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THE PRINCIPLE OF SOCIALIST LEGALITY

I. CONCEPT AND CHARACTER OF LEGALITY

The principle of legality is an essential characteristic of a State with enacted laws as postulated by nineteenth-century liberalism and subsequently put into effect in many countries. Such a State, which is also called the *Rechtstaat* in the formal or organizational sense, acts through the law, on the basis of the law and in accordance with the law. The legitimacy of any state activities also stems from the law, which is created by the representatives of the people and thus expresses the will of the people. The principle of legality is incorporated primarily in the two rules of administration and adjudication according to law. All State authorities are bound by the laws applicable to them.¹

The *raison d'être* of the principle of legality is that it effectively checks arbitrary action by state authorities even if it cannot exclude such action altogether. The resulting predictable response of legal machinery in all cases falling within the circumstances laid down by the law safeguards the legal protection of the individual. The guarantee that state action must be lawful is an element in such protection, which is itself one of the two universal factors in the concept of law (justice being the other).²

As for the actual content of law, the principle of legality offers no criteria and remains quite neutral. It is an institution of law that subjects the activity of state authorities to certain restrictions and lays down the way in which it is to be carried out.³

Jurisprudence makes the distinction between material and formal legality. Material legality requires that the application of the law through administrative orders and decisions by the courts should correspond *in their content* to the appropriate statutory pro-

¹ *Novissimo Digesto Italiano* (Turin, 1963), Vol. IX, under reference "Legalità e legittimità". Hans Nef, "The Purpose and the Protection of Constitutional Legislation and Lawful Administration in the Confederation," (in German) *Zeitschrift für Schweizerisches Recht*, 1951, p. 135 ff.

² Gustav Radbruch, *Rechtsphilosophie* (Stuttgart, 1956), p. 170.

³ Paul Duez and Guy Debeyre, *Traité de droit administratif* (Paris, 1952), p. 203.

visions.⁴ Formal legality insists on observance of the hierarchy of enactments – constitution, statutes, regulations.⁵

The principle of legality presupposes the existence of laws according to a comprehensive legal order. The extent to which observance of the principle of legality can make state activity predictable and strengthen the protection of the individual by the law is directly determined by the legal limitations placed on state authorities, by clarity and compactness in the law and the limits placed on discretionary powers.

Predictability requires that laws should be brought to the prior notice of those who will be affected and should have no retroactive effect harmful to those concerned.

For a system of legality to be effective, there must be certain safeguards whereby the legal aspects of the acts of one organ are subject to control by another. It is generally agreed that the effectiveness of such control depends on the independence of this other organ. Thus, many countries have independent administrative or ordinary courts to decide whether the acts of the Administration are lawful. In both civil and criminal matters the decisions of lower courts may be brought before higher jurisdictions. In countries where the Rule of Law is fully applied there are constitutional courts to decide whether enactments are in accordance with the constitution.

II. THE PRINCIPLE OF SOCIALIST LEGALITY: ORIGIN AND EVOLUTION

In order to understand the content and scope of socialist legality it may be useful to review its evolution in the Soviet Union.

A period of revolutionary upheaval is naturally not conducive to legality, particularly when the new regime sets out to transform the entire social and legal structure. It has to be decided what should be done with the old legal order, since to set everything aside immediately would leave a vacuum. On February 22, 1918, the Russian Revolutionary Government issued a Decree on judicial procedure, stating that previous legislation should be applied provided it was not "contrary to the legal conscience of the workers". A Decree of July 20, 1918, ordered the courts to give decisions corresponding to their socialist legal conscience. The Decree of November 30, 1918, on people's courts confirmed this provision by expressly forbidding reference to statutes or judicial precedent from pre-revolutionary times. The courts were to be guided by the decrees of the workers' and peasants' government and the judges'

⁴ *Ibid.*, p. 205.

⁵ *Ibid.*, p. 207.

own revolutionary conscience. At that time several important enactments of the new regime concerning such matters as family and labour law and agrarian law were already in force. The legal structure of the Russian Soviet Federative Socialist Republic (RSFSR) was subsequently consolidated by means of the codification of 1922 in particular. The launching of the N.E.P. (1921-27) necessitated the enactment of a Civil Code, and section 1 of that Code guaranteed protection of private rights "in so far as they are exercised in accordance with the social and economic aims for the furtherance of which they have been introduced".

There was considerable discussion in party circles and among jurists to decide whether the government and the administration were bound by the new laws. Bukharin referred to revolutionary legality in 1929, and believed that it would end all forms of arbitrary administrative action even on the part of revolutionaries themselves.⁶

Lenin's primary concern was that uniform legal rules should apply throughout the country. As he saw it, the principle of revolutionary legality was intended to ensure the obedience of the population and discipline in the ranks of the administration.⁷ In his interpretation of the concept of law a leading Soviet jurist referred to Lenin's dictum that: "Decrees are instructions appealing to general practical requirements . . . They should not be regarded as binding commands to be executed at all costs . . .", and went on: "We believe that the legal formula approximating most closely to Lenin's idea of the revolutionary decree is to regard it as an administrative instruction."⁸ In the words of Diablo, the principle of expediency fulfilled the same function of guiding state activity at that time as do general principles of law in bourgeois States: "We replace these general principles of law with a concept that is entirely different in its class character - revolutionary expediency."⁹

Two leading legal experts, Stuchka and Pashukanis, both of whom were for a time in charge of the People's Commissariat of Justice, endeavoured to develop a revolutionary Marxist theory of law. They and their followers regarded the legislative codes of 1922 as temporary palliatives, transient phenomena, "concessions to the effective functioning of the 'neo-capitalism' of the N.E.P. period, to be abandoned or at least simplified when the benefits of capitalist incentive had restored the economy sufficiently to make possible a

⁶ Vladimir Gsovski, *Soviet Civil Law* (Michigan, 1948), Vol. I, p. 162.

⁷ *Ibid.*, p. 161.

⁸ Arkhipov, "The Main Stages in the Development of the Concept of Soviet Law," in *Sovetskoe Pravo*, 1925, No. 5, p. 17.

⁹ Diablo, "Publication, its Legal Characteristics and its Organization in Western Europe and the USSR," in *Sovetskoe Pravo*, 1925, No. 5, p. 39.

new start in the direction of socialism".¹⁰ The goal of historical development as propounded by Marxist doctrine is of course the classless and stateless society, and Stuchka was thinking of this famous theory of the disappearance of the State when he wrote in 1923: "Communism means not the victory of socialist law but the victory of socialism over any law, since with the abolition of classes with opposing interests law will disappear altogether."¹¹ Pashukanis followed the same ideas when he declared: "The withering away of the categories of bourgeois law (the categories themselves and not just this or that particular rule) can in no circumstances mean their replacement by new categories of proletarian law."¹²

These were also the ideas underlying the drafts for a criminal code and a criminal procedure code which were submitted for discussion in 1927. It was proposed to introduce a substantially simplified system of legal rules and a wide degree of judicial discretion in individual cases.

Under Stalin there was a complete revulsion against the ideas put forward by Stuchka, Pashukanis and their followers. In the report of the Central Committee submitted by Stalin to the Sixteenth (1930) Party Congress, he demanded top priority for the strengthening of the dictatorship of the proletariat with a view to extending government powers to the maximum in order to prepare the way for the disappearance of all government powers. As Kelsen wrote: "The Soviet Government, for political reasons, became vitally interested in a legal theory recognizing the authority of the Soviet State, and that means the normative character, the binding force of its law, as a specifically socialist legal order, and not as a mere relic of bourgeois law."¹³ Vyshinsky became the chief legal theorist of the Stalin era and replaced what he called the "juristic nihilism" of Pashukanis and Stuchka by a new theory of law that fell in with Stalin's intentions. His definition of law (in which he agreed with the majority of non-communist jurists by regarding law as compulsory order) was as follows:¹⁴

Law is the aggregate of the rules of conduct expressing the will of the dominant class and established by way of legislation as well as customs and rules of community life confirmed by State authority; the application whereof is guaranteed by the coercive force of the State with a view to the maintenance, consolidation and development of social relationships and conditions acceptable and advantageous to the dominant class.

The expression "revolutionary legality" was gradually supplanted by that of "socialist legality". Both jurists and party leaders

¹⁰ J. N. Hazard and Isaac Shapiro, *The Soviet Legal System* (New York, 1962), Part. I, p. 4.

¹¹ Gsovski, *op. cit.*, p. 170, footnotes 46 and 48.

¹² *Ibid.*

¹³ Hans Kelsen, *The Communist Theory of Law* (London, 1955), p. 111.

¹⁴ Quoted in *Staat und Recht* (East Berlin, 1963), p. 122.

emphasised the fluctuations and changes that must occur in the content of either concept. For example, Shlyaposhnikov wrote: "In different stages of proletarian dictatorship the content of revolutionary legality is subject to change, depending upon the circumstances and forms of class struggle."¹⁵ And Stalin himself referred to these changes as follows:

To say that the revolutionary legality of the present time does not differ from that of the first N.E.P. period . . . is entirely wrong . . . Then it guaranteed to the private boss, the capitalist, the safeguard of his property, provided that he strictly observed the Soviet laws. The revolutionary legality of our time is quite different . . . It is pointed against thieves and sabotage, against hooligans and grafters of public property. The main task of revolutionary legality consists now in the protection of public property and nothing else.¹⁶

By revolutionary legality Stalin here obviously meant the essential goals of the revolutionary legal order.

In the period of Stalin's personal rule that began with the purges of 1936-38, the principle of socialist legality became devalued and perverted in a manner that has since received universal publicity. The period of deStalinisation introduced by the Twentieth (1956) Party Congress has been marked by a revival of the principle. In his famous secret speech to the Congress, Krushchev condemned Stalin's reign of terror as continually violating socialist legality. At the Twenty-Second (1961) Congress Stalin's excesses were attacked with equal determination, but this time publicly. There can be no doubt that the revival of the principle of socialist legality has done a great deal to strengthen legal protection of the individual in the Soviet Union. What this process means for a Communist philosopher may be assessed from the comments by George Lukács, the well-known Hungarian philosopher, on the 1963 exchange of letters between China and Russia:

The Chinese letter shows the formally closed, pseudo-theoretical manner of Stalin's day. The Soviet letter is a deep-felt appeal to the great common experience of our time, an experience which moves the hearts of hundreds of millions of people.

I shall refer only to the most important points. First and foremost, the Communist Party of the Soviet Union has made a clean break with the Stalinist practice of haughty disdain for legality. If this is described as ending the "cult of personality" the term is far too modest to convey the extent and the depth of what has taken place. What this means is that the socialist State provides the essential firm guarantees whereby human existence is assured, after Stalin's regime had systematically and contemptuously eliminated the smallest modicum of humanity . . . We cannot

¹⁵ Shlyaposhnikov, "Revolutionary Legality", in *Sovetskoe Pravo*, 1934, No. 4 p. 46.

¹⁶ J. V. Stalin, *Problems of Leninism*, quoted by Gsovski, *op. cit.*, p. 185, footnote 89.

here convey even a rough impression of the depth and breadth of this liberation in the socialist countries that have decisively turned away from the Stalinist past.¹⁷

Ideas of legality in the Soviet Union and those countries following the Soviet pattern are at present built around the requirement that the administration and the courts must adhere strictly to the law (material legality). In 1956 the Soviet Procurator-General, R. A. Rudenko, described socialist legality as the daily, precise and unswerving application and enforcement of the law.¹⁸ Similar ideas come from such leading figures in the field of Soviet jurisprudence as Strogovich, Perlov and Rakhumov. Thus far the Communist concept is no different from that accepted in the West. Where it diverges basically from the model of free democracies is by subjecting not only the organs of the State to the principle of legality but also non-State institutions and organisations, and private persons as well. This is unequivocally stated throughout the pronouncements of the Communist Party of the Soviet Union and in the writings of Soviet jurists.¹⁹ In the German Democratic Republic "all state organs, and all institutions, undertakings and citizens are required to maintain socialist legality", states an essay by Rudolf Hermann and Rolf Schüsseler.²⁰ And this means not merely acting according to the law but also actively collaborating in the maintenance of legality ("enlisting the various levels of the population for the control of legality").²¹ The consequences of this extension of the principle of legality are examined below under Section V.

There are some Communist jurists whose definition of socialist legality goes beyond the concepts of material and formal legality as stated in section I and includes in it such principles as human rights. In this way they equate socialist legality with the material aspects of the Rule of Law. This was, for example, the approach of the participants at the 1958 Symposium on socialist legality in Warsaw.²²

In addition to material legality, the principle of formal legality – observance of the hierarchy of laws – has been defended by some

¹⁷ Georg Lukács, "The Debate between China and the Soviet Union," in *Forum* (Vienna), November 1963, p. 519.

¹⁸ R. A. Rudenko, "The Tasks of Further Strengthening Socialist Legality in the Light of the 20th Party Congress Decisions," as quoted in *The Current Digest of the Soviet Press*, September 19, 1956, pp. 7–10.

¹⁹ Cf. V. Radkov, "Concept and Content of Socialist Legality," in *Sotsialisticheskaya Zakonnost*, (Moscow) 1961, No. 11, pp. 31ff.

²⁰ Rudolf Hermann and Rolf Schüsseler, "Content and Significance of Judicial Independence in the GDR," in *Neue Justiz* (East Berlin, 1963), p. 131.

²¹ *Neue Justiz*, 1963, p. 16.

²² S. Ehrlich (Poland), J. Boguszak (Czechoslovakia), I. Szabo (Hungary), V. M. Chkhikvadze (U.S.S.R.), in *Le concept de la légalité dans les pays socialistes* (Warsaw, Polish Academy of Sciences, 1958).

Soviet lawyers.²³ To what extent, if at all, this principle has been incorporated into state practice is discussed below under Section V.

Communist law similarly acknowledges to a greater or lesser degree most of the rules derived from the principle of legality, such as publication of laws before they come into force, clear and accessible compilation of the whole body of substantive and procedural law (codification), and prohibition of retroactive legislation. There are likewise guarantees of legality, although these vary considerably from what is normal in the free democracies, as will be pointed out below.

It is worthy of particular note that the new Yugoslav Constitution of April 7, 1963, presents the principle of legality in terms of positive law.²⁴ Sections 145-159 state that the principle comprises:

- a. observance of the law by "the courts, the organs of the State, the organs of social self-government, and all organs discharging official or other functions" (material legality);
- b. observance of the hierarchy of laws (formal legality);
- c. due notice of laws before enforcement;
- d. prohibition of retrospective legislation;
- e. instances of constitutional jurisdiction, control of administrative law and appeal against decisions by courts of law.

The operation of the principle of legality in communist States is nevertheless circumscribed by distinct limits, which are of significance in both content and effect. To a certain extent such limits spring naturally from the pattern of the communist State. Until the Twenty-Second (1961) Congress of the Communist Party of the USSR the constitutional form of the Soviet Union was defined as the dictatorship of the proletariat. But the new programme adopted by that Congress no longer regards the dictatorship of the working class as essential and defines the State as the "national organisation of the workers". The State is now "the State of the whole people, an organ to express the interests and the will of the whole people".²⁵ This alteration in the Party's programme is of purely terminological significance. Thus, Soviet legal scholars have stated that the Soviet State of the whole people and the State of the dictatorship of the

²³ *Op. cit.*, p. 324 (Chkhikvadze).

²⁴ Cf. *Bulletin of the International Commission of Jurists*, No. 17 (December 1963), pp. 48ff.

²⁵ F. C. Schroeder, "Content and Development of State and Law under the New Party Programme of the CPSU," in *Jahrbuch für Ostrecht* (Munich, 1962), Vol. III, Jan.-June, p. 65.

proletariat belong in the same category, since they are of the same nature.²⁶

Lenin used the metaphors of directing force, transmission belts and levers to describe the dictatorship of the proletariat. The levers and transmission belts were the trade unions, the Soviets, the co-operatives and the *komsomol*, whilst the directing force was the Communist Party. It is most noticeable that the Soviets, the State machinery created by the Constitution, occupy only second place. The terminology of the Party's statutes lumps the State, as represented by the Soviets, together with the unions and the co-operatives as "non-party organisations, which are all guided by the Party."²⁷

There is nothing uncommon in the need to interpret the laws. This means that the effectiveness of the principle of legality is greatly dependent on the rules of interpretation. The measure of protection guaranteed by the lawful discharge of judicial or administrative functions can depend on the methods of interpretation that administrative authorities or courts use or have to use. Under a communist legal system interpretation of the law depends in the final analysis on how the Party chooses to interpret the law. It is the Party's dictates that guide even the judge, whereas he would interpret the law according to his unbiased conviction in the Western world.

A. Legal Interpretation and how it is Affected by the Party

The interpretation of laws is closely linked with the character of the law to be interpreted and the aims of any given legal system. In a recent address the Rector of the University of Berne, Professor Hans Merz, made the following comments on statutory interpretation:

Interpretation relates to a whole system, and its sole aim is to prepare the way for correct decisions in the individual cases which arise when the law is put into practice. This gives particular importance to the dictates of unity and consistency among the various approaches to interpretation. A law cannot be considered in isolation. It has its place within a pattern of ideas, aims and values. These are either stated in the law or in the higher authority of the constitution, or they stem from extra-judicial social situations such as moral conduct, good faith or social and commercial custom to which the law refers. In the administration of the law they must frequently be remodelled with due regard for the circumstances they reflect, in order to cope with the vast range of problems emerging in new and unprecedented forms.²⁸

²⁶ O. S. Yoffe and M. D. Shargorodsky, "The Significance of General Concepts in Examining the Problems of Law and Socialist Legality," in *Sovetskoe Gosudarstvo i Pravo*, 1963, No. 5, p. 49ff.

²⁷ J. V. Stalin, *Problems of Leninism* (Moscow, State Foreign Publishing House, 1947) p. 148.

²⁸ *Neue Zürcher Zeitung*, December 8, 1963.

What then are the ideas, aims and values by which those applying the law in Communist States are guided or have to let themselves be guided? In accordance with Soviet legal theory²⁹, K. Polak, who was a member of the State Council of the GDR until his death, defined the aim of the socialist State and its law as follows:

The socialist State and its law are the levers for the achievement of socialist social relations and thereby of the standards of socialist social order.³⁰

This concept is officially confirmed in the Decree of the National Council of the GDR of April 4, 1963, concerning the basic tasks and working methods in the administration of justice, which states that "socialist law gives expression to the objective operation of the laws of socialism".³¹ This Decree was issued "not merely to revise the operation of a single field of law, namely judicial law; its purpose is to achieve socialist relations in society, to put into effect the basic laws of society underlying such relations, consciously to implement those laws in the over-all development and application of the law".³²

Knowledge of these repeatedly mentioned "laws of society" is acquired through the study of dialectical and historical materialism. This doctrine views human history as an inevitable natural process that occurs through a series of class struggles for domination of the economic basis of society and culminates in the creation of the classless and stateless society. The function of the State and the law is to promote and accelerate this evolutionary process. It is a vital element in the pattern that only the Communist Party is able to reveal the objective laws of this historical process and therefore to say how legislation and the application of the law can help to accelerate the process in a given historical situation. It is the Party which is equipped with the scientific theory and carefully evaluates the lessons of practical experience in order to discern the objective trends of reality both in depth and in breadth and to direct and organise the devoted efforts of the popular masses on that basis.³³ The Communist Party owns this monopoly of revolution in its capacity as spearhead of the proletarian class, whose function as the most recent class to emerge in the course of history is to overcome class divisions and to organise the classless society.

