it is not unprofitably thwarted.

Before T. S. Fernando, Acting Chief Justice, Sirimane J. and Siva Supramaniam J.

Decided on November 26, 1967.

Reasons delivered December 5, 1967.

Proceedings were instituted in the Magistrate's Court, Colombo, against the appellant and three others on a complaint of murder. After inquiry, the Magistrate, on February 18, 1967, committed the appellant for trial to the Supreme Court but discharged the other three accused.

¹ 18 N.Y. 2d 993, 224 N.E. 2d 730 (1966); see also *Long v. District Court of Iowa*, 385 U.S., 192 and *Digest of Judicial Decisions on Aspects of the Rule of Law*, *Journal of the International Commission of Jurists*, Vol. VIII No. 2 (Special Human Rights Issue, Part One, December 1967) pp. 145-6.

After February 18 there were held, for the Western Circuit, two criminal sessions; one commencing on March 20 and the other on June 10, 1967. Thereafter the current session commenced on October 12, 1967. The appellant feared that he might not be brought to trial even at this third session for the reason that, although over nine months had elapsed since his committal for trial, he had not yet even been served with a copy of the indictment. He had been over thirteen months in custody and claimed that, in the circumstances, he had a right under Section 31 of the Court's Ordinance to be released on bail.

The relevant part of Section 31 runs thus:

If any prisoner committed for trial before the Supreme Court for any offence shall not be brought to trial at the first criminal sessions after the date of his commitment at which such prisoner might properly be tried (provided that twenty-one days have elapsed between the date of the commitment and the first day of such criminal sessions), the said court or any judge thereof shall admit him to bail, unless good cause be shown to the contrary, or unless the trial shall have been postponed on the application of the prisoner.

T. S. Fernando, A.C.J., who delivered the judgment of the court granting the petitioner's application for bail, quoted with approval an earlier judgment of the Supreme Court where it was pointed out that Section 31 contained an important principle safeguarding the liberty of the subject, who had a right to be brought to trial with reasonable despatch. He observed that the liberty of the subject was an important personal right enjoyed in democratic communities observing the Rule of Law, and that since custody pending trial was an infringement of that principle, the courts must be vigilant in ensuring that the infringement was restricted to the limits set down by the legislature.

Stating that the object of Section 31 was to prevent imprisonment for unduly long periods of accused persons awaiting trial, Mr. Justice Fernando held that the appellant had established that he was entitled to the right conferred on him by Section 31, namely the right to be released on bail, and made the following observations:

'After the date of his (the appellant's) commitment two sessions of the Western Circuit have been commenced and terminated. He has now been in custody remanded pending trial for well over a year. Nothing catastrophic can ensue from his release on bail. A court has an undoubted right to cancel bail where it is shown that the right to release on bail has been or is being abused. We venture to think that the granting of this application may in some measure induce a speedier disposal of the criminal proceedings against the applicant and other accused and, indeed, act as a spur to all concerned in the disposal of cases of remand prisoners filling our gaols in our common duty of eradicating the lethargy that is currently afflicting us. The liberty of the subject is not a slogan but is a valuable right of a citizen, and the courts must be vigilant in ensuring that it is not unprofitably thwarted.'

Supreme Court of the United States of America

RIGHT TO FULL HEARING AND REASONED JUDGMENT

SPECHT v. PATTERSON, WARDEN, ET AL.

(386 U.S. 1967, p. 605)

Petitioner charged under Colorado Statute with sex offence—convicted however, under Sex Offenders Act, which could be applied if court believed that person convicted of specified sex offences ‘if at large, constitutes a threat of bodily harm to members of the public, or is a habitual offender and mentally ill’—requisite report on psychiatric examination tendered before sentence—however, no hearing held—invocation of Sex Offenders Act entailed new charge leading to criminal punishment—it therefore required, under Due Process Clause, that accused be present with counsel, have opportunity to be heard, be confronted with adverse witnesses, and have right to cross-examine and offer evidence—also essential that there be findings adequate to make an appeal meaningful.

Opinion of the Court delivered by Mr. Justice Douglas.

Decided on April 11, 1967.

The petitioner was charged under a Colorado Statute for a sex offence. He was convicted but was sentenced under another law, the Sex Offenders Act, which could be applied if the trial court believed that a person convicted of specified sex offences ‘if at large, constitutes a threat of bodily harm to members of the public, or is a habitual offender and mentally ill.’

The requisite procedure, namely the holding of a psychiatric examination and the tendering of a report of it to court before sentence, had been complied within the petitioner’s case, but there had been no hearing.

The procedure adopted was approved by the State Supreme Court. The Federal District Court dismissed a *habeas corpus* proceeding and the Court of Appeals affirmed the dismissal. The petitioner then applied to the Supreme Court of the United States for a writ of *certiorari* on the Court of Appeals.

The Supreme Court held that the invocation of the Sex Offenders Act entailed the framing of a new charge leading to criminal punishment and therefore required, under the Due Process Clause, that the accused be present with counsel, that he be afforded the opportunity to be heard, that he be confronted with adverse witnesses, that he have the right to cross-examine them and to offer evidence of his own, and that there be findings adequate to make any appeal against the findings meaningful.