²⁹ Polish Academy of Sciences, *Le concept de légalité dans les pays socialistes*, *op. cit.*, p. 322.

³⁰ K. Polak, "State and Law - The Instrument for the Achievement of Socialist Social Relations," in *Einheit* (East Berlin, 1963), No. 7, pp. 75 ff.

³¹ Reprinted in *Dokumentation der Zeit* (East Berlin, 1963), No. 10, pp. 35ff.

³² "The VIth SED Party Congress and the Tasks of the German 'Walter Ulbricht' Academy for State Questions and Jurisprudence," in *Staat und Recht*, 1963, p. 1065.

³³ *Principles of Marxism and Leninism* (German translation, East Berlin, 1960), p. 794.

Consequently the so-called general line of the Communist Party is of immense importance in the administration and interpretation of the law. It provides the basis for the all-important principle of "Partyyness". The former Procurator-General of the GDR, Melsheimer, stressed the need for the courts to apply this principle: "Judicial decisions must reflect willingness to carry out the orders of the Party of the working class and the Government."³⁴

The principle of legality is no obstacle to interpreting the laws on the basis of "Partyyness". Legality and "Partyyness" are in fact in "dialectical unity". In the words of Hilde Benjamin, Minister of Justice of the GDR,³⁵ "to apply the law according to 'Partyyness' is to apply it in the way which corresponds with the views of the majority of the workers and therefore with the aims of the Party of the workers and the aims of the Government. But it is at the same time to discern and put into effect the dialectical unity of legality and "Partyyness". Hilde Benjamin was in agreement here with the view stated in the Soviet Union that "bolshhevik 'Partyyness' is the essence of socialist legality."³⁶ She has stated elsewhere that:

The decisions of the Central Committee of the Party of the working class always contain important guidance for all state organs; above all they indicate very clearly to the organs of justice the most important areas to which they should devote their full attention at any particular time. Rapid implementation in the light of such indications is an important duty for all responsible members of the judiciary, and in particular judges, attorneys and notaries.³⁷

In these decisions we therefore see not only general political indications. They constitute the basis for specific measures which we must take within the judicial framework.³⁸

Until recently the principle of "Partyyness" (and consequently also of legality) required that the interests of the ruling class should be safeguarded and promoted. It was therefore all-important to see how those interests were to be satisfied in specific instances. This was determined by analysing the local situation with regard to the class struggle and whatever party line happened to be current at the time. The possibility of the new ruling class (the working class) falling from power was ruled out, but it was agreed that the economic situation had not yet been moulded in a truly socialist pattern and that class conflicts had not yet been wholly overcome. There

³⁴ Melsheimer, "Socialist Legality in Criminal Proceedings", in *Neue Justiz*, 1956, p. 289.

³⁵ Hilde Benjamin, "Towards the Realization of the Dialectical Unity of Legality and the Party Approach," in *Neue Justiz*, 1958, p. 368.

³⁶ B. Meissner, "The Legal Position of the Communist Party of the Soviet Union," in *Jahrbuch für Ostrecht* (Munich, 1961), Vol. II, Jan.-June, p. 23.

³⁷ "The 17th Plenum of the SED and the Tasks to Be Met in the Administration of the Law in Rural Areas," in *Neue Justiz*, 1954, p. 97.

³⁸ "The Results of the 21st Plenum of the Central Committee of the SED and the Work of Authorities Administering the Law," in *Neue Justiz*, 1954, p. 679.

were still groups of the population that might hold up the natural process of history. The principle of socialist legality therefore demanded repressive action against elements that remained under the sway of bourgeois, capitalist mental attitudes. "The remnants of capitalist mentality in human consciousness" are declared by communist theory to be responsible for criminality, and in particular for offences against the property of State and society. This meant that persons guilty of offences against property were to be prosecuted with relentless vigour. They still are, in fact, and with renewed severity, because such offences become increasingly heinous as society comes nearer to the complete Communist structure. By Decree of the Presidium of the Supreme Soviet of May 5, 1961, the death penalty was introduced for serious theft of state property and for counterfeiting money. On July 1, 1961, the same authority introduced the same penalty for currency and securities speculation. In both cases the previous maximum punishment was 15 years' imprisonment. On December 29, 1961, another Decree instituted terms of imprisonment of up to one year for careless use of agricultural machinery and failure to carry out repairs, and of up to three years in the case of serious damage or a second offence.

Following the declaration at the 22nd Party Congress in 1961 that there were no longer any opposing classes in the Soviet Union and therefore no more classes to be suppressed as a whole, the dictatorship of the proletariat could become the "all-people's State". All the Soviet bloc countries followed suit. In the GDR it was proclaimed that the "moral and political unity" of the people had been achieved. This meant that the original proposition of the class struggle could no longer serve as the key to interpretation of the law. A well-known jurist in the GDR, Gerhard Haney, wrote in this connection:

The courts will be led into error if they work according to the virtually stereotyped formula of "the local position of the class struggle" as the basis of their decisions in civil or criminal cases. They would be treating the cases coming before them as the expression of an antagonism that no longer exists. This would affect the way in which they decide such cases since this false and unrealistic basic concept prevents their judgment from aiming in the proper degree at the consolidation of the political and moral unity of the people. In that event the administration of justice is not sufficiently geared to the growing solidarity and collaboration of all classes and sections of the population in constructing and completing socialism in our Republic.³⁹

This new approach is, of course, primarily a matter of terminology. It in no way alters the fact that party decisions and directives remain the guiding light in regard to legal interpretation. The Party

³⁹ G. Haney, "The Content of the Socialist Concept of Law," in *Staat und Recht*, 1963, No. 1.

continues to lay down lines of guidance for state authorities in the field of economic organisation and cultural and educational work. These two fields of activity serve to transform the economy and man respectively "in the light of the economic and anthropological conditions for Communism".⁴⁰ As regards the aims of economic organization, Grzybowski comments: "The centre of legal order is not the bill of rights contained in the socialist constitutions. It is, rather, the economic plan administered by the Party."⁴¹ He quotes the examples of a Polish town council which had quite lawfully set aside a part of the municipal area for housing. Families had had houses built there, laying out gardens and paying for development costs (roads, sewers, water supply, etc.). In 1959 an Industrial Ministry claimed the land in order to build blocks of flats. The Ministry cancelled the contracts signed by the town council, evicted the owners and occupants and went ahead with its building project. This caused considerable uproar in the town.⁴²

The educational aims of the Party and the State in both the Soviet Union and the GDR have been clearly revealed by a number of judicial decisions depriving either one or both parents of parental rights because they had not brought up their children "in the spirit of socialism" and according to "socialist moral standards". One such example was the decision by the Stralsund district court of October 14, 1958, that a mother should not be entitled to bring up her child, on the following grounds:

The accused has until now brought up her children in a strictly religious manner. Such an exercise of parental rights cannot be accepted since it does not guarantee a proper upbringing in the spirit of democracy, socialism, patriotism and national brotherhood...⁴³

Because of the decisive influence of political authorities on the interpretation of laws the administration of justice is inevitably subject to considerable fluctuation. The treatment of moral offenders under the criminal law of the GDR may serve as an example. As mentioned above, after the 22nd Party Congress of the CPSU, following its doctrinal pronouncements, the GDR also declared that class antagonism had disappeared within its territorial domain. From this it was deduced that those guilty of criminal deeds in the GDR were – subject to only a few exceptions – not "enemies" of the "workers' and peasants' State" but "men whose consciousness of socialist reality was insufficiently developed". This was not to be

⁴⁰ F. C. Schroeder, *op. cit.*, p. 65.

⁴¹ Kazimierz Grzybowski, *Soviet Legal Institutions* (Ann Arbor, 1962), p. 78.

⁴² *Ibid.*, p. 74.

⁴³ Quoted by Werner Schulz in *Recht und Staat als Herrschaftsinstrumente der Kommunisten* (Munich, 1963), p. 59.

regarded as an "antagonistic conflict" as defined by Marxist-Leninist thinkers, and it did not therefore need to be resolved by the use of force or compulsion but could be eliminated by educational measures. It had always to be ascertained whether the offender was an "enemy" or a person with an insufficiently developed socialist consciousness who was not basically hostile to the workers' and peasants' State, and this was discernible primarily from his ability to engage in active work for socialist construction.

This division of criminals into enemies and backward elements was a great boon to classes of delinquents who were not guilty of indulging predatory urges towards the property of the State or society but who had committed sexual offences, and particularly if they had fulfilled their obligations at work. In such instances offenders were often merely placed on probation. In the Leipzig district about one-third of sexual offenders were sentenced to penalties other than imprisonment in 1962, and the figure rose to 35.7 % in the first two months of 1963. In its decision No. 1 dated June 15, 1963, the Presidium of the Supreme Court had to acknowledge that judges were not always applying socialist justice correctly or with sufficient regard to different cases, this being shown in particular in cases where persons guilty of crimes of violence or sexual offences were either not imprisoned at all or were sentenced to unduly short terms of imprisonment.

The above description of the principles and methods of legal interpretation, and in particular the way in which the Party can affect policy, leads to the inescapable conclusion that the principle of legality can be used to make flexible adjustments of the law according to the specific needs of the moment. In the thirties it was even the rule that Party directives had precedence over the law, so that it was "lawful" to violate the law in carrying them out. This is clearly demonstrated in a work by Vyshinsky, when he was Procurator-General, guardian of legality in the Soviet Union. He wrote that Soviet judges should not hesitate to depart from the law and should show absolute obedience in following the Party's directives, which represented the highest rule for them.⁴⁴

This principle seems to have been abandoned nowadays. It is clearly evident that the authority of the Party's decisions is no longer invoked in order to rule, administer or judge *contra legem*. Khrushchev stated at the June 1959 plenary session of the CPSU Central Committee:

Offences against party and state discipline must be resolutely opposed, whatever form they may take. . . It may be proposed to amend any par-

⁴⁴ Michel Rigin, "Socialist Legality: Yesterday and Today," in *Osteuropa - Recht*, 1961, p. 97.

ticular law but so long as it is in force no one must be allowed to violate it.⁴⁵

However, it has to be borne in mind that legislation can be very rapidly amended in the Soviet Union. Contrary to Section 32 of the Constitution, which provides that legislative power may be exercised only by the Supreme Soviet of the USSR, the Presidium of the Supreme Soviet invokes Section 49(b) of the Constitution in order to issue decrees (*ukazi*) which rate as full laws.⁴⁶ These decrees undergo the same procedure as that for important laws: they are drafted by the competent department of the Party administration, which is subject to the authority of the Central Committee. The Central Committee makes its decision and the decree is then issued by the Presidium of the Supreme Soviet. This method was followed on three occasions in 1961 and 1962 for the above-mentioned provisions introducing the death penalty for large-scale theft of state property, currency speculation, counterfeiting and bribery. Even penal decrees are given retrospective effect for specific criminal cases, either through the Presidium of the Supreme Soviet or the Presidium of the Supreme Court of the USSR. In the result, this procedure is no different from that of the earlier practice sanctioning unlawful decisions conforming to Party directives: the Party believes that serious currency offences should be punishable by death. The criminal law in force at the time of the offence lays down a maximum penalty of "only" 15 years' imprisonment. A decree by the Presidium of the Supreme Soviet introduces the death penalty for currency offences. The decree has retrospective effect for specific criminal cases so that persons found guilty of an act regarded by the party leadership as deserving execution may in fact be sentenced to death (see p. 183).

B. The Principle of Legality in Criminal Law

The principle of legality is incorporated in criminal law clearly and specifically through the rule *nullum crimen, nulla poena sine lege*. Criminal proceedings may be brought only in respect of acts or omissions specifically covered by the criminal law. The punishment meted out must correspond to the law in both degree and kind. Anti-social or other unwelcome activities may not be tried and punished on the basis of application by analogy of appropriate provisions of the criminal law. The general principle of legality thus leads to the requirement of specific legislation.

⁴⁵ Quoted in *Staat und Recht*, 1963, p. 1717.

⁴⁶ Reinhard Maurach, *Handbuch der Sowjetischen Verfassung* (Munich, 1955), p. 197.

Prosecution for anti-social actions through the application of provisions by analogy was introduced in the very first criminal legislation after the October revolution. This was the Criminal Code of the RSFSR of 1922 (section 10). The 1926 version contained the same principle in section 16:

If the Code does not specifically refer to a particular antisocial act the principles and limits of liability for such an act shall be determined in accordance with such sections of this Code as refer to criminal acts most closely related to those in question.

The majority of the Criminal Law Commission appointed by the Council of People's Commissars were at first against abandoning the prohibition of prosecution by analogy when they drafted the 1922 Code, but then gave way to two outstanding jurists, Kursky and Krylenko, representing the People's Commissariat of Justice, who insisted that prosecution by analogy was limited to exceptional cases of special character. They maintained that the only acts which would be covered would be those which the legislature had clearly regarded as punishable but which had been omitted from the Criminal Code merely by oversight or through faulty drafting. Such acts should be genuinely comparable and related to those covered by the Code. In the practice of the courts this reservation demanded by Kursky and Krylenko has been all too often neglected.⁴⁷

As a result of the revival of concern for legality which was set off by the 20th Party Congress in 1956, prosecution by analogy was prohibited by the new Soviet criminal codes. This was first done in Section 3 of the "Principles of Criminal Law in the USSR and the Union Republics" and subsequently in the Criminal Codes of the Union Republics (for example, in Section 3 of the Criminal Code of the RSFSR of October 27, 1960: "Only persons who are guilty of a criminal act shall be liable under the criminal law and subject to the appropriate penalties, that is to say those who have either deliberately or negligently committed an anti-social act as provided by the Criminal Code. Punishment shall be based only on the decision of a court of law.").

There is obviously considerable anxiety in the Soviet Union at present that the principle of *nullum crimen, nulla poena sine lege* should be consistently applied. Courts convicting persons who have committed no act specifically forbidden by the law are severely criticised in legal periodicals, which are subject to censorship in the same way as most other publications. The following example is taken from an essay that appeared in the leading Soviet legal journal, *Sovetskoe Gosudarstvo i Pravo*:

⁴⁷ R. Schlesinger, "Some Observations on Socialist Legality in the USSR", in *URSS. Droit, Economie, Sociologie, Politique, Culture* (Paris, 1962), Vol. I, p. 52.

In the Bukhara district, for example, several persons, including Tukhtayev, violated the provisions relating to registration of persons liable for military service (by failing to record entry and departure in due time). This occurred in 1961 and the first half of 1962 when such actions were not yet subject to criminal prosecution (the Decree of the Presidium of the Supreme Soviet of the Uzbek S.S.R. of August 2, 1962, introduced criminal liability for such offences). Nevertheless, criminal proceedings were brought against Tukhtayev, and his action was wrongly found to be avoiding conscription for military service. The people's court sentenced Tukhtayev to 18 months' imprisonment. The district court also approved this sentence. Subsequently, of course, the sentence was quashed because this was not a criminal offence but Tukhtayev was detained for eight months. Those responsible for this miscarriage of justice were punished. Some leading members of the court continue to believe, however, that the judge does not bear any personal liability for wrongful decisions by a court. It must be demonstrated that such persons are wrong. The law requires every chairman of a court of law to ensure complete and objective examination of the facts, so that correct decisions can be reached. If judges are immune from liability for partially or completely failing to comply with this duty, a situation of irresponsibility results which cannot be tolerated under our conditions and which must be decisively eliminated.⁴⁸

The Supreme Court of the USSR also found itself obliged to exhort the courts to stricter observance of the principle of *nullum crimen, nulla poena sine lege* in the guiding principles it laid down on March 18, 1963:

Some courts apply a criminal law providing for a much heavier sentence, even though that particular law does not make any direct provision for the crime actually committed. In cases of offences against traffic safety regulations, for example, some courts, influenced by the serious implications of the offence, apply to it the law on premeditated murder, ignoring the fact that this is irrelevant to the circumstances of that particular case. The law on responsibility for premeditated murder is sometimes applied to persons who have committed manslaughter as a result of their carelessness, or who have caused death in the course of elementary self-defence. Individuals who had no intention to divert property for their own benefit or for the benefit of others, but who have only caused a deficit, are sometimes sentenced according to the laws on embezzlement.

Where a Communist regime believes it must protect itself against real or imaginary opponents the principle of legality is not necessarily honoured. What then happens is the sort of thing condemned by the Supreme Court in the above-quoted guiding principles. Criminal laws are applied that really have nothing to do with the case in hand. One such example was the conviction of Harry Seidel by the Supreme Court of the GDR on December 29, 1962. Seidel had assisted people to escape from East to West Berlin in various ways. One of his activities had been to help to build tunnels for the purpose, and on one occasion he was armed. Seidel undoubtedly

⁴⁸ V. V. Kulikov, "The Educational Role of Socialist Jurisdiction," German translation in *Staat und Recht*, 1963, p. 1717.

violated various laws (offences against the Pass Act by illegal entry into the GDR; assisting his wife, his four-month old child and 62 other persons to escape; damage to property by breaking through foundation walls when digging tunnels). The Supreme Court found Seidel guilty of repeated violations of the Protection of the Peace Act, of repeated anti-social subversive acts of violence, of repeatedly inducing others to leave the GDR and of unlawful possession of firearms.⁴⁹ It is difficult to see how Seidel's actions could be described as "subversive acts of violence", since the relevant legislation (Section 17 of the Act amending the Criminal Code) reads as follows:

Any person attempting to alarm the population through acts of violence or threatening to perform such acts, in order to spread insecurity and to undermine confidence in the workers' and peasants' State shall be liable to hard labour, or in less serious cases to not less than six months' imprisonment.

What is quite inconceivable, however, is that Seidel's assistance to escapees should be regarded as a crime against the peace. Section 2, paragraph 1, of the Protection of the Peace Act on which his sentence was based, reads as follows:

Any person making propaganda for an act of aggression, in particular a war of aggression, or inciting others in any other way to undertake warlike actions, and any person recruiting, inducing or encouraging German citizens to participate in belligerent actions aimed at securing the oppression of a people shall be punishable by imprisonment and in serious cases by hard labour.

According to its legislative history and its preamble the Protection of the Peace Act is intended to impose penal sanctions to prevent various forms of war propaganda and incitement to war. The reporter of the Legal Committee of the GDR House of the People described in the following terms the guilty parties against whom the Act was directed: "The people we are concerned with are the real warmongers, the originators of a new and monstrous crime. We are concerned with them and no-one else." Someone like Harry Seidel who helped others to escape could hardly be included in that category.

The gradual withering away of the State that is due to accompany the transition from socialism to Communism is characterised by two particular trends in Communist countries as regards the administration of criminal law: the diminishing application of repressive laws and the increasing use of social and educational sanctions. One way in which this change appears is through the transfer of proceedings in respect of anti-social acts or behaviour from

⁴⁹ The sentence is published in *Neue Justiz*, 1963, p. 36ff.

the organs of the State to social organs (e.g., works assemblies, meetings of citizens, comradesly courts and social courts, grievance boards and arbitration boards). When the administration of justice is "socialized" the principle of legality is inevitably affected, and for the worse, as is illustrated by the anti-parasite laws and their application. Most of the Communist States have adopted such laws. In the Soviet Union legislative competence in this respect belongs to the Union Republics: the RSFSR issued its anti-parasite law on May 4, 1961, the Ukraine on June 12, 1961, and Byelorussia on May 15, 1961, all of these still being in force. The Decree of the Presidium of the Supreme Soviet of the RSFSR concerning intensification of measures against persons evading socially useful work and leading an anti-social parasitic existence states in its first section:

Able-bodied adult citizens failing to carry out their most important duty under the Constitution – namely to work honestly in accordance with their ability –, avoiding socially valuable work, drawing unearned income from the use of land, automobiles or property or committing other anti-social acts enabling them to lead a parasitic existence shall be resettled in specified places, subject to the decision of the district people's court, for a period of two to five years and required to work at the place of resettlement, the property acquired other than through their own work being confiscated.

The same measures, as imposed by a district people's court *or by the social decision* of a works assembly, a works section, an authority, an organisation, a collective farm or a collective farm section, shall apply also to persons *accepting employment in an undertaking or a state or social organization or becoming members of a collective farm for reasons of appearance only*, claiming the privileges and rights of wage earners, salaried employees or collective farm members, but actually undermining labour discipline, operating as private entrepreneurs and living on means acquired other than through work or committing other anti-social actions enabling them to lead a parasitic existence (italics supplied).⁵⁰

The resettlement orders issued by social organs (i.e., by collectives of workers in undertakings, works sections, authorities or collective farms) must be confirmed by the executive committee of the district soviet. It is the responsibility of the militia and the procurator's office to investigate charges of parasitism. "When an investigation has been completed the evidence is transmitted to the district people's court or to the workers' collective, subject to authorisation by the procurator's office" (Section 3 of the Decree). From the point of view of legality, the authority of the procurator's office to transmit a case for further action and in particular its power to choose between a workers' collective and a people's court amount to some improvement on the anti-parasite laws previously in force. Bilinsky comments on this point:

⁵⁰ German translation in *Jahrbuch für Ostrecht*, Vol. II, Jan.-June, p. 219.

The anti-parasite legislation issued in certain of the Union republics between 1957 and 1959 required the whole proceedings to remain in the hands of "society" and admitted no form of judicial control. The decision of the social organ was, moreover, not subject to other authority. All the executive committee of the local soviet could do was to confirm the judgment and to examine whether it was lawful and well-founded. This arrangement was liable to result in a "social" justice quite independent of the state system, which gave the lower party cells considerable scope but undermined the authority of state justice. Examination of the social judgment by administrative officials offered no guarantee that legal principles would be observed. This situation gave rise to serious misgivings among Soviet jurists, and the May 1961 anti-parasite law of the RSFSR can be taken as a measure of their success.⁵¹

Nevertheless, the definition of what constitutes a parasite existence lacks the precision required by the principle of legality. An example is the provision on "other anti-social actions" enabling a person to "lead a parasitic existence". This lack of precision in the law is an inducement to exceed or abuse the power conferred. Thus, the anti-parasite laws and their application continue to encounter criticism from Soviet jurists. What is more, when the Presidium of the Supreme Court of the USSR issued its guiding principles of March 18, 1963,⁵² it felt impelled to disapprove of the application of the anti-parasite laws, stating that they often served as a convenient instrument for the resettlement of undesirables without any attempt to get such persons to perform socially useful work; it was increasingly common for sentences on disabled persons holding a licence for an occupation to be based on the provisions of the anti-parasite laws; "sentences" and decisions requiring resettlement were frequently inadequate; it was exceedingly rare for defendants' arguments to be objectively refuted; there was often no evidence whatsoever to substantiate charges of anti-social activities; officials were treated by the courts with undue clemency; wrongful confiscation of documents needed for employment was a common occurrence.

Other bodies concerned with social justice, such as comradesly courts, arouse the same misgivings on the observance of legality as do the workers' collectives that combat parasitic activities. It is true that comradesly courts are empowered to inflict far less severe penalties than those laid down under the anti-parasite legislation. In the RSFSR the Ordinance concerning comradesly courts dated July 3, 1961, as amended in October 1963, provides, *inter alia*, for the following penalties: warning or public rebuke, reprimand with or without publication in the press, fine up to 10 rubles, or a recommendation to the employer that the offender be put on work at

⁵¹ A. Bilinsky, "Antiparasite Laws in the Soviet Union," in *Jahrbuch für Ostrecht*, Vol. II, July-Dec., pp. 131ff.

⁵² German translation in *Recht in Ost und West*, 1963, p. 243.

lower rates of pay or be dismissed. The following offences come under the jurisdiction of the comradely courts: violation of work discipline, e.g. bad time-keeping, absence without proper reason, drunkenness and undignified conduct in public places or at work, failure to carry out one's duties with regard to the education of children, insulting behaviour, petty theft and assault, deliberate use for one's own purposes of means of transport, machinery, tools or materials belonging to a state undertaking, a collective farm or some other public organisation, and other "anti-social actions not punishable under the criminal law". The Party itself states what constitutes other anti-social actions and behaviour, since:

According to the evolutionary process of communist morality in a socialist society, new forms and rules of conduct which emerge from life are accepted in the progressive section of society before they acquire general currency and finally become truly part of the heritage of the whole people.⁵³

It is rather cold comfort when Soviet jurists declare:

The most effective guarantee for the observance of socialist legality by social bodies of non-lawyers is undoubtedly supervision by the Party organs. They guide the activities of comradely courts through local trade union committees and the executive committees of district soviets (at the level of village settlements and municipalities) . . . The trade unions play the leading role in this connection. . . They are required to ensure that the decisions reached by comradely courts are correct and to adjust any such decisions that are in conflict with the facts, statute law or other rules of law. With regard to the great educational role of the comradely courts the Presidium of the All-Union Central Council of Trade Unions made a special study of this question on July 14, 1961, and called on the committees of both soviets and trade unions to give the comradely courts greater assistance in their day-to-day work than hitherto.⁵⁴

From the principle of legality comes the rule that no law may be given retrospective effect to the detriment of the individual (*cf.* Section 154 of the Yugoslav Constitution of April 7, 1963). This rule is of particular importance in criminal law, and it is stated in the constitutions of many States as well as in Article 11, paragraph 2, of the Universal Declaration of Human Rights:

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

⁵³ "Towards the Creative Development of Marxist-Leninist Ethics," leading article in *Voprosy Filosofii*, No. 2, 1963; German translation in *Ostprobleme*, 1963, p. 283.

⁵⁴ Quoted by V. M. Savitsky in "Public Participation in the Campaign against Legal Offenders and Safeguards for Socialist Legality," German translation in *Ostprobleme*, 1964, p. 118.

In contrast to earlier times, when as a general rule little attention was paid to it, the prohibition of retroactive criminal legislation is nowadays recognized in the realm of communist law (it is for instance incorporated in the Principles of Criminal Legislation in the USSR and the Union Republics, as well as in the legislative codes of the Union Republics). This has not prevented cases when laws have been applied retrospectively in recent years, as in the case of the Decree of the Supreme Soviet of the USSR of July 1, 1961, introducing the death penalty for currency speculation. It was on the basis of this Decree that the Supreme Court of the RSFSR sentenced Rokotov and Faibishenko to death. They had originally been sentenced to 15 years' imprisonment in June 1961 by the Moscow Municipal Court. What is particularly shocking is that the Decree of July 1, 1961, was used against persons who had already received the maximum sentence possible under the previous, more lenient law. According to Professor Berman, the Supreme Court of the RSFSR was only able to apply the death sentence retroactively on the basis of a special edict by the Presidium of the Supreme Soviet.⁵⁵ G. Z. Anashkin, President of the Criminal Collegium of the USSR Supreme Court, suggests in an article on the humanism of Soviet criminal law that the Presidium of the Supreme Court regards itself as entitled to sanction retroactive application of criminal laws in specific cases:

A law that lays down a punishment for an act or increases a punishment is not as a general rule retroactive. In court practice there have been individual instances when a court applied a law retroactively, but only when the Presidium of the USSR Supreme Court has given a ruling on the specific case, allowing the court to apply a law retroactively against a particular individual who has committed an especially grave crime.⁵⁶

C. Institutionalized Party Control over Administration and Justice

The way in which the Party affects the government's and the administration's application of the law extends beyond the dominant role that its doctrine and its resolutions play in legal interpretation by state authorities. Specific machinery has been set up for the Party to supervise the administration.

The Party has undisputed authority over the state administrative machinery, as represented by the Soviets and their executive committees, and this authority is partly laid down in the Party's constitution. It can be exercised in two directions: (1) either the Party organ at a specific level of the hierarchy can issue a direct

⁵⁵ H. J. Berman, "The Dilemma of Soviet Law Reform," in *Harvard Law Review*, Volume 76, No. 5, March 1963, p. 949.

⁵⁶ As reproduced in *The Current Digest of the Soviet Press*, Nov. 6, 1963, p. 10.

order to the Soviet or its executive committee at the corresponding level; or (2) so-called Party cells are organised in the Soviets or their executive committees. Under the Party's constitution Party cells have to be formed in all elected authorities containing three or more Party members. These Party cells are required to ensure strict adherence to the decisions of the competent Party organs in all matters to be dealt with by their respective authorities. They are responsible for seeing that all Party orders are implemented by the authority in whose area the cells operate. This generally works out in practice by a member of the Party cell stating the Party's attitude on a particular matter when the authority meets, whereupon the authority then makes whatever decision best corresponds to the Party's expressed desires.

The Party also directs the executive authorities by means of the fusions of State and Party functions. The chairman or secretary of the executive committee of a municipal Party will normally be the chairman of the executive committee of the town's Soviet. The higher the rank of a Soviet the more Party members it will contain. In this way the Council of Ministers of the Soviet Union is the State organ closest to the Party. In her well-known book, *The Organs of the Soviet State Administration in the Present Period*, C. A. Yampolskaya writes:

The Council of Ministers conducts the whole of its activities under the direct guidance of the Central Committee of the CPSU. (According to the Constitution, i.e., in appearance, the Council of Ministers is subject to the authority of the Presidium of the Supreme Soviet of the USSR – author's note.) With regard to organisation, this is facilitated by the fact that the Chairman of the Council of Ministers of the USSR, his deputies and several ministers are members of the Central Committee. The most important decisions made by the Council of Ministers are discussed beforehand by the highest organs of the Party.⁵⁷

Although Section 112 of the Soviet Constitution states that judges are "independent and subject only to the law", the courts are in fact basically subject to the Party. "Our socialist justice is an essential element in the State's over-all guidance", wrote Professor Polak, a member of the State Council of the GDR.⁵⁸ Regarding the situation in the Soviet Union Polyansky writes as follows:

In our Soviet State the courts function as part of the political machinery for guidance, and it has to be ensured by appropriate means that they are truly the instruments of the policy of the Communist Party and of the Soviet Government. . . The essential feature of judicial policy is to implement Party and State policy in the form peculiar to judicial action and by the means available to the judiciary. . . The Party's decisions have

⁵⁷ Quoted by Meissner, *op. cit.*, p. 11.

⁵⁸ *Neue Justiz*, 1963, p. 225.

absolute binding force for all State officials and therefore for the judiciary also. . .⁵⁹

The courts follow the Party's decisions in interpreting and administering the law. Their independence is subject to this requirement, as indicated most clearly by the former Procurator-General of the USSR, Krylenko:

We do not want to be thought to advocate mere judicial independence in its earlier forms. We believe the judiciary should be wholly dependent on State policy and the representatives of the State. But we wish to place the judiciary in a situation where their strict adherence to State policy and to no other can guarantee their being able to carry out that policy within the framework of the law and independently of extra-judicial factors.⁶⁰

In contrast to the practice under Stalin, the Party no longer claims any right to instruct the ordinary courts in specific cases. In recent years the Party has passed resolutions condemning intervention by Party officials in pending cases, and there have also been articles in newspapers and periodicals making the same point.⁶¹ However, it does not seem any too easy to break Party committees and officials of the habit, as is indicated in an article by the Soviet jurist Pavlov in 1963:⁶² "It must be added that certain Party committees are still on the wrong track. They demand the right to intervene directly in specific cases and to dictate their ideas regarding guilt and punishment to the courts." He then refers to a resolution by the Central Committee of the CPSU when a local Party committee intervened in pending proceedings. This resolution condemned interference by organs of the local and district Parties in the activities of courts, the procuracy and the militia. It pointed out that the role of the Party organs in giving guidance lay in a quite different direction, namely, to educate the judiciary so that they could discharge their functions in a truly Communist spirit. (It should be specially noted, however, that this instruction to keep out of the affairs of the courts is addressed specifically to Party organs at the local and district levels.)

The guiding principles issued by the Supreme Court of the USSR on March 18, 1963, also contain a statement against Party intervention in pending cases (at least, that is what Soviet jurists take it to mean). It reads as follows:

⁵⁹ Quoted by Meissner, *op. cit.*, p. 24.

⁶⁰ N. V. Krylenko, "Structure of Courts in the USSR", quoted by Strogovich in *Handbook of Soviet Criminal Procedure* (Moscow, 1960), p. 76.

⁶¹ Kulikov, *op. cit.*, p. 1721.

⁶² I. Pavlov, "The Leading Role of the Communist Party in Consolidating National Legality," in *Sotsialisticheskaya Zakonnost* (Moscow, 1963), No. 7, pp. 3ff.

The Constitution stipulates that the administration of justice in the USSR can be carried out by the courts only, and that no one can be declared guilty of a crime and subject to criminal punishment in any other manner than according to the verdict of the court; this constitutional requirement imposes upon the court full and complete responsibility for the final decision in every criminal case. It is the task of the courts to secure a thorough, complete and objective investigation of facts in each criminal case and to pronounce lawful, substantiated and just verdicts on the basis of the law, in accordance with socialist jurisprudence and *under conditions which exclude any external influence upon the judges.*

Although there is no institutionalized Party supervision of the ordinary courts with regard to specific cases, certain organs of social justice, such as the comrades courts, are so controlled. Their decisions have to be confirmed by the local trade union committee or the executive committee of the local Soviet and it has already been seen on p. 172 above how the activities of both these are guided by the Party (Party directives, Party cells).

D. Supervision of Courts

Until the revival of concern for legality and the consequent legal reforms the departments dealing with the administration of justice (Ministry of Justice of the USSR; Ministries of Justice of the Union republics and the autonomous Soviet republics; administrative departments of the Ministries of Justice attached to the regional and district executive committees) were able to guide court practice by means of directives, giving the courts "specific or general indications or guide lines on what should be contained in their decisions".⁶³ With certain reservations this was admitted semi-officially. For example, Polyansky wrote in the Moscow University Journal (1950, No. 11):

A bourgeois jurist would no doubt be more than a little surprised to see the directives issued to the courts and the procuracy by the top level of the Ministry of Justice. The bourgeois jurist believes it is enough if he knows the law and can interpret it formally in the light of precedents and supplementary provisions. The directives issued to Soviet courts, on the other hand, may go deeply into political and economic problems.

This institutionalised intervention by the Administration in the administration of justice has disappeared as part of the legal reform following the 20th Party Congress in 1956.

There is no constitutional objection to the power of the Supreme Court of the USSR and those of the Union republics to lay down guiding principles in plenary sessions having binding force for all lower courts, on matters of legal interpretation and the application

⁶³ Maurach, *op. cit.*, p. 309.

of the law. This practice is akin to the rules of precedent applying in many other legal systems.

What is vastly different, however, is the duty of courts at all levels to account for their activities to their electorate (*cf.*, for instance, Sections 33 and 34 of the principles for legislation on the courts issued by the Supreme Soviet of the USSR in 1958). At the lowest level, the people's courts are elected by popular vote and therefore answerable to the electors. All other courts are elected by the corresponding levels of Soviets (Supreme Soviets of the USSR, and the Union republic, territorial, regional and district soviets), and are answerable to them. Voters and electoral colleges are entitled to revoke the appointments of judges they have elected before their terms of office expire. Power to institute proceedings for such dismissal lies with the authority which originally nominated the judge, and that is generally the Party organisation corresponding to the judge's rank.⁶⁴

In the GDR the Act of January 18, 1957 on the local organs of State power contains detailed provisions regarding the duty of the courts to account for their activities to the local representatives of the people. This refers to the Circuit Assemblies, District Assemblies, Municipal Assemblies and communal representatives. (These bodies are modelled on the soviets of workers' deputies in the USSR and are controlled by the Communist SED (*Sozialistische Einheitspartei Deutschlands*). Section 8 of the Act states:

Judicial bodies and public prosecutors acting within the administrative area of the local representative bodies of the people . . . must co-operate closely with these bodies and respect and support them as being the supreme organs of power in respect of matters coming under their authority. The local representative bodies of the people have the right to require the directors of the organs, enterprises and institutions named in Section 1 to supply information on matters coming under the authority of such representative bodies.

According to the relevant provisions, the representatives of the people are entitled to criticise the work of the courts if, through deficiencies in their activities, "the accomplishment of the tasks of the local representatives of the people, the building of socialism and the evolution of democratic life are impeded". Thus the Circuit Assembly can criticise the Circuit Court, and the District Assembly the District Court. The court is "obliged to reply to the criticism within four weeks", which means that it has in fact to justify its position to the representatives of the people.⁶⁵ This right of control is emphasised in the most recent legal writings in the GDR. The fol-

⁶⁴ *Ibid.*, p. 311.

⁶⁵ W. Rosenthal, "The Power of the Judiciary in East Germany." in *Journal of the International Commission of Jurists*, Vol. IV, No. 1, p. 134, at p. 144.

lowing passage may be quoted from a study by Michael Benjamin and Hans Fritzsche on *Justice and Socialist Education*:

District and Circuit Assemblies have the right and the duty to make a critical assessment of the activities of the courts within their territory and to make specific recommendations for the improvement of their work in accordance with the decisions of the State Council regarding the further development of the administration of justice in the GDR.⁶⁶

At the same time the District and Circuit Courts are subject to supervision by the Supreme Court of the GDR which, like its counterparts in other Communist countries, directs the decisions of the lower courts by issuing guiding principles for the interpretation and administration of the law. In specific cases the Supreme Court may reverse the decisions of other courts by means of proceedings for cassation. *Cassation* is a special form of proceedings whereby any final civil or criminal judgment or any other final court decision may within one year of its becoming final be challenged by the Chief Procurator or the President of the Supreme Court, on the grounds of "illegality" or "gross injustice".

It is particularly revealing to note how the Supreme Court and the powers of the judiciary have been constitutionally subordinated to the authority of the most powerful State organ in the GDR. — and the closest to the Party — namely, the State Council, of which Walter Ulbricht is the Chairman.⁶⁷ This was done through the legal reform of 1963 on the basis of a State Council Decree of April 4, 1963, concerning the basic functions and the procedure of the courts.

The Supreme Court is responsible to the House of the People (Parliament) and, between the House's infrequent sessions, to the State Council. It is required by the new legislation "to keep the State Council informed of the work of the courts. This obligation extends to general developments in judicial decisions and their effectiveness in society, basic questions arising for decision, and the evaluation of applications to the Supreme Court by individual citizens (and usually consisting of requests to set aside lower court judgments)" — a statement by Dr. Heinrich Toeplitz, President of the Supreme Court, in the House of the People.

⁶⁶ Michael Benjamin and Hans Fritzsche, "Justice and Socialist Education," in *Staat und Recht*, 1963, p. 233.

⁶⁷ Following the Soviet model, the functions of President of the Republic were taken over by the State Council of the GDR on September 12, 1960. At the same time the powers of the Presidency were greatly extended. To the traditional functions of Head of State were added competence to issue universally binding interpretations of the law, and the power to issue Decrees with statutory force and to issue basic resolutions on questions of national defence and security, etc.

The following persons participate regularly in the deliberations of the Supreme Court Plenum: two members of the State Council, the Chief Procurator, the Minister of Justice and a representative of the Bureau of the FDGB (the central trade union organisation). The two State Councillors also take part, where desirable, in the sittings of the Praesidium of the Supreme Court. They must "super-
vise and control the implementation by the Supreme Court and the Chief Procurator of the laws and resolutions of the House of the People and of the decrees and resolutions of the State Council relating to the administration of justice" (statement by Mr. Gotsche in the House of the People).

The State Council, for its part, influences the activities of the Supreme Court through "suggestions and recommendations". In this way "important issues of State policy are brought to the notice of the Supreme Court by the highest State organs and thus find their way into court decisions . . . The State Council can also recommend the Supreme Court to lay down directives and resolutions. Moreover, the Chief Procurator can call for a debate on basic principles arising from judicial decision by availing himself of the provisions of Section 25 of the Act on the Procuracy, which empowers him to make objections to the State Council against resolutions of the Supreme Court laying down rules for the guidance of the courts" (statement by Dr. Toeplitz in the House of the People).

The judicial reform has been most effectively described as follows:⁶⁸

Since neither the House of the People nor the State Council can be regarded as a body to make independent resolutions without the assent of the top Party leadership, the meaning of the reorganisation is clear. The Head of the Party, Ulbricht, who is Chairman of the State Council, will keep an even tighter rein on the Judiciary than before. The Party's dictatorship over the latter, which has long existed in practice, has now, with the new Judicial Organisation Act of the German Democratic Republic, received legal sanction.

III. THE PRINCIPLE OF SOCIALIST LEGALITY AND THE ROLE OF THE PEOPLE

It has been seen in section I above that in States adhering to the Rule of Law on the western pattern the principle of legality is concerned exclusively with the organs of the State. Parliaments are bound by the Constitution in their legislative activities; both executive and judicial authorities must base their actions and decisions on the law and must act in accordance with the law. The whole purpose of the principle of legality is to offer private persons

⁶⁸ *Neue Zürcher Zeitung*, April 8, 1963.

and their organisations and undertakings protection against an excess or abuse of power by State authorities. Socialist legality is incomparably wider in the extent of its application to individuals. It commands universal allegiance, from every non-State organisation and institution and from every private individual. It makes it the duty of the whole people not only scrupulously to observe the law but also to co-operate actively in creating socialist law, whose function is "to give citizens a precise understanding of these objective natural processes (i.e., of social evolution), in order that they may organise all their essential individual activities in a positive social framework".⁶⁹

The principle of socialist legality is therefore an important instrument in the educational and cultural role of the socialist State, a vital tool in the gigantic task of reshaping man into a pattern that satisfies the demands of the stateless and classless Communist society. Socialist legality demands that every single person should be imbued with knowledge of the laws of the socialist State and the rules of socialist community existence as well as the desire to follow those rules.

The courts have a leading role to play in the pursuit of this goal. *The educational function of the ordinary courts* is repeatedly emphasized in specific provisions of different branches of laws in a given country. To take one example, Section 3 of the Soviet Principles of the Law on the Judiciary of December 25, 1958, states:

By the whole of their activity the courts educate the citizen of the USSR in a spirit of devotion to the country and the Communist cause, in a spirit of strict and resolute observance of Soviet laws, in a spirit of respect for socialist property, of maintenance of labour discipline, of honest fulfilment of public and social tasks, of respect for the rights, honour and dignity of citizens and for the rules of socialist community life.

The courts are required "consciously to use all the resources of society and the State in order to promote the process of development of our citizens to socialist personality, from concern for oneself to concern for the community".⁷⁰

The educational effect of court decisions in communist countries is assisted by the manner in which *public* hearings can be used. In order to "develop the workers' consciousness of the State and the law . . . and to enhance the educational effect of proceedings" the courts in the GDR are required to

give due notice of proceedings to the appropriate trade union authorities, the Free German Youth, works management, National Front committee and other organs, institutions and collectives which may be concerned,

⁶⁹ G. Haney, *op. cit.*, p. 137.

⁷⁰ Michael Benjamin and Hans Fritzsche, *op. cit.*, p. 233.

wherever it is appropriate, and in particular in the case of criminal proceedings, and to inform them specifically of the potential value in their work of their attendance in enabling them to make use of the proceedings; to hold appropriate hearings in socialist undertakings, co-operatives and institutions, at a time of day enabling the workers to attend.⁷¹

Organised participation of social organs is sometimes actually written into laws in the case of certain categories of offences. Thus a Decree of the Presidium of the Supreme Soviet of the RSFSR of July 26, 1962, provided that representatives of social organisations should be invited to all hearings involving confiscation without compensation of houses, dachas and other structures built or acquired with unearned income or through the illegal use of funds of state undertakings or collective farms.⁷² The purpose of the Decree was stated to be to prevent such anti-social acts.

In *criminal proceedings* the court may authorise representatives of trade unions, other social organisations or workers' collectives to appear as *social prosecutors* (in addition to the public prosecutor) or as *social defence counsel* (in addition to the professional defence counsel). To do so they must be delegated by their organisation or collective. Their duties are described as follows:

The principal function of the social prosecution and defence counsel is to state the opinion of their collective regarding the offence and the defendant, to help the court to examine the facts and to find a just solution, and to assist in mobilizing the forces of society in order to prevent further offences and help in the education of offenders.⁷³

Such participation of social representatives is also the practice in *civil cases*. They are required to "inform the court of the opinion with regard to the case in hand of the organisations and collectives which have delegated them".⁷⁴ An "analysis of court practice" by the Ministry of Justice and the Supreme Court of the RSFSR contains the following observations on how properly to organize the participation of social representatives in civil proceedings:

This arrangement can serve a useful purpose only if social representatives give the court the collective opinion of their organisation. This means that the matter must be thoroughly debated before it comes up for hearing, either at the instigation of the court or on the initiative of the workers in the housing or industrial collective or other organisation. Such a debate should aim at a unanimous or at least a majority view. Notes or

⁷¹ Decree of the State Council of the GDR concerning the basic tasks and methods of operation of organs administering the law, dated April 4, 1963, Part I, IV B, Sections 1 and 2.

⁷² Reproduced in *The Current Digest of the Soviet Press*, Nov. 7, 1962, p. 23.

⁷³ Decree of the State Council of the GDR dated April 4, 1963, Part I, IV C, Section 2.

⁷⁴ Section 36 of the Principles of Civil Procedure as adopted by the Supreme Soviet of the USSR.

minutes of such debates should be kept in order to show what opinion the collective reached and by what means. These should be presented to the court by the representative of the collective. The representative should be elected by the collective and given appropriate powers. This form of careful collective preparation not only ensures that the court learns of "public opinion". It can also provide an excellent basis for a conciliatory settlement that satisfies the interests of socialist society as well as the individual interests of those directly affected. . . . By this means a relatively large circle of citizens who are for the most part very well informed of the circumstances obtain an immediate impression of the State's active guidance in civil proceedings and the intensive ideological discussion entailed, thus learning how to shape their own relations in the field of civil law.

This both facilitates objectively based and psychologically well prepared comparisons and plays a major part in helping to prevent any further violation of civil law in the same circumstances.⁷⁵

One form of the educational activity demanded of the courts is so called *judicial criticism*. If in the course of judicial proceedings "causes and contributory factors" of breaches of the law are established in an administrative department, a state or a collective undertaking, etc., the Court is required to inform that administrative department, etc., which then takes the necessary steps. The President of the Supreme Court of the GDR, Dr. Heinrich Toeplitz, gives the following example:

If, for example, there is a legal dispute regarding faults in the heating system between a tenant in a new housing block and the communal housing administration the court has to find out the facts and give judgment. But it also has to see whether any defects it finds exist throughout the block. If so, the court must attempt to settle the whole problem and advise the responsible state organ, perhaps in the form of judicial criticism.⁷⁶

Otherwise, the main instrument for activating the people and thereby consolidating respect for the law and the extension of social, state and legal consciousness, as demanded by the principle of socialist legality, is *social justice*, administered by anti-parasite courts, comradesly courts, labour dispute boards and arbitration boards as described above on page 13. These are regarded as especially capable of satisfying the communist regime's desire for an "atmosphere of intolerance towards anti-social behaviour".⁷⁷ In this connection the following statement by Mrs. A. I. Stavtseva, Head of the

⁷⁵ Fritz Niethammer, "Soviet Academic Doctrine Concerning the Development of Socialist Democracy in Civil Procedure through Participation of Representatives of Social Organizations in Hearings," in *Staat und Recht*, 1962, p. 1407.

⁷⁶ *Neue Justiz*, 1963, j. 321.

⁷⁷ Siegfried Petzold, "The Role and the Tasks of Soviet Courts of Fellow Workers in the Education of the Workers," in *Staat und Recht*, 1962, p. 2241.

Department of Labour Law, Lomonosov University, is particularly interesting:

The strength of the comradely courts is that they enjoy the confidence of the collective and are based on public opinion. The respect and the position they occupy are well summed up by the employees of the Marat Textile Works in Moscow: "The comradely court is our conscience." Offenders who would even prefer dismissal, rather than appear before the court composed of their fellow workers, are not few.⁷⁸

IV. OBSERVANCE OF THE HIERARCHY OF LEGAL SOURCES (FORMAL LEGALITY)

In the same way as Parties in a Communist State guide the State's administrative activities they also determine the content of the law. The function of judicial law-making in a socialist State is to implement the Party line exactly by specifically juridical methods.⁷⁹ In the Soviet Union the normal legislative procedure is for acts, decrees or ordinances to be drafted by the Party administration, which is answerable to the Central Committee of the Party. After they have been agreed upon by the Central Committee they are then turned into law by a state authority having legislative powers, namely the Supreme Soviet, the Presidium of the Supreme Soviet or the Council of Ministers. However, the Party has also passed laws on its own, most commonly through ordinances issued by the Central Committee in conjunction with the Council of Ministers of the Soviet Union. This situation, which arises through the dominating role of the Party in the Communist State, explains something else that comes as a surprise to minds schooled to respect the Rule of Law, namely the anarchy in the formal sources of law that persisted until quite recent times. Socialist legality did not include the principle of formal legality, observance of the hierarchy of laws.

For example, through decrees issued on the basis of Section 49(2) of the Constitution the Presidium of the Supreme Soviet itself amended provisions of the Constitution although Section 146 lays down a special procedure for constitutional amendments (approval by both chambers of the Supreme Soviet by a two-thirds majority) In this way the 7-hour working day guaranteed in Section 119 was replaced by the 8-hour day under a decree of the Presidium dated June 26, 1940. This decree came into immediate effect and, although it was confirmed by the Supreme Soviet on August 28, 1940, this was not done according to the procedure laid down for amendment of the Constitution. It was not until seven years later

⁷⁸ *Ibid.*, p. 2237.

⁷⁹ Siegfried Petzold, *Grundzüge der sozialistischen Gesetzgebung in der DDR* (East Berlin, 1962), p. 71.

that the original text of the Constitution was adapted to conform with the legal situation created by the Presidium's decree. Similarly, the minimum age for deputies as prescribed by Section 135 of the Constitution was raised by decree of the Presidium dated October 10, 1945, from 18 to 23 years for deputies of the Supreme Soviet and to 21 for deputies of the Supreme Soviets of the Union and autonomous republics.

Although Section 32 of the Constitution provides that legislative power lies exclusively with the Supreme Soviet, decrees of the Presidium have been permitted not only to repeal provisions in existing enactments but also to amend the wording of ordinary laws passed by the Plenum of the Supreme Soviet. The effect of Section 32 was only that enactments issued by authorities other than the Supreme Soviet, whether State or Party organs, could not be given the solemn designation of "legislative Act" (*zakon*). It did not exclude their power to issue enactments, and there was no objection when the actual substance of constitutional and legal provisions was repealed by joint ordinances of the Central Committee of the Party and the Council of Ministers.

Professor Walter Meder explained these idiosyncrasies of Communist legislation as follows:

The typical feature of such legislative procedure in the totalitarian one-party State is that its laws and regulations are not moulded by the give-and-take of varying opinions, as in a liberal democratic State, but in accordance with the guiding principles laid down by a uniform political will. For the totalitarian one-party State it is a minor and purely formal question whether this uniform political will should be expressed in constitutional amendments, in legislative acts or in regulations.⁸⁰

The principle of formal legality has also gained ground with the revival of the principle of legality. Soviet jurists have come out in favour of formal legality, and N. G. Alexandrov wrote in 1961:

One of the supreme principles of socialist legality is the predominance of the law over all other measures of the state machinery. . . Soviet laws contain all the essential elements in the Soviet legal system. All other acts by state authorities should be subordinate to the law. It must be based on the law and undertaken for the purpose of enforcement of the law.⁸¹

The supremacy of the Constitution is emphasized by A. I. Denisov and M. G. Kirichenko:

Soviet theory of state and law and Soviet legislative practice correctly distinguish between constitutional laws and ordinary laws. . . Provisions at the constitutional level are the basis for the current activities of state organs having legislative powers.⁸²

⁸⁰ *Osteuropa-Recht*, 1956, p. 175.

⁸¹ N. G. Alexandrov, *Law and Legality in the Period of Comprehensive Construction of Communism* (Moscow, 1961), p. 110.

⁸² A. I. Denisov and M. G. Kirichenko, *Soviet State Law* (Moscow, 1957), p. 4.

The Supreme Soviet of the USSR and the Supreme Soviets of the Union republics have in recent time come to play a very prominent part in law-making activities. From the formal point of view, they have largely resumed their constitutional functions in this respect. They were responsible for the major reforms in the law of the judiciary, criminal and civil procedure, criminal law and other branches. It was admittedly a joint Ordinance of the Central Committee of the Communist Party, the Presidium of the Supreme Soviet and the Council of Ministers of the USSR that introduced in November 1962 a new form of combined State and Party control over the whole economic system whereas this properly required amendment of the Constitution.⁸³ Nevertheless, the hierarchy of laws and regulations in the Soviet Union does now seem to be viewed with greater respect.

V. PUBLICATION OF LAWS AND CODIFICATION

In Western States governed by the Rule of Law it is a matter of course that a law cannot be universally effective unless previously published. For a long time this principle was applied only to a very limited extent in the Soviet Union. Between 1937 and 1958 the Supreme Soviet of the USSR passed more than 7,000 laws, of which no more than a few hundred were ever published. During the same period the Council of Ministers of the Soviet Union issued some 390,000 ordinances and regulations, of which only a few thousand were published. The remainder were simply brought to the attention of the officials responsible for putting them into effect.⁸⁴ The situation of uncertainty and arbitrary administration created by this practice was severely criticized in 1956 by no less a person than the Procurator-General, R. A. Rudenko:

In a number of cases these or other matters are regulated by numerous acts which have no standing in law, some of which are altogether unknown not just to scholars but frequently even to the officials concerned. This leads to legally wrong decisions and infringement of the rights of citizens and gives rise to conflicting practice. It is impossible to talk seriously of the propaganda of Soviet legislation when systematic collections of laws have closed circulation lists and are available only to a limited number of officials.⁸⁵

In order to remedy this situation an Act was passed in 1958 requiring all laws adopted by the Supreme Soviet of the USSR to be published. Decrees of the Presidium of the Supreme Soviet and

⁸³ *Collection of Laws of the Supreme Soviet*, 1962, No. 48/503.

⁸⁴ Berman, *op. cit.*, p. 940.

⁸⁵ Rudenko, *op. cit.*, p. 8.

Ordinances of the Council of Ministers were to be published if they contained provisions "of normative character" or of "general significance".⁸⁶

In the same article Rudenko also attacked the lack of systematic and accessible presentation in Soviet law:

In order more successfully to carry out the Party's directives on strengthening the observance of socialist law in all spheres of life in the Soviet State, we must have well codified, well publicized, practicable legislation. V. I. Lenin paid great attention to the problems of codifying legislation. As early as September 1922, he pointed out the need for a Soviet code of laws. Yet to this day we have no such code of laws of the Soviet State.⁸⁷

In recent times I. Pavlov has stressed the connection between codification and the principle of legality:

Without law there is no legality. If laws are lacking in this or that important field of public life arbitrariness arises. Stalin's personality cult found its expression mainly through the fact that in this period many fields of social life were not regulated by law. Though the USSR Constitution of 1936 envisaged the enactment of the most important legislation in criminal law, in procedure, in civil and labour law etc., this was not carried out.⁸⁸

In order to overcome such deficiencies ambitious codification projects have been undertaken and the most important provisions arranged in accessible laws. These include the Acts adopted by the Supreme Soviet of the USSR on December 25, 1958, concerning the Principles of the Law in the Judiciary in the USSR and the Union republics, the Principles of Criminal Legislation, the Acts of December 1961 on the Principles of Civil Legislation and the Principles of Civil Procedure. These Acts served as the basis for similar codification in the Union republics.

SAFEGUARDS OF LEGALITY

The principle of legality as understood in a free society under the Rule of Law is expressed in the subordination of state authorities to the law and the consequent protection of citizens against violation of the law and abuse of discretionary powers. Safeguards of legality therefore take the form of statutory provisions to implement this subordination. These include the existence of constitutional courts and administrative courts, judicial control over administrative action,

⁸⁶ Reproduced in *The Current Digest of the Soviet Press*, August 20, 1958, pp. 13ff.

⁸⁷ Rudenko, *op. cit.*, p. 8.

⁸⁸ I. Pavlov, *op. cit.*, pp. 3ff.

and control of observance of statutory requirements within the administration. A citizen whose rights or legitimate interests have been violated is legally entitled to appeal to the guardians of constitutional and administrative justice in order to obtain redress and bring the State's supervisory machinery into action.

The legal system in Communist States makes scarcely any provision for such recourse. In the Soviet Union a modest start has been made towards judicial control over administrative action. A citizen can complain to the local people's court if a local Soviet refuses to enter him in the electoral register. Complaints may be made in respect of omissions or wrong entries by the registration authorities. The jurisdiction of the courts to review administrative decisions regarding taxes, compulsory levies and fines is of considerable practical significance. Such decisions may only be enforced if a court so orders after examining the assessment.⁸⁹ A general right of appeal in these matters is now given by Section 4 of the Act on the Principles of Civil Procedure.

Soviet authors have repeatedly pointed out the meagre protection against legally wrong administrative decisions. For example, N. S. Strogovich wrote in an article published in 1956:

Soviet legislation established a broad system of legal guarantees of legality in all branches of Soviet law and the main task consists of putting these guarantees into practice. At the same time one cannot but recognize that there is the important task of improving and broadening legal provisions guaranteeing the principle of legality. In particular it seems to us desirable to broaden the *judicial* guarantees of legality by extending the jurisdiction of the court to cover various administrative acts that have not hitherto been subject to judicial review. . . There are reasons for moving forward in this direction and for permitting the courts in certain cases to deal with complaints against organs and institutions of the State against officials, if the complaint has not been remedied by the higher agency.⁹⁰

P. E. Nedbailo spoke out even more emphatically in the same journal a year later:

The legal position of the court, its functions and its strictly-defined activity create favourable conditions for ensuring the correct application of legal norms as no other form of state activity can. Therefore, within the system of legal guarantees, judicial guarantees are the *highest* guarantees of the rights of citizens. . . Hence, one should draw the practical conclusion that it is necessary to broaden the jurisdiction of the court, to raise its role and prestige in public life. In particular, in our opinion, the functions of the court should be extended to deal with the administrative activity of government agencies in their relations with the population. . .⁹¹

⁸⁹ Dietrich A. Loeber, "The Soviet Procuracy and the Rights of the Individual against the State," in *Journal of the International Commission of Jurists*, Vol. I, No. 1, p. 63.

⁹⁰ *Sovetskoe Gosudarstvo i Pravo*, 1956, No. 4, p. 22.

⁹¹ *Ibid.*, 1957, No. 6, pp. 20ff.

Every statement or explanation on this subject both by the authorities and by Soviet jurists insists that the protection of legality is primarily the task of the Procuracy. The Procuracy is the guardian of legality in the whole field of administration and justice, although decisions by the supreme Party and state organs fall outside its field.

The citizen, who cannot himself challenge a judicial decision or an administrative act in due and proper form, is entitled to take his grievance to the Procuracy. This is a request for what is known as extra-legal redress. The complainant has no procedural rights. His role is that of an informant or a reporter. The Procuracy is free to decide whether it will use the legal remedies open to it (protest, request for *cassation*) in order to obtain redress for the complainant. No attempt is made to deny that this safeguard of legality has been found wanting in practice.

The Procuracy's supervision of legality is more effective when the leading Party and state organs are concerned for the observance of the law. Provisions defining the "tasks of the Procuracy in safeguarding socialist legality" continually stress the State's interest in maintaining legality. The Procuracy Act of the German Democratic Republic of April 17, 1963, which is the most recent legislation of its kind in the Eastern bloc, stipulates in Section 36:

The activities of the Procuracy in ensuring the uniform application and observance of socialist law and legality shall be concentrated on the protection of the national economy, of socialist property, and of new developments and patents and on safeguarding the rights and legally-protected interests of citizens.

In addition to the standard functions of the Procuracy in criminal proceedings in communist States, it also checks in legality in the whole field of administration. In fact, this side of its activities is now coming to eclipse its responsibilities in criminal proceedings and judgments. In this connection an article by four members of the GDR Procuracy in the journal *Neue Justiz* in 1963 is of great interest. They wrote that:

General supervision (of the Procuracy) must guarantee that the rights of citizens are not violated in the process of social revolution, so that the consolidation of relations between the State and the citizen is not disturbed and the development of the moral and political unity of the people is actively promoted. The Procuracy must make a decisive contribution to the further improvement of our state and economic machinery through its check on legality. In the work of the Procuracy it will become increasingly important to contribute more and more to General Supervision in the way of ensuring specific responsibility, discipline and order in state and economic guidance and in the implementation of the basic rule underlying the guidance given by all state and economic organs, which is that every task must be fulfilled in the closest relationship with the people.

General supervisory activities must come to play the leading role in the work of the Procuracy in our Republic. The greater the prominence of our State's activities with regard to economic organisation, culture and education, the greater will be the shift of emphasis from the prosecution of crimes to the function of General Supervision.⁹²

The same article stated that the main task in the second part of 1962 was construction, and that:

Contact was established and the task clarified either through the standing committees for internal affairs, the People's Police and the judiciary or directly with the standing committees on construction of the local assemblies of people's representative. Some members of the Procuracy actually belong to these committees, which give their views on grievances and on other matters. The Berlin-Prenzlauer Berg District Procurator addressed the sixth assembly of municipal representatives on construction questions in October 1962 and reported on the results of the Procuracy's work in that field, giving specific examples of violations of the law. The people's representatives were thus enabled to obtain a general view of legality in this field and to adopt specific resolutions.⁹³

It is not improbable that the indirect effects of such supervisions are to the advantage of the individual citizen, who thus enjoys benefits inherent in the principle of legality which he cannot obtain through his own unaided efforts.

SUMMARY

The foregoing survey would seem to show that the following features of the principles of socialist legality are to be regarded as essential characteristics.

1. The principle of socialist legality insists in the first place on administration and adjudication according to law. In this respect it is identical to the principle observed in western constitutional States. It has also been incorporated into criminal law in the form of the prohibition on conviction by analogy (*nullum crimen, nulla poena sine lege*) as part of the legal reforms following the Twentieth (1956) Party Congress in the USSR. Similarly, the prohibition of retroactive criminal legislation is nowadays generally applied, in contrast to earlier practice, although there are certain exceptions. The principle of formal legality – observance of the hierarchy of legislative enactments – also enjoys greater respect even if not

⁹² Rudolf Wunsch, Dr. Günter Lehman, Wolfgang Seifart, Dr. Werner Bahrt, "Basic Questions Concerning the Concept of General Supervision by the Procuracy," in *Neue Justiz*, 1963, p. 15.

⁹³ *Ibid.*, p. 17.

consistently. The very remarkable work of codification in the Soviet Union and other Communist States, which is now mainly completed, has provided a far better basis for the maintenance of legality, since the principle can only be fully developed where there is a sufficient body of law to guide the state organs.

2. Legal protection of the individual, which is the aim of the principle of legality, is impaired by "social justice" (jurisdiction of anti-parasite courts, comradesly courts, labour dispute boards, arbitration boards etc), and the charges heard by such courts are frequently stated in very loose terms, being drawn up in terms of imprecise legal concepts that leave considerable latitude for interpretation. The organs of social justice have considerable discretionary powers in considering when they have to take action against "other anti-social actions permitting persons to lead a parasitic life" or "other anti-social offences which do not entail criminal liability".

3. The rules for interpreting the law, which the principle of legality requires to be applied scrupulously and predictably are of vital importance in the maintenance of the principle of socialist legality. It is only too clear that legal interpretation is decisively influenced by the ideas, values and aims underlying the legal system. According to the communist concept, the law must also reflect the objective laws of human history in its progress towards a classless and stateless social order and must also serve as an instrument in promoting and accelerating that process, that is to say "in achieving socialist social relations". The organs of the State are therefore required to ensure that the law is applied "in a manner corresponding to the laws and needs of social evolution", in other words, to implement these conditions by applying the principle of socialist legality.

Being the avant-garde of the working class, which is the latest class to appear in the course of history and therefore puts into execution the laws of history, the Communist Party is alone able to perceive whether social evolution follows these laws. Its decisions and lines for guidance are authoritative and binding on state organs which interpret and administer the law. Accordingly all legal interpretation and the application of laws follow "Partyness", and it is perfectly logical, however paradoxical it may seem, for Communist legal theory to state that Bolshevik Partyness is the essence of socialist legality.

4. The Party's decisions and lines for guidance are also binding on judges, for whom freedom of judgment and independence are absolute requirements of the Rule of Law according to the Western

pattern. The courts in Communist States are specifically designated as "a part of the machinery for political guidance". To quote the former Procurator-General of the Soviet Union, Krylenko, judges are "independent of extra-judicial factors" provided that they acknowledge their "total dependence on state policy and its representatives". In order to ensure that the courts do in fact comply with the policy in the Party and the country's leaders, they are brought under institutionalized control by authorities in closer contact with the Party. They are answerable to their electors, whether assemblies of people's representatives or electoral meetings, and must give due regard to their criticism and recommendations. The Supreme Court of the GDR receives "indications and recommendations" from the State Council, two representatives of which participate *ex officio* at plenary sessions of the Court together with a representative of the Trade Union Confederation. Several Communist States have now abolished the earlier practice whereby the Ministry of Justice also affected the operation of the courts. There are now specific orders by the Central Committee of the CPSU forbidding intervention by Party organs at the intermediate and lower levels in legal proceedings.

5. There is a fundamental divergence between the principle of socialist legality and the principle of legality in States under the Rule of Law in their respective attitudes towards the individual. In the West only the state authorities are included. The organs of the State are required to observe the laws in order to respect the individual's sphere of freedom. Under socialist legality not only is every individual required to adhere to the law, he must also collaborate actively in the implementation of socialist law. The widest possible range of social organisations and sections of the population are required to participate in "the supervision of legality". This is the function of the various social courts, the social prosecution and defence counsel in criminal proceedings, the representatives of workers' collectives in civil proceedings, and the comradely court. In pursuance of the educational and cultural tasks before the Party and the State, the citizen must be prepared for the stateless Communist society, for a system in which the collective has absolute precedence. The individual must be taught to interweave "all essential individual activities into social activities". Correct human behaviour is to be in harmony with the particular phases in human history as discerned by the Communist Party and announced to the people.

The fact that every single individual comes within the operation of socialist legality thus means that everyone is required to educate both himself and his fellows in order to become mature for the

communist social order ("Each citizen his own secret policeman").⁹⁴ In its extension and application to cover private individuals and their various relations, the principle of socialist legality, as spelled out in communist legal doctrine, is an instrument of "social self-education". Thus the principle of socialist legality differs from the concept of the Rule of Law in this respect also: its purpose is not to safeguard the individual's sphere of freedom but to permit the total shaping of the individual. It is in no way surprising that the difference between free democracy and totalitarian democracy is reflected in the divergences between respective concepts of legality.

EDOUARD ZELLWEGER *

⁹⁴ Richard Reich, "Communist Society and the Freedom of Man," *Schweizer Monatshefte*, 1963, p. 934.

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REPORT ON PRE-TRIAL RELEASE PRACTICES IN SWEDEN, DENMARK, ENGLAND AND ITALY TO THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE*

Editor's Introduction:

A chemical engineer and New York industrialist, Mr. Louis Schweizer, was shocked to learn that boys had been detained for months awaiting trial because of their inability to provide the bail fixed as a condition of their release. His first reaction was to set up a fund to provide bail, but on the advice of those familiar with the problem he established a research foundation, which he named Vera, the main purpose of which was to promote equal justice under law through the study of criminal procedures, beginning with the bail system.

The Manhattan Bail Project was launched in October 1961 by the Vera Foundation, with the financial assistance of a grant from the Ford Foundation. The project drew its workers from New York University, and set about the task of investigating the background of persons before a New York court with a view to winning their release without bail in suitable cases.

The work of the Vera Foundation has been encouraged by the authorities, judicial and executive, and as its Executive Director and co-author of the following article has said, "One of the most encouraging by-products of the Manhattan Bail Project has been the spread of its philosophy and methodology to other cities".

The National Conference on Bail and Criminal Procedure was in substance a report on problems of bail to the people with the power to act by implementing a new approach. The then Attorney-General of the United States, Mr. Robert F. Kennedy, himself convened the conference, where police and probation officers, judges, prosecutors and defence counsel gathered together. As Mr. Kennedy said, "The real work of the National Bail Conference cannot be done at meetings in Washington. It must be accomplished by action in the communities you represent. . . . The challenge extends to the entire relationship of the poor man and the courts. Let us today accept that challenge. Let us see to it that for the poor man, the word law does not mean an enemy, a technicality, an obstruction. Let us see to it that law, for all men, means justice".

This challenge is of interest and concern far beyond the confines of the United States. What is also of interest beyond those confines is to see the possibilities within the reach of those who by dedication and effort can beat down injustice within the framework of a free society. For these reasons the International Commission of Jurists is pleased to publish the report of the National Bail Conference, a comparative study by Judge Botein and Mr. Sturz.

Articles for publication on this subject in relation to other countries will be welcomed.

* This conference was sponsored by the Department of Justice of the United States and the Vera Foundation, Inc., and was held in Washington, D.C., May 27-29, 1964.

Spelling in this article has been anglicized - Ed.

INTRODUCTION

These studies were undertaken in the hope that an analysis of the advantages and disadvantages of pre-trial release and detention practices in other countries would help in evaluating our own bail system. We believe that this expectation has been justified by our experience. Let us say, however, that we entertained no illusion of finding a system that could be imported full-blown into the United States to replace the bail system as it now exists in this country, even had we found the best of all possible systems. There are too many and too great variations in the court structures, in the laws affecting the administration of criminal justice, and in the national character and traditions to warrant such an expectation.

Sweden was selected for study because it has no provisions whatsoever for bail in its law or its practice. The accused, after inquiry by prosecutor or court, or both, is either released pending trial or held in detention. Italy and Denmark were chosen because their statutes, while stressing the stark, pre-trial alternatives of liberty or custody, also make provision for bail as an alternative measure; and we believed that it would be productive to examine such a bifocal approach to the pre-trial detention problem. We have ascertained, however, that although there are such statutory provisions for release on bail in the last-mentioned countries, the power is exercised so rarely that we can state unreservedly that in practice Italy and Denmark likewise do not employ a bail system. Another reason for selecting these three countries was because with varying degrees of tenacity and depth, they all maintain inquisitorial procedures unlike the Anglo-American accusatorial system. In each of these countries, functioning within the complex of investigation to determine whether the accused is to be prosecuted, the prosecutor or judge determines also whether he is to be released or detained pending charge and trial.

England was visited because like the United States it follows accusatorial procedures in its administration of criminal justice. England does maintain what is technically a bail system. In practice the personal recognizance of the defendant in which he pledges to pay the Crown a sum of money if he does not appear when required, or in some instances the personal recognizances of the defendant and co-surety, satisfy the bail requirements. In other words, in England security in the form of cash, bonds, real estate equities or surety company bond are not required to be posted in the furnishing of bail. The concept and nature of bail in England, therefore, are radically different from bail as it is generally furnished in the United States. The United States and the Philippines are the only countries in which bail requirements must usually be satisfied by full security or surety company bond.

In each country visited the attitudes reflected in pre-trial detention procedures are fundamentally the same and quite similar to those prevailing in the United States. These apparently universal objectives are to give freedom during the critical period from the initial preferment of charges to final disposition of the case to certain categories of accused. They are (1) persons charged with minor offences and (2) the large number of persons charged with moderately serious crimes who have no criminal records, or no serious criminal records, and who are of previous good character.

These two categories constitute an overwhelming majority of the persons charged with criminal offences in all countries; and in Sweden, Denmark, Italy, and England we found that these persons were in fact usually given their liberty prior to trial, whereas in the United States we too often fail to realize this objective, and many persons in these categories remain behind bars.

Essentially, the reason for this statement is that the previously mentioned solicitude for these types of accused persons in the countries under study finds its solution in their outright release by police, prosecutor and judge pending trial. In the United States, however, this solicitude too often results in the committing magistrates, animated by the best of motives, fixing what they regard as low or nominal bail. Unfortunately large numbers of defendants are unable to furnish bail in such amount or in any amount; and the result is that they are incarcerated for varying periods, some lengthy, while facing charges for which they would be released pending trial in the European countries we visited. When the pre-trial detention decision must be either liberty or custody, there can be no easy accommodation of the judicial conscience by the fixation of so-called low or nominal bail. So, strange as it may seem, many defendants are held in pre-trial custody in the United States who would be released in countries that do not otherwise enjoy our more liberal and enlightened concerns for safeguarding the accused.

Putting it another way, although the judge in the United States fulfils the statutory responsibility of determining whether a defendant should be released on bail and in what amount, too often in practice it is the bail bondsman – a private businessman – who makes the ultimate decision as to whether the accused will in fact be released. It is widely thought that sometimes bondsmen with guarantees from organized crime will not require collateral from hardened criminals charged with the most serious and shocking crimes, but will lay down stringent collateral requirements for persons charged with first and much less serious offences. In this respect we find that in the countries we studied, and we suspect in most countries, the courts strive consciously or unconsciously to detain pending trial persons charged with the most serious types

of crime or those which the community regards as particularly outrageous or horrendous. In the United States the norm for detaining or releasing any accused in most categories of crime is professedly governed by the likelihood whether he will appear for trial. In the countries we visited the authorities were influenced by additional and often what they regard as more weighty factors, such as the previous criminal record of the defendant and the possibility that while at liberty he would commit additional crimes; or the possibility that he would obstruct the prosecution by tampering with its witnesses. There is no doubt that these considerations enter into the bail determinations of many judges in the United States. But even this unsanctioned attitude is often frustrated by the bail process, for dangerous professional criminals who would without hesitation be retained in custody in the four countries we visited are at times released on very high bail in the United States through the favour of bondsmen.

Again, all civilized countries strive to detain children and juveniles in trouble only to the extent necessary for treatment and rehabilitation. Such concern manifests itself in a cautious exercise of detention powers in this area. Perhaps because of this universal solicitude, and the fact that juvenile or children's courts do not hold youths falling within their jurisdiction in bail, there is greater similarity among the countries we studied and the United States in the pre-disposition detention experiences for this age group than in any other grouping of accused persons. There are, as will be indicated, differences in statutory age limits, definitions and disposition provisions for youthful offenders. And of course, there are differences in the effectiveness and efficiencies of youth procedures due more to variations in social service and related resources than to distinctions in the conceptual approaches to youth problems. But to repeat, because of a common absence of the bail requirement for youth in trouble, the pre-disposition detention practices for young persons resemble ours most closely.

The social and political concepts of bail that are held by the Continental countries we visited, however, differ radically from the Anglo-American attitudes. In Sweden, there is total and blunt rejection of the bail process as favouring the rich over the poor. This is not surprising in view of the strong egalitarian tradition in Sweden. In Denmark, however, and somewhat unexpectedly in Italy, we encountered a similar and pervasive abhorrence of bail as an instrument oppressive to the poor but convenient for the rich and well-connected.

This report, however, will not be a panegyric on the fairness and effectiveness of pre-trial detention in the countries we visited. To the contrary, we entertain substantial reservations, particularly as to how fairly these countries deal with persons charged with

crimes regarded as serious by the community. We are persuaded that detention under the inquisitorial system at least holds the potential for harsher and more unbridled treatment of accused persons and suspects than is possible under the Anglo-American system.

Nevertheless we return from our studies abroad strengthened in our conviction that bail procedures in the United States are not as effective or as fair as a democratic nation could wish. However faithful to the democratic ideal may have been the original weaving of the bail process into the fabric of the American system of justice, it cannot be gainsaid that defendants of limited means are often detained simply because bail bondsmen do not consider them good financial risks.

In the following pages we present the body of our report. First, however, we would like to acknowledge the support of the Ford Foundation and the Institute of International Education for giving us the benefit of their expert guidance and in making available funds for travel and study. We also wish to express our appreciation to the Department of Justice and the Department of State¹ for the invaluable assistance given us in the countries we visited.

SWEDEN AND DENMARK

We looked into pre-trial practices in the strongly democratic countries of Sweden and Denmark, being particularly interested in those of Sweden, which has no bail system either by law or in practice. While the applicable statutes and court structures of these two countries differ, their pre-trial practices are in fact remarkably similar. Although Denmark does have a bail system by statute, she does not have one in practice. The animating philosophy underlying the administration of criminal justice in the two nations is marked by a deep concern for the fair treatment of citizens accused of crimes, with marked emphasis on not favouring the rich over the poor. Modes of pre-trial release and detention, as we expected, reflect the social consciousness which exists at every level in Sweden and Denmark. We observed first hand and in some depth the procedures in Sweden relevant to our study; and explored further in Denmark those areas in which pre-trial practices of the two countries differed.

Court Structure

Sweden's three-tiered court structure is comprised of (1) the general lower courts - district courts for rural areas and smaller

¹ Of the United States - Ed.

municipal areas, and town courts for larger urban areas, (2) the intermediate courts of appeals, and (3) the Supreme Court. The district and town courts serve as courts of first instance for both civil and criminal cases; their original jurisdiction in criminal cases extends from the most trivial offence to the most serious crime. Trials for trivial offences are held before a single professional or career judge. In the more serious criminal cases, the career judge is joined by a panel of lay judges – not less than seven, not more than nine. Lesser, but more than trivial, offences may be tried by a professional judge sitting with a panel of three lay judges.

The lay judges and the career judge deliberate together. Because the lay judges must vote as a body, the professional judge generally has the controlling voice in determining the outcome. The opinion of the laymen prevails over the contrary vote of the professional judge only when all panel members, in the case of a three lay judge panel, or at least seven members when a full panel of seven to nine is used, agree upon both the decision and the reasons advanced in its support. In practice, it is rare that the career judge is outvoted. We were informed that lay judges play a more important role in the fixing of sentence than in the adjudication of guilt or innocence.

From the general lower courts there is a virtually unlimited right of appeal to an intermediate appellate court. Appeal to the highest level requires Supreme Court permission. All appellate tribunals have college-trained benches. On appeal from a court of first instance, a party is generally entitled to review of all aspects of the case. The courts of appeals may hear witnesses and examine tangible evidence; they may redetermine fact questions as well as questions of law. Although examination and re-evaluation of facts may also occur in the Supreme Court, high court review is usually addressed primarily to matters of law.

Representing the Swedish Parliament is the Parliamentary Commissioner for Civil Affairs (Ombudsman), who acts as a sort of watchdog over the entire court system. The Ombudsman can act as a Special Prosecutor and initiate suit against police, prosecution, or court authorities – not necessarily for corruption in office, but often for neglect of duty. He is also authorized to communicate “reminder” opinions directly to an investigated official. These “reminders”, in lieu of criminal prosecutions, sometimes set forth conditions to which the investigated official must adhere in order to avoid prosecution. Compensating an aggrieved private complainant is one example of the conditions the Ombudsman may impose. Within our field of interest the Ombudsman’s responsibility includes the monitoring of seizure, arrest and detention procedures; and high police and court officials informed us that his vigilance exerts a wholesome influence in those areas.

Denmark has two Courts of First Instance, with jurisdiction, as in Sweden, over both civil and criminal cases. Most criminal cases originate in the Lower (District or Municipal) Court. Less serious crimes are heard summarily in these Courts by a career judge; or if they go to trial, are heard by a career judge and two elected lay judges. An accused person can plead to serious crimes in the Lower Court. The other Court of First Instance is the Upper or Jury Court, which tries serious crimes and is composed of three career judges and twelve lay judges. A majority among the career judges and a majority of eight among the lay judges is necessary to convict. This is referred to as the "double guarantee".

An Appellate Court acts on appeals from the Lower Court. Both the Appellate Court and the Supreme Court act on appeals from the Upper or Jury Court.

Although the Danes use the term "Jury Court", the Anglo-American system of trial by jury does not exist either in Denmark or in Sweden. But on a humorous note, we were told that more and more Swedes are coming to believe that they do indeed have the right to a jury trial. This notion has sprung up from weekly television exposure to that internationally known American lawyer, Perry Mason. And in Denmark, where as in Sweden an indigent accused has the right to request a court-appointed attorney by name, one accused person actually asked to be represented by Mr. Mason.

Chronological Progress of Eventual Detention or Release Pending Trial of Persons Suspected of a Crime

Sweden

In Sweden persons may be brought to the police station for questioning by the police for a period up to six hours. If at the end of six hours the police consider the questioned person a "suspect" he may be held for a maximum of six additional hours. Swedish Code of Procedure (*Ratttegångsbalk* (RB)) 24 : 23; 23 : 9. (Note: The Code covers both civil and criminal procedure.) In minor cases for which the penalty is a fine or temporary suspension from office, but not imprisonment, a suspect whose identity and residence in Sweden are known must be released pending trial after the twelve hour preliminary inquiry period. RB 24 : 1(4). Health considerations or those of age may also lead the police to release persons at this time after charging them with a crime. RB 24 : 3. After detaining a suspect twelve hours under its general seizure power, the police must release him or obtain arrest authorization. Normally, jurisdiction passes from the police to the prosecuting authorities at the end of the twelve hour period. However, the relevant statute provides that a decision to arrest at the close of

preliminary inquiry may be made by the police officer in charge of the investigation or by the prosecutor. Arrest is permitted in two situations: (1) when the preliminary inquiry discloses grounds for pre-trial detention, and (2) when full grounds for pre-trial detention have not been uncovered, but custody pending further inquiry is found to be of particular importance. RB 24 : 5.

After arrest of a suspect, if prolonged detention is sought, the prosecutor must present a pre-trial detention petition to the court of first instance. In no case may this petition be filed later than five days after the prosecutor's or police investigator's arrest decision. RB 24 : 12. Once the petition is filed, the court must hold a detention hearing within four days, unless trial on the criminal charge is to take place within a week after the filing of the petition. RB 25 : 13.

Although a suspect can therefore be seized and detained for nine to ten days before receiving his day in court, such delay is a rarity. At the detention trial (presided over by one career judge) the court determines whether legal grounds exist for continued detention. If legal grounds do exist the court hears the prosecutor's request for continued detention pending trial as well as the arguments of defence counsel and the suspect himself.

Circumstances under which a person may or must be committed pending trial are specified by statute. When there is "probable cause" to suspect a person of a crime punishable by penal servitude (imprisonment with obligatory labour), pre-trial incarceration may be ordered "if there is reason to fear that the suspect may flee, dispose of evidence, prevent investigation or pursue his criminality". RB 24 : 1(1). A non-resident suspected of a lesser crime than the foregoing but one which may lead to a prison sentence, may be detained, if there is reason to believe that he may flee. RB 24 : 1(2). If a crime carries a minimum penalty of two years imprisonment, the person shall be detained, "unless it is clear that no reason exists [for this precaution]". RB 24 : 1-3. Swedish authorities estimate that less than 1 % of persons released pending trial fail to return to court when required.

At his pre-trial detention hearing the suspect has the right (though rarely exercised) of calling character witnesses to speak for his pre-trial release. If the court orders detention, as it will in over 95 per cent of cases in which the police so recommend, the judge must state the offence of which the person is accused and indicate the grounds for pre-trial detention. RB: 14-16. The judge must also set a date for the detained person's formal trial. Usually this is within two weeks. If the trial is not held within this two week period, normally another pre-trial detention hearing must be held unless waived by the suspect. RB 24 : 18. If the prosecution has not been initiated within the time limit fixed by the court, and the

prosecutor has not requested an extension before expiration of that period, then the court must release the detained person. RB 24 : 19. The suspect may enter a guilty plea at the detention hearing. Admission of guilt, however, does not close the case; it must be tried by the court on the theory that admissions need corroboration.

An August 1963 Report prepared by a Special Commission on the Police reveals that in Sweden from 1959 to 1962 approximately 14,000 persons were arrested, i.e., detained upon charge by the investigating police officer or prosecutor. Detention petitions were filed by the prosecutor in about 45 % (6,000) of these cases. Over 80 % (5,000) of the filed petitions were approved by the court. The Report points out that many filed petitions were rendered moot to court consideration, especially those involving youthful suspects, when responsibility for the case was assumed by social welfare authorities.

Of all persons detained at Stockholm's arrest division for criminal investigation in 1962, 57 % were released within 24 hours. The remaining 43 % spent an average of 4 to 5 days in jail awaiting formal detention hearings. The average length of pre-trial incarceration in Stockholm, following court commitment, in 1962 was 14 days - or a total detention time of 19 days. This detention period is much shorter than those that prevail in many English and American communities.

Like the judge, the prosecutor may impose various forms of provisional liberty, such as requiring the suspect to report to the police at stipulated intervals, limiting him to Stockholm or Sweden, etc. Generally, however, accused persons are released pending trial solely on their promise to return to court.

The prosecutor's quasi-judicial power to control release of accused persons is troublesome to those trained in Anglo-American law. In our accusatory system the prosecutor, theoretically representing the people, and theoretically responsible for developing evidence both favourable and unfavourable to the accused, is in fact dominated largely by pressures to win convictions. Thus prosecution and defence of criminal cases usually take on the flavour of adversary proceedings. Untrammelled power for United States police and prosecutor to control the liberty or detention question for nine to ten days would be intolerable. However, the Swedish people do not appear to find the exercise of this power in the hands of the police and prosecutor intolerable. Perhaps this is because the Swedish system combines the inquisitional and accusatorial philosophy with ingrained and traditional acceptance of safeguards for an accused. Defence counsel are assured that the police and prosecutor will develop evidence both favourable and unfavourable to the suspect and that the police will provide background data in order to facilitate his release pending trial. At the request of

defence counsel, or by court order, police will seek new evidence, possibly favourable to the defence, locate witnesses, etc. Experts available to the police will also be made available to the defence.

Furthermore there is no "surprise" in the Swedish trial system. The prosecutor may not present an indictment in court until the person concerned and his counsel have had an opportunity to acquaint themselves with the course of the preliminary investigation. To present an indictment, the prosecutor submits to the court a signed request that the accused be sent a Notice of Proceedings. The request must identify the accused; the injured party, if any; the offence in question, including the time and place of commission and other identifying circumstances, as well as the relevant legal provisions; the evidence the prosecutor intends to present and the purpose of such evidence and the competence of the court unless this is evident from other information given. DB 45 : 4. If the court agrees to issue a Note of Proceedings, this request, and the documentation attached thereto by the prosecutor, must be transmitted to the accused. In proceedings before the lower courts, the judge may empower the prosecutor to draw up the Notice of Proceedings. In that case, the indictment is considered as having been brought on the day the Notice was delivered to the accused. RB 45 : 1.

Withal, under the Swedish system it would appear that conceivably the prosecutor can abuse his power by using the decision to release or to detain coercively to obtain evidence or confessions. This potential for abuse is enhanced by the fact that defence counsel may be present when the suspect is interrogated only "if this does not endanger the investigation." RB 23 : 10.

On the other hand, if a detained suspect cannot retain a lawyer privately, he may request the court to assign him one, which the court will do, generally within a period of two days after seizure. This does not automatically mean that the suspect will confer at once with his court-appointed attorney; it is more likely that the first time a detained person sees assigned counsel will be at the detention hearing or about five days after his arrest. While the law does not guarantee right to counsel at all pre-trial stages, counsel is generally present if requested by the suspect. The court may assign counsel to a rich defendant. In fact, most private lawyers engaged in criminal trials, although selected by the accused, are designated by the court to act in the capacity of public defender. The state is responsible for the attorney's fee in the event of an acquittal whether the defendant is rich or poor. If the defendant is found guilty the state bears his attorney's cost only if he is poor, i.e., the beneficiary of "free legal proceedings".

There is no large segment of the bar which specializes largely or exclusively in the practice of criminal law. While under Swedish

law a party to a lawsuit may represent himself or be represented by a layman, in practice litigation of any importance is usually handled by college trained lawyers.

Denmark

As we have said earlier, the Swedish and Danish pre-trial systems are quite similar. Perhaps one of the major differences lies in the extensive use of summonses with which the Danish police originate criminal cases. Danish authorities estimate that about two-thirds of all prosecutions originate with a summons. In these cases, it is not uncommon for a person to be charged, to be indicted, to stand trial, and, if found guilty, to await sentencing, all while at liberty. It may happen that a person will run the gamut of these procedures and then be sentenced to prison. Charges such as simple theft, burglary, embezzlement, simple assault, and forgery may originate with the summons. The summons may be by telephone or letter. Generally first offenders will not be seized or spend any time in custody prior to trial unless charged with a very serious crime. Danish authorities feel that seizure is "very upsetting" to persons accused of a crime for the first time. The Danes are concerned with keeping the accused person's record free from the stigma of arrest, as well as giving him an opportunity to keep his job and life intact.

Criteria governing pre-trial release or detention follow almost precisely those of Sweden. Persons charged with homicide, forcible rape, intentional manslaughter, serious cases of forgery and counterfeiting are rarely released pending trial. As in Sweden, in Denmark drunken driving is regarded as a most serious crime and persons so accused are rarely released. Those charged with moderately serious crimes, whose prior records are good, are invariably released pending trial. Those charged with moderately serious crimes who have lengthy or serious past criminal records, may or may not be released depending upon the discretion of the court. We learned that frequently judges invoke a three-day detention as a cooling-off period, especially in cases of minor assault involving husband and wife.

The law provides for bail but it is never used. The Danes feel that a financial tie to liberty "improperly favours the rich". Persons are either released outright pending trial or held in detention. The law provides for various kinds of provisional liberty but these devices are not used.

On all charges, the police have discretion to release suspects or accused persons prior to a detention hearing. In 1961, 6,600 persons were seized by the police; of these 5,000 were released - generally covering those charged with misdemeanours - within 24 hours. If the police detain a person, it is rare for the court, composed

of one career judge, to release him at the detention hearing. As a result of 1,500 detention hearings held in Copenhagen in 1961, only 50 persons were released. In all Denmark in 1961 there were 3,200 detention hearings and only 200 persons were released. We were told that judges who at the detention hearings have before them the suspect's dossier consisting of personal history and background, prepared by the police, rarely release persons over the objection of police or prosecutor because the police, the prosecutor and the court employ the same criteria in determining release or detention. The estimate of the average pre-trial detention period that we received is three to four weeks. Difficult cases, ones that require prolonged preparation, can of course take months.

There is no right to defence counsel at the moment of seizure. Counsel will represent an accused suspect at the detention hearing, which is not later than three days after arrest. A public defence counsel is in court every day and regularly assigned to cases. A defendant can plead guilty at his detention trial.

The Handling of Young Persons

The minimum age for criminal responsibility in both Sweden and Denmark is 15. There are no special courts in either country to adjudicate youthful offenders. However, judges have broad areas of discretion in imposing or withholding criminal sanctions on those between the ages of 15 and 18. In Sweden it was our understanding that whenever possible those in the 15 to 18 year old age group would be released pending trial and placed under the supervision of the Children's Welfare Board. The prosecutor may also defer prosecution and assign the youth to the Children's Welfare Board for appropriate supervision. There are special youth preferences for persons 15 to 18 and 18 to 21 and these age groups are segregated at all stages from older accused or suspected persons. The Children's Welfare Board is composed of laymen elected by the community. It is the general rule that if a young person is seized by the police during the day, the youth will be immediately turned over to a Children's Welfare Board social worker whose offices are at the central police headquarters. Jointly the prosecutor and the Welfare Board will make the decision as to detention and prosecution. If a young person is seized at night, he may be placed in detention until the next morning, at which time the Welfare Board will enter the case. The Welfare Board has institutions throughout Sweden where young persons may be detained up to four weeks awaiting court action.

In Denmark, the lower court judge has discretion as to whether to impose a criminal sentence in the 15 to 18 year age group. If a person in this age group has a serious prior record, he will be imprisoned in the Danish equivalent of the British Borstal system.

The Swedish Day-Fine System

Although not directly related to the question of pre-trial release or detention we took the time to inquire in some detail into the system of imposing day-fines, since it does reflect the Swedish philosophy of criminal law sanctions. The purpose of the day-fine system is to ensure equal treatment – in this case relating to punishment – of rich and poor. Day-fines also serve the purpose of markedly reducing the prison population.

The day-fine system works like this. The court makes two determinations in passing sentence: it decides the *number* of day-fines required, ranging from 1 to 120 days and the *amount* of day-fines, ranging from 1-300 crowns per day (20c-\$60). As of January 1, 1965, the range will be 2-500 crowns per day (40c-\$100). In deciding on the number of day-fines, the court considers the nature of the offence and the offender. The amount of the fine is independent of the seriousness of the offence and must be correlated exclusively with the income of the convicted, his assets, the number of his dependents, and his general financial status. It is the judge's responsibility to determine what amount per day the fined person can raise, short of becoming financially distressed and punishing his family. The judge ascertains a person's financial status by checking with the tax authorities and by police report. It has been estimated that as a result of the introduction of this measure there has been a 50 % drop in the number of alternative prison terms served in Sweden.

The day-fines can be paid in instalments at monthly intervals. The fined person may have up to four months to begin paying the State. Usually the obligation of the fine must be paid within one year but up to two years may be permitted. If the fined person falls behind the State can garnish his income or employ attachments. If the fine is not paid the person can be sent to prison. We were told that this outcome rarely eventuates.

ENGLAND

Three nation-wide courts of criminal jurisdiction function in England: Magistrates' Court, Quarter Sessions Court, and Court of Assizes. There are special courts where serious charges are tried in certain large centres of population, such as the Central Criminal Court (Old Bailey) in London and the Crown Courts of Manchester and Liverpool.

As in the United States, bail decisions affecting most persons charged with crime are made initially in the so-called lower courts – by Magistrates. (We shall not clutter this report by distinguishing between Stipendiary Magistrates who are lawyers and Lay Magis-

trates, i.e., Justices of the Peace, who in bail procedures, at least, exercise essentially similar jurisdiction.) But a Magistrates' Court in England – whether composed of one legally trained judge in some urban areas or two or more Justices of the Peace – possesses plenary jurisdiction over much more serious crimes than its American counterpart. Therefore, some discussion of the summary powers of English Magistrates is indicated to help define their role in bail and custody procedures.

The Magistrates' Court in both countries are quite similar in that they exercise summary jurisdiction over minor offences. And similarly, when a defendant must be or elects to be tried before a jury in a higher court, they conduct preliminary hearings to determine whether the prosecution has shown sufficient cause to warrant holding the defendant for trial. In England, summary offences which call for a penalty not exceeding three months imprisonment must be tried summarily in the Magistrates' Court. Such cases include drunk and disorderly conduct, minor traffic violations, violations of the administrative code, simple assaults, etc. In the great proportion of these cases accused persons are released by the police prior to their first court appearance or are held overnight to appear the next morning before the Magistrate, at which time the case is usually disposed of. Generally, the arresting officer will serve as prosecutor for minor charges. The police are impressively restrained and knowledgeable in the conduct of trials.

Summary offences which may carry a penalty exceeding three months in prison – but not more than six months – can either be tried summarily in the Magistrates' Court or the defendant can demand trial on indictment by a jury in Quarter Sessions Court. Offences falling within this category include such infractions as animal theft, forgery of licenses and certificates, dangerous driving, driving while intoxicated, etc. If the case is tried summarily, either the arresting officer or a Solicitor or Barrister will act as prosecutor. Even though the accused is without funds, counsel will probably not be furnished him in a Magistrates' Court, unless he requests such representation. If a defendant asks for legal aid and does not possess the means to hire counsel, the Court will generally assign a Solicitor to defend him – particularly if he is charged with an offence involving imprisonment. If the case is tried by a jury in a Quarter Sessions Court, a Solicitor attached to the police organization will present the Crown's evidence at a preliminary hearing in the Magistrates' Court and a Barrister in private practice will be retained by the police Solicitor to prosecute the trial itself in the name of the Crown. Often, in these cases, an accused will not exercise his right to a jury trial. It is rare for a defendant, in crimes of this category, to be held more than one night in detention pending summary disposition in the Magistrates' Court.

A third and more serious category of crimes are certain so-called indictable offences which may be tried by jury in a Quarter Sessions Court or summarily in a Magistrates' Court with the consent of the accused. These cases include fraud, embezzlement, petty larceny, receiving stolen goods, attempted suicide, obscenity, minor forgery, some assaults, etc. It should be noted that many of these charges constitute felonies in the United States and are usually tried by a jury and not summarily by Magistrates. "A person summarily convicted of an indictable offence... shall be liable for a term not exceeding six months or a fine not exceeding one hundred pounds or both." (Magistrates Courts Act, 1952, s. 19.) If more than one charge is prosecuted the Magistrate can impose an aggregate of twelve months imprisonment. If a Magistrate believes punishment in excess of his power is required, or if the offender is between 15 and 21 years of age and the Magistrate considers Borstal training appropriate, he may after conviction commit the defendant to Quarter Sessions for sentence. Generally, the Police Solicitor will conduct the prosecution if a case in this category is tried summarily, while a Barrister must prosecute if the case is tried with a jury. Again, the defendant will often waive his right to a jury trial. If, however, the case does go to jury trial, delay ensues because of the committal process; and the question of pre-trial liberty or detention becomes important - assuming of course that the police have not granted the accused person his release prior to his first court appearance.

The fourth and most serious category of crimes are indictments for crimes such as murder, treason, manslaughter, armed robbery, perjury, conspiracy, criminal libel, forgery of official documents, burglary, grave sexual offences, etc. As we have said these cases - as do all cases - originate in a Magistrates' Court where the Police Solicitor or, even a Barrister (should the case be especially difficult or important) will conduct the preliminary hearing and be heard on the question of bail or jail. If the defendant is indigent and is charged with a capital offence he must be assigned counsel at the time of trial. In the prosecution of all other crimes appointment of counsel is at the discretion of the court, but counsel is usually provided for defendants charged with the serious crimes in this fourth category.

In cases of a serious nature the police are not in practice authorized to release an accused prior to court appearance. Also, a person charged with treason shall not be admitted to bail except by order of a judge of the High Court or the Secretary of State.² In all other cases the question whether to admit to bail or to remand in custody lies in the discretion of the committing Magistrate, who

² I.e., the Home Secretary - Ed.

in over 95 % of the cases follows the recommendation of the police and also consults them about the solvency of the sureties. High bail is usually set in fraud cases involving large sums of money, presumably because the accused in such cases are less securely rooted in the community than most defendants; and the sureties in this type of case, whose role in the bail process is described further on, are scrutinized especially closely for financial responsibility. We were told by a judge that in severe cases of violence the defendants simply do not get bail.

It is customary for the police to make representations to the court as to the advisability and amount of bail. Here again, as in the above-described prosecution of summary trials, they fulfil a function usually performed by the district attorney in the United States. The English have no local level prosecuting offices, manned full-time by public officials; and therefore many duties we associate with district attorneys devolve upon the police. About 60 % of all persons charged with indictable offences who are remanded for trial are released on bail pending trial; 40 % are detained. Pre-trial detention in cases held for Quarter Sessions and Assizes averages four weeks in large urban centres, where the courts function continuously, and six to seven weeks in less populated areas where Assizes may be held only three or four times a year. These pre-trial detention periods approximate roughly the detention intervals in New York City and many other jurisdictions in the United States. As in most countries, England usually affords an earlier trial to persons held in custody than to those released on bail.

A word about juveniles charged with offences. Children of the age of eight years or over³ may be accused and convicted of crime, and are not shielded by the device of an adjudication of juvenile delinquency. Special sittings of Magistrates to deal with offenders under 17 years of age are held in "Juvenile Courts." These courts are governed by the same solicitude for youth in trouble that animates United States Juvenile Courts. They sit in a different place or on a different day from the place or day designated for the hearings of charges against adults and the general public is excluded.

Unlike the procedure in the United States, we shall see that the bail process is often started in the police station. Juveniles charged with offences are generally released by the police or Magistrate, unless the crime is homicide, or very serious in nature; or unless the police believe it is not in the juvenile's best interest to be released on bail.

³ The age was raised to ten years by the Children and Young Persons Act, 1963 - Ed.

At this point some statistics may help in appreciating the role of bail in the administration of criminal justice. About 200,000 indictable offences are prosecuted each year in England, of which more than 80 % are disposed of summarily by Magistrates, and the remainder by Quarter Sessions, Assizes and the special metropolitan courts. About 1,000,000 non-indictable offences are brought to Magistrates' Court each year, of which approximately 700,000 are motoring offences. Three-quarters of the persons committed for trial plead guilty – a lower average than obtains in most jurisdictions in the United States. Some idea of the shrewdness with which bail determinations are made may be gleaned from a recent debate in the House of Commons. It was revealed that in 1962 35,244 untried persons were received in prisons because bail was refused or not provided by the accused. Subsequently, 1,265 were found not guilty – only about 3 % of the number held in custody.

Bail as it is furnished in England is quite different from bail in this country.⁴ Generally release is conditioned upon the accused, or the accused and one or two sureties, furnishing a recognizance under which they agree to forfeit a stated sum – the amount in which bail is fixed – if the accused fails to appear subsequently in court. As explained by a Police Solicitor, the agreement upon the stated sum of money which may become forfeit “legitimizes” what is in effect a contract between the accused and the Crown. There is no requirement, in fact it is forbidden, to post cash or security of any kind with the court – another departure from American practice. If the police should report and the court agrees that a certain surety is unacceptable, either because of his character or financial status, the accused is afforded the opportunity of producing another surety. A defendant may not, by decisional law, agree to pay or indemnify his surety, and bail may not be posted by insurance companies. Therefore, the furnishing of bonds for profit or as a business is illegal and there are no professional bondsmen in England. One important purpose is to ensure the personal involvement of the surety in accepting responsibility for the defendant's appearance in court.

In accepting a recognizance from a surety the court requires him to appear before the court, where he is interrogated as to his means. The court impresses upon the surety that he will be liable for the amount of the recognizance if his principal does not appear, and is most careful to make certain that the surety appreciates the extent of the responsibility he is undertaking. In the rare instances where recognizances are forfeited, the surety is often not required to pay the full amount pledged.

In cases where bail has been denied, an appeal may be taken

⁴ I.e., the United States – Ed.

to a Judge of the High Court. This appeal is most informal, particularly by our American experience, and availed of with some frequency. A form is filled out by the accused, containing relevant material such as the police report and evidence and brought to the Judge in chambers by the accused's Solicitor or the Official Solicitor if the accused cannot afford a lawyer. A High Court Judge informed us he frequently processed about six a day; but only about 2 % of such applications are granted. Bail is seldom permitted while a defendant is awaiting sentence or his conviction is being appealed.

In England, the principal criterion governing release on bail is whether the accused will appear in court when required. In making this determination the following factors are weighed: nature of the offence; past criminal record; weight of evidence; range of possible sentence; trustworthiness of sureties. There is also some decisional law encouraging the practice of detaining a person not because he may fail to appear but rather to prevent his committing another crime while at liberty, even though he is presumed innocent of the first crime; or because of apprehension that, if released, the accused will tamper with the prosecution's witness (*R. v. Phillips*, (1947), 111 J.P. 333, C.C.A.). Many Barristers and Solicitors express dissatisfaction with these criteria. Nor is it uncommon for the police to request that the accused be detained if further inquiries are to be made, further charges against the accused are to be levied or further related arrests are contemplated. We were informed, too, that on occasion bail at the arrest stage may be withheld coercively by the police; that is, to induce "co-operation" – sometimes in the form of a confession.

In many countries these latter factors are legally and openly considered in deciding whether to detain or release an accused before trial. In the United States, where they are unacknowledged and unauthorized considerations, judges, prosecutors and police are nevertheless often influenced by them.

Since, as stated, English judges follow the recommendation of the police in over 95 % of bail determinations, it is important to discuss police procedures in some detail as they relate to the bail decision.

A Magistrate who issues a warrant for arrest may endorse it with a stipulation that bail be granted forthwith by the police upon such terms as he specifies. If the warrant is not endorsed, the accused must be brought before a magistrate as soon as possible. As in the United States, however, the great majority of criminal prosecutions originate by arrest without a warrant.

Magistrates' Courts Act, 1952, s. 38, reads:

On a person's being taken into custody for an offence without a warrant, a police officer not below the rank of inspector, or the police officer in

charge of the police station to which the person is brought, may, and, if it will not be practicable to bring him before a magistrates' court within twenty-four hours after his being taken into custody shall, inquire into the case and, unless the offence appears to the officer to be a serious one, release him on his entering into a recognizance, with or without sureties, for a reasonable amount, conditioned for his appearance before a magistrates' court at the time and place named in the recognizance.

When the officer in charge decides the offence is not serious and release is indicated he will say to an accused person: "We are going to release you in your own recognizance of (blank) pounds to attend court - and if you fail to appear in court you will be liable to forfeit some or all of that (blank) pounds." In cases punishable by fine the amount of bail does not exceed the maximum possible penalty. Before releasing an accused the police will at the least verify his residence. If the bail amount is less than fifty pounds the police generally take the word of the accused as to his having sufficient funds to meet the forfeiture demand. Only rarely do the police set bail higher than the sum of fifty pounds. When bail is set by the court it is generally a fraction of the amount fixed on similar charges in the United States. A Home Office study of the higher courts, above the Magistrates' Court level, discloses, interestingly enough, that 37 % of defendants released on bail had one to five convictions, and 13 % had six or more. A 1960 Home Office Research Unit Report entitled "Time Spent Awaiting Trial" reveals that in only 1 % of cases in which a bail amount had been set were persons detained pending trial because of inability to find sureties acceptable to the police or to the court.

In practice, however, there appears to be little danger of forfeiture despite the fact that the recognizances are unsecured and relatively low in amount. In fact, so few defendants fail to appear in court when required that "no show" or forfeiture statistics are not even kept by the courts and the incidence of forfeitures is so minimal that the Home Office keeps no record of them, despite its tradition of detailed, comprehensive crime statistics. The Chief Magistrate of London informed us that in his long experience not more than four defendants had failed to appear when required. Several factors probably contribute to this result, such as a high degree of respect for those who administer the criminal process and difficulty in leaving the country. Also, accused persons considered dangerous and likely to flee are detained outright; and generally, those with shallow roots in the community, with poor employment records and without dependents are likewise detained awaiting trial.

We believe another reason there are so few forfeitures of unsecured recognizances as compared to bail forfeitures in the United States is that sentences and punishments are milder in England. The offender does not apprehend the stiffer sentences

meted out in the United States. We witnessed a case in a Magistrates' Court in which a young man just released from prison pleaded guilty to attempting to take and drive away a motorcar. This is a special statutory offence, separate and distinct from larceny. He was sentenced to three months imprisonment; in the United States his sentence would probably have ranged from one to five years imprisonment for a similar offence. We observed cases in which defendants found guilty of breaking and entering, with records of several convictions of like crimes, were sentenced to six months imprisonment. In the United States they would generally have drawn much more severe sentences.

Also, fines are imposed in many instances when prison sentences would be imposed, or at the least suspended, in the United States. In 1961, according to the Home Office Report on Criminal Statistics in England and Wales, 54.4 % of all persons aged 17 and under 21 found guilty of indictable offences by Magistrates were punished only by imposition of fines, only 3.9 % were sentenced to imprisonment, and 2.8 % committed to Quarter Sessions for sentence. In the 21 or over age group Magistrates fined 58.8 %, imprisoned 15.3 % and committed 3.1 % to Quarter Sessions for sentence.

In the higher courts, where the most serious crimes are prosecuted, 9.9 % of the 17 to 21 age group were fined in 1961, 11.4 % imprisoned, 27.9 % remanded for Borstal training, and 36.2 % placed on probation. In the over 21 age group, the higher courts imprisoned 55.4 %, fined 16.8 % and placed 14.8 % on probation.

In the cases of persons found guilty of nonindictable offences, 95.2 % were fined and only 1 % imprisoned. Judges generally afford convicted persons a month or longer to pay their fines – a practice quite different from that generally followed in the United States, where a person who cannot pay a fine is usually put behind bars at once.

Conditional Liberty

Bail or recognizance – the terms are used interchangeably – is sometimes granted subject to certain conditions. These include surrender of a passport, daily or weekly reports to a police station, residence in a particular town or house, the promise to remain at home by day or night, or both (virtually house arrest). In one extreme case the accused was permitted bail on condition that he stay at home, communicate with no one, and consent to have his telephone wires cut. Conditional liberty in England is intended to lessen the accused's opportunity to commit further crimes as well as to deter flight.

Use of Summons

In metropolitan areas the summons is seldom used in police prosecutions in cases other than minor traffic offences. Occasionally an exception is made when an offence such as minor assault or petty larceny comes to light – considerably after the crime is alleged to have been committed. When however the prosecutions are instituted by Government departments, such as the Inland Revenue for tax evasion or the Board of Trade for breaches of the requirements of corporation law, the proceedings are almost inevitably commenced by summons even where they involve substantial amounts of money or where the penalties may be severe. Apart from traffic offences and a few violations of the administrative code metropolitan police are directed to arrest whenever they have the power to do so. It is our understanding that the summons is used more extensively in rural areas for two reasons: courts do not sit continuously and the accused is generally quite familiar to the police.

Conclusion

There is no doubt that release on recognizances furnished by defendants and sureties functions much better in England than does the bail system in the United States. The weighting of pre-trial release in favour of rich as compared with poor is minimized by the English procedure. In England, judge and police look to the factors that experience has proven indicate a defendant can be released with reasonable assurance that he will appear for trial. He and his family do not then first have to face the problem, often insurmountable and often impoverishing, of raising collateral and the surety bond premium. And the halls of justice are rendered no less pure by the absence of professional bondsmen.

Although there is little doubt that English bail procedures as they operate in England are healthier, fairer and more democratic than ours, this does not mean that they can be imported *in toto* to the United States. There are differences of geography, tradition, national temperament and the climate of criminal justice which give one pause. It is clear, however, that we can learn and probably adapt within our administration of the criminal law a good deal of the English system of bail. But each aspect will have to be studied in the light of our own experience and that of other countries, and perhaps tested separately and cautiously on an experimental basis in the United States.

ITALY

Persons charged with crimes are tried in three courts: (1) the Pretura or lower court, which deals with relatively minor offences; (2) the Tribunal, which deals with moderately serious crimes; (3)

the Court of Assizes, a special section of the Tribunal, which has jurisdiction over the most serious crimes. From each of these courts an appeal as of right lies to a higher court on both questions of fact and questions of law. Subsequently, by constitutional mandate, as of right a review of issues of law may be carried to the Supreme Court. Any provisional order or decree affecting personal liberty may be brought to the Supreme Court for review. In 1960, some 50,000 petitions for review were brought before the Supreme Court in criminal matters.

In all three courts of original criminal jurisdiction the power to arrest or detain a person pending trial hinges primarily on the term of punishment that can be meted out for the crime charged. Also, we shall note that this paper will be preoccupied largely with pre-trial detention statutes and practices as they affect persons suspected of or charged with the moderately serious crimes falling within the jurisdiction of the Tribunal; it is usually in those cases that prosecutors and judges will be called upon to exercise discretion as to pre-trial release or detention.

The Pretura

This Court has jurisdiction over crimes with penalties ranging from fines up to three years imprisonment. (If a crime calling for three years imprisonment is aggravated (*infra*), the punishment may be increased and still fall within the jurisdiction of the Pretura.) In the large proportion of cases, accused persons charged with crimes under the jurisdiction of the Pretura are "invited" by the police to respond to a charge. Formal arrest does not usually take place, although what might be termed a form of "seizure" of the person may; in the overwhelming proportion of the above-described cases there is no pre-trial detention at all.

Should an accused be detained in connection with a case pending in the Pretura in excess of thirty days and a decree ordering him to trial not be issued, the accused must be freed. In practice, however, the trial is usually held within this thirty day period. (Article 272 of the Code of Penal Procedure.) Generally, since detention is discretionary, (art. 277), only an accused with a "tendency to crime" or labelled a "professional" will be detained.

It is interesting to note that in certain cases, even if apprehended in the commission of a crime *in flagrante delicto*, the offender may not be arrested by a policeman or by a private person when the crime being perpetrated would fall within the jurisdiction of the Pretura. What would seem at this juncture to be a paralysis of police power is remedied by the fact that while the offence itself may not justify arrest, the refusal to accept the "invitation" to proceed to the police station is itself an offence for which the suspect

may be seized or arrested. Police arrest is to be distinguished from detention pursuant to a formal warrant of seizure issued by a court. Persons subject to police arrest must be released within 48 hours or alternatively placed at the disposition of the District Attorney. The police may request authorization from the District Attorney to continue to hold a person in police arrest up to a maximum of 7 days in cases requiring extensive preliminary investigation. However, in most cases falling within the jurisdiction of the Pretura, police arrest usually does not occur and, if it does, it lasts for only a few hours.

Cases in the Pretura, which it will be recalled are in the least serious categories of crime, are tried by one judge. This judge also functions in the dual official capacity of prosecutor in developing preliminarily the facts of the case – a dual role somewhat difficult for votaries of an accusatorial system such as prevails in the United States to comprehend. It is the prosecutor-judge who alone makes the determination whether the accused is released or detained pending trial. Since the prosecutor becomes the judge who hears the charges which he himself has instituted and will decide them upon trial, a private attorney picked at random from among those lawyers who happen at the moment to be in the Pretura, is chosen to represent the people's interest in the case. In Rome the prosecutor-judge of the Pretura is responsible to the District Attorney located in the city.

Since the prosecutor combines the office of judge in the Pretura he may dismiss charges prior to trial. In the higher courts the prosecutor is independent of the judge and his function more closely resembles that of the prosecuting attorney in the United States. This combination of the prosecution and judicial function – never permitted in our courts – can only be understood in the climate of the career service, upon which both prosecutors and judges embark at the outset of their professional careers. In the United States and England, judges often ascend the bench, after winning their spurs as practising lawyers or by accident of political or other process; this is not the case in Italy. There a young graduate of law school chooses such a career and his advancement thereafter is based upon the capacity and merit he exhibits. Early in his career he will very likely become a prosecutor, and then move on to the judiciary. However, it is not unusual for a judge to forsake the bench, temporarily or permanently, to take a high-ranking position in the prosecution or in other areas of the administration of justice.

Court of Assizes

Pasing over the middle-level Tribunal for the moment, we turn to a brief discussion of pre-trial detention in the Assizes Court

— which entertains the most serious criminal charges. This court consists of 2 career judges and 6 lay judges (private citizens having at least 8 years formal education and appointed for the duration of the court's current session).

Because of the gravity of the crimes falling within the jurisdiction of the Court of Assizes, as reflected in the statutory provisions for lengthy imprisonment, little discretion is vested in police, prosecutor, or even judge in the arrest or formal seizure for pre-trial detention of an accused. We have remarked that, in cases within the jurisdiction of the Pretura, police arrest and pre-trial detention are not the rule. We shall note further on that in alleged crimes which would be prosecuted in the Tribunal the Italian officials concerned may exercise a certain degree of discretion. However, police arrest and subsequent pre-trial detention almost invariably occur in cases which are so serious as to come within the jurisdiction of the Court of Assizes.

Pre-trial detention in cases for the Court of Assizes is based on an *ordine* (an order of seizure issued by the District Attorney) or a *mandato* (a warrant of seizure issued by the Investigating Judge). These warrants serve the same purpose. Under Article 253 of the Code of Penal Procedure a warrant for the seizure of the person must be issued against the accused for charges coming within the scope of that article, the more serious of which would be triable in the Court of Assizes; and the defendants must be kept in pre-trial detention until the case is decided by the Court (for limitations, see *infra* under "General Practices"), unless the charges have been previously dismissed.

According to Article 253 of the Code of Penal Procedure "the warrant of seizure *must* (emphasis supplied) be issued against a person accused of:

1. a crime against the personality of the State, for which the law provides imprisonment of not less than five years in its minimum, or ten years in its maximum or life imprisonment;
2. a crime for which the law provides for imprisonment for a minimum of not less than five years, or a maximum of not more than fifteen years, or life imprisonment;
3. sale or purchase of slaves;
4. clandestine or fraudulent trading of narcotics;
5. forging of currency, wilfully spending, using and introducing forged currency in the State."

The jurisdiction of the Court of Assizes encompasses crimes punishable by imprisonment in excess of 10 years and certain specified crimes, including crimes against the personality of the State (treason, espionage, etc.), wilful homicide, crimes relating to enslavement of persons, aggravated robbery, aggravated extortion, kidnapping, commerce in adulterated foodstuffs, and others.

The Tribunal

The Tribunal consists of 3 career judges. It is in this court, which deals with the moderately serious crimes, that discretion as to pre-trial detention is most often invoked, and in which difficult decisions as to such detention arise. The Tribunal has jurisdiction over crimes not specifically within the jurisdiction of the Court of Assizes or of the Pretura. The rules and standards governing the exercise of discretion by prosecutor and judge are somewhat difficult to comprehend by persons conditioned in the Anglo-American system of criminal law. According to Article 254 of the Code of Penal Procedure:

The warrant of seizure *may* (emphasis supplied) be issued against a person accused of:

1. a non-negligent crime (*delitto non colposo*) for which the law provides imprisonment for not less than three years in its maximum;
2. a non-negligent crime (*delitto non colposo*) for which the law provides imprisonment for a maximum of not less than two years, when the accused has been condemned more than twice for a non-negligent crime (*delitto non colposo*) or was condemned once before for a crime of the same type, or when he is not a resident of the State, or he has taken or is preparing to take flight;
3. a non-negligent crime (*delitto non colposo*) for which the law provides imprisonment for a minimum of not less than two years or for a maximum of not less than five years.

In order to appreciate adequately the functioning of the Tribunal as it relates to pre-trial detention, it is necessary to trace procedures from the moment of police arrest of the suspect or accused – in those situations in which the police exercise their discretion so to restrain a person. Within forty-eight hours (usually sooner) the police either release the suspect or place him at the disposition of the District Attorney. In the latter event, the District Attorney will then make the decision whether to release the accused person, or have him detained for further questioning and investigation by the police, or issue a warrant for his formal seizure and pre-trial detention. In the American system the principal criterion for release is whether the accused will return to court for trial. Italian prosecutors and judges, for various reasons, are not particularly worried about an accused's failure to appear; they are, however, concerned about the accused's behaviour should he be granted his liberty pending trial. As in Sweden and Denmark, specific and enunciated criteria are the severity of the crime charged, the likelihood that the accused would tamper with witnesses or evidence, past criminal record and concomitant consideration that the accused may commit further crimes while at liberty. (In fairness to the Italian, Danish, and Swedish procedures it should be stated that

the same considerations, consciously or unconsciously, govern bail decisions of many judges in the United States and England.)

Italian officials and defence counsel whom we interviewed made it clear that an added factor is influential in determining pre-trial release or detention. This was the matter of the accused's co-operation with or "usefulness" to the prosecution in the preparation of the prosecution's case. It is of course abhorrent to one conditioned in the concepts of Anglo-American law that a person's liberty pending trial should be affected by such considerations. Prosecutors, judges and other public officials with whom we discussed this aspect of the administration of criminal justice were frankly in favour of this practice. One cannot blink the fact that in Italy full confession is probably considered full co-operation by the prosecutor. On the other hand, the harshness of this standard may be mitigated by the calibre of the officials who administer the law, and their career status. There appears to be an enveloping protective philosophy toward the accused which reflects the attitude of the state and its officials towards its citizens. And there is a variant of this concept of "co-operation" that is practised by some prosecutors in the United States. An accused may be rewarded with pre-trial liberty and recommendation for leniency in sentence in exchange for testimony implicating a more important defendant.

Recently in Italy, the Code of Penal Procedure has been subjected to the widespread criticism that it does not implement the libertarian spirit of the post-war democratic constitution. The Italian Parliament has delegated power to the government to enact a new Code of Penal Procedure within the next four years. The basis of the new law will very likely be a model code already drafted under government auspices. The model code reflects a quite different attitude toward the rights of the accused from that prevalent in the present code. For example, it provides that the accused has a right to counsel before he is interrogated by the prosecutor. If he does not have counsel of his own choosing, the prosecutor must appoint counsel for him.

Coming back to the chronological development of seizure and detention procedures: after a case within the jurisdiction of the Tribunal has been turned over to the public prosecutor by the police, the prosecutor must examine the accused as soon as possible and in any event within 3 days after such referral. Should the prosecutor decide to proceed with the case, he has 40 days within which to complete the pre-trial investigation and to request that the case be put on the court's docket. During this 40 day period the prosecutor may hold a person under investigation in pre-trial detention, although we were informed that it is unusual to do so for the maximum period. Failing to ready the case for trial within 40 days, the prosecutor must then refer it for a form of preliminary hearing

to the *Giudice Istruttore* (whom we shall call the Investigating Judge).

The Investigating Judge proceeds in much the same manner as the prosecutor in preparing a case. He interrogates the accused, the victim of the alleged offence, and any witnesses, and calls in experts when necessary. Counsel for the accused is not present when the prosecutor, or the Investigating Judge, interrogates the accused and the witnesses. In fact, during these periods of preparation and interrogation defence counsel may consult with the accused only with the approval of prosecutor or judge. We were informed, however, that in practice this approval is rarely withheld. Defence counsel may discuss informally with the prosecutor or judge the possible pre-trial release of his client during the preliminary inquiry period.

When he has concluded his hearings the Investigating Judge returns the case file to the prosecutor. The latter official studies the file, which contains statements from witnesses, expert testimony, etc. If the prosecutor decides to recommend to the same judge that the accused be indicted, he then recommends either continued detention, or his release pending trial. After receiving the prosecutor's recommendation, the Investigating Judge then makes the file available to defence counsel and generally hears the attorney formally for the first time concerning the accusation(s) against his client. It is at this point that the Investigating Judge finally determines whether the accused is to be indicted or exonerated. This judge cannot serve as one of the three judges at the trial of a defendant whom he has indicted. In determining the issue of further pre-trial detention the judge is governed by the same considerations which animate the prosecutor. For that reason the judge will rarely release a defendant who has been held in detention by the prosecutor during the investigative stages, or override a prosecutor's recommendation for continued detention. At any time after the accused has been formally seized, his counsel may petition for his release either during the time the case is being investigated by the prosecutor or by the Investigating Judge. Even on the first day of the trial counsel may move for his client's release from detention; and sometimes such release is granted.

General Practices

In cases in which the warrant of seizure is optional, pre-trial detention may not exceed six months if the maximum penal sanction for the crime charged is longer than four years; three months if the law provides a shorter period of imprisonment. In cases in which the warrant of seizure is compulsory, pre-trial detention may not exceed two years if the law provides a penalty of detention

not less than twenty years or life imprisonment in its maximum; one year if the law provides for a shorter penalty (art. 272 of the Code of Penal Procedure). Time spent in jail awaiting trial is credited against a subsequent prison sentence. (art. 137 of the Penal Code) We were assured, however, that rarely does a detention period approximate the permissible maximum.

There are extrinsic circumstances which constitute "aggravations" of a crime. We have noted the correlation between initial police arrest of the person, pre-trial detention, and range of sentence. One aggravating circumstance may increase punishment by up to one-third; more aggravating factors may increase punishment by up to three times the statutory maximum. Limitations on this general rule are set forth in Article 66 of the Penal Code. Thus a case in which pre-trial detention would have been discretionary may, if aggravation is present, be propelled into that category of crime whose sentence range makes detention mandatory. This is perhaps of minimal importance in the Tribunal as aggravating circumstances, even without the provision for additional punishment, would ordinarily influence a judge to exercise his discretion in favour of detention anyway. Similarly, aggravation may result in removing a case from the jurisdiction of the Pretura to that of the Tribunal and into a category where pre-trial detention becomes optional. Aggravating circumstances include such factors as the use of cruelty in commission of a crime, abuse of one's authority (police vis-a-vis a person in custody; head of family vis-a-vis wife and children *et cetera*), abuse of hospitality, and inflicting grave financial damage. For example, the crime of negligently causing a fire is punishable by not less than one or more than five years imprisonment. An aggravating circumstance would be that the accused acted although he foresaw the possibility of the disaster. This element of foreseeability would increase the maximum penalty by one-third or to six years eight months and, being more than five years, would permit the issuance of a warrant of seizure.

To round out and summarize a complex picture, an accused who is held before trial must be released if he is not indicted within the statutorily specified period of time. He may be released, except where a warrant of seizure is mandatory, when the judge in his discretion finds that the accused's further detention is not necessary for the development of the case; or that the accused either because of his good past record or because of family or health considerations warrants being released pending trial. The accused's co-operation is an important factor in the judge's exercise of discretion. Even in cases where the issuance of a warrant of seizure is mandatory, the accused must be released if insufficient indicia of guilt appear in the pre-trial record. In addition, the prisoner must be released if the warrant of seizure is vacated where it is shown to have been

either improperly issued or no longer valid because of supervening factors.

When the prisoner is freed under any of the provisions for mandatory release, he is at full liberty. When, however, the release is based on the judge's discretionary powers, the prisoner may either be released outright pending trial or be placed on provisional liberty. The court may require an accused to surrender his passport, to live in a particular town, or to report at specified times to a police station. Provisional liberty may be revoked upon violation of these conditions or upon the accused's preparing to take flight or his actual flight, or upon his committing some other crime.

The use of bail in Italy is severely restricted, since a financial tie to liberty is considered undemocratic. It should be mentioned that a person accused of crime in Italy does not quite enjoy a presumption of innocence, but rather a presumption that he is not guilty. (art. 27 of the Constitution). The Chief Prosecutor of Rome stated that a bail contract between the sovereignty of the state and a private individual is antithetical to Italian legal philosophy. Though provisions for the furnishing of bail exist in the statutes, these provisions are rarely invoked. One judge of the Tribunal declared that he set a bail amount in about one case in every five hundred; and only then when the offence charged arose from a disaster, e.g., a bridge has collapsed, and where the posted bail money represents security for plaintiffs who may intervene in a criminal action to obtain civil relief.

We have stated above that the officials administering criminal justice in Italy are not overly concerned about the possibility of an accused's failure to appear for trial; and in fact, such defaults appear to be negligible. One influential reason may be that in Italy, as we have observed in England, punishment upon conviction for crime is substantially less severe than in the United States. According to Italy's Statistical Guide Book, over 50,000 persons were sentenced to prison in 1960. Of this number only 384 received sentences ranging from five to ten years, 266 over ten years, and 34 persons received life imprisonment. Coupled with the fact that the average offender need not fear a severe sentence is the additional consideration that defendants charged with the gravest categories of crime are just not released pending disposition of their cases.

Before wringing one's hands at the potential for oppressiveness in Italian pre-trial detention procedure, it would be well to study another item from the Statistical Guide Book. About ten percent (23,939) of the persons (234,584) against whom the police lodged formal criminal charges (non-traffic) were arrested in the first instance. The other 90 percent did not suffer even a few hours detention in jail prior to arraignment. Few jurisdictions in the United States, under their bail procedures, can match this record.

Perhaps the newly awakened interest of a few communities in the use of the summons in lieu of arrest for charges of offences and minor crimes may mark a step in the direction of reducing the number of unnecessary arrests.

It may be that some of the criminal charges upon which arrests are not made in Italy are so minor that they would not result in arrests in the United States. Nevertheless, even giving superficial validity to the last-mentioned statistic, it is likely that a smaller percentage of Italian defendants are held in detention awaiting trial than obtains in most communities in the United States, where an unreserved presumption of innocence prevails. Italy's inquisitorial system of administering criminal justice has some harsh overtones, as we have observed. But if despite these features its pre-trial detention practices may in the generality deal more generously with defendants, this could be a weighty argument for a fresh look at our own bail procedures.

Tribunal for Minors

As stated in the introduction, Italy shares the universal concern for the sensitive treatment of youthful offenders. The age of criminal responsibility commences at fourteen. No child under that age may be charged with a crime. There are provisions not dissimilar to those in many other countries, for imposition of safety measures and rehabilitative treatment of offenders under that age limit.

There are also special provisions for the 14-18 age group, even though in the eyes of the law they are responsible for criminal conduct. The Tribunal for Minors is composed of a panel consisting of two career judges and two lay judges experienced in social work. We were impressed by endeavour to procure both career and lay judges imbued with a high degree of social consciousness.

Articles 253 and 254 of the Code of Penal Procedure relating to mandatory and optional detention also relate to juveniles, but are applied more leniently. If detention is indicated, however, there are special observation institutions to which youngster in the 14-18 year group are sent pending adjudication. They are not intermingled with older persons accused of crimes while in detention. Those charged with less serious crimes almost always remain free, unless home conditions require institutionalization for the protection of the youthful offender.

If a youth within this age group is found guilty and sentenced to prison he is confined in a special reformatory for youth. Convictions of young persons found capable of reclamation to useful lives can be "rehabilitated"; that is, the past criminal record will not be shown on police certificates issued for presentation to prospective employers or to public officials authorized to grant pass-

ports, driver's licences, *et cetera*. There is a roster of defence lawyers who have manifested their desire to represent juvenile defendants. Only 150 youths in this age group are serving specific terms of imprisonment. In 1960, over 3,500 were receiving various forms of correctional and rehabilitative treatment adapted to their ages, capability and personalities. Two-thirds of these were in re-education centres, most of them in centres operated by private groups, rather than directly by the State.

There appears to be extensive granting of suspended sentences to persons convicted of minor crimes and crimes of moderate severity – particularly with respect to first offenders. We were informed that a factor in the decision to release a defendant pending trial is the awareness that if convicted he will in all likelihood receive a suspended sentence. It would seem that judges are generous in handing out suspended sentences, at all age levels. Prosecutors and defence attorneys are adept at forecasting the likelihood of a suspended sentence, and in such a case, the defendant may be advised by his counsel that it is unnecessary for him to be present at his trial – a circumstance quite unusual in an American or English criminal court. There is no requirement at law that the defendant appear for trial or any stage of the prosecution following the pre-trial investigation by the prosecutor or the Investigating Judge; and it is not unusual for a trial to be concluded and suspended sentence imposed with only the attorney present.

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JUSTICE AND STATE SECURITY*

Since the main object of this paper is to provide an introduction to the discussion which is to follow on this subject, it should therefore be brief and confine itself to high-lighting the main problems raised by this question as well as the facts behind these problems. Both should be presented objectively and no doubt for this reason the task of making this report was entrusted to a professor.

I shall endeavour, as far as possible, to be objective but I must confess here and now that the desired brevity will not be achieved.

Firstly we should look at the essential facts behind the question which we are to discuss today. (I) Then we should examine the various problems to which this question may give rise (II) and lastly the way in which these problems appear to have been dealt with so far (III).

* * *

Any government, whatever it is, whatever its political form, however it came to power, must tackle a number of imperative tasks:

1. It must *maintain order*. This task for a government is so fundamental that theologians take it into consideration in assessing the legitimate power of the state and the obedience that is its due.

Lawyers are no less concerned with this essential aspect of any government worthy of the name. A government which keeps order is already a *de facto* government and for this reason alone, is worthy of some consideration.

The maintenance of order is carried out by various means, some administrative, some repressive. Repressive methods may not normally be devised *ad hoc*. It is for the legislature to give notice to the citizen of activities which can only be allowed at the expense of public order and which therefore are punishable. The Declaration of Human Rights stated that "the law may forbid only those actions which are against society," that is, against the general interest of the polity in which the law is made. In particular, the private rights of individuals must be adequately respected. Others must not be allowed to violate these rights, whether it be the bodily integrity,

* This paper was read at the 1963 Annual Meeting of *Libre Justice*, the French Section of the International Commission of Jurists, when this question was the subject of a colloquium.

the property or the reputation of the private individual. This is the ordinary function of the criminal law and of repressive justice. The state will employ these means and must do so in order to maintain sufficient order in the community which it governs.

2. Any government must *ensure the proper functioning of the public services* for which it is responsible and which are necessary for the smooth development of social life in the society which it governs. This may be done by various methods, if need be coercive (for example, the requisition of supplies or personnel necessary for the proper functioning of these public services); but here again, the government will have to use criminal sanctions fairly extensively. Indeed, those who impede the proper working of public services cause undeniable harm to the general interest. It is therefore to be expected that such conduct incurs criminal liability.

3. Any government must obviously *ensure the survival of the nation*, its independence and its autonomy as a nation, and therefore must use all lawful means against those whose activities could bring about the extinction of the nation, its annexation to a foreign country or its enslavement. Patriotism has always been a virtue respected and carefully nurtured by governments to help them in their task. Several methods are open to governments to safeguard the nation. International agreements and good relations with neighbouring countries, military defence to repel attack, armed forces, supplies, armaments; and laws which are sufficiently effective in time of war or other danger. In modern times this task has become more complex. National defence is inconceivable without economic organization geared to the needs of a total war which may be of long duration.

Then again it has been usual from time immemorial to punish those who commit treason. Treason has in all times been considered as the most infamous of acts and accusing someone of being a traitor is the worst and most effective insult. Even in modern times, treason is still considered as a kind of parricide. Those, too, who undermine in any way the military strength of the nation must be punished resolutely. We now see emerging the problem of state security.

4. Any government must *protect its own authority and safety*. If this were not so it would disappear or at least be paralysed and would be unable to carry out its functions. The question arises whether in this field also the criminal law is to be used to protect, not society or the nation as such, but rather a particular political regime or even a ruling group. What methods are to be employed to ensure that the government stays in existence, a continuity which is natural and to ensure which is a perfectly proper desire?

Sometimes, it has been proposed that a kind of repression which is not strictly penal should be employed, a "political repres-

sion" having its own rules and sanctions. The extent of this political repression would vary according to the liberalism of the regime in question and the degree of criticism which it allowed. During the period of transition after the revolution, governments were rather prickly in this domain and it is strange to find in the Law of 27 Nivose, year 8, the following provisions of Article 5: "All newspapers shall be immediately suppressed if they contain articles contrary to the respect due to the social contract, to the sovereignty of the people and the glory of the armies or if they publish hostile criticism of the governments allied with the Republic, notwithstanding that such articles may be extracts from foreign publications." Do not these provisions have the familiar ring of recent events?

The difficulty is that this domain concerns the expression of opinions. Opinion is an extremely fluid phenomenon and it is difficult to punish for holding opinions (but criminal lawyers know that a criminal conviction is not possible unless there is in existence a law setting out in clear terms that the act is punishable). These expressions of opinion may be extremely dangerous for a government and rapidly bring about its downfall. Here again our great forefathers in the Law of August 23, 1791, imposed clear limits on the freedom of opinion which they proclaimed: "No man shall suffer criminal punishment on account of what he has caused to be printed or published in any way whatsoever unless such matter intentionally incites *disobedience of the law, bringing the government into contempt, resistance of its orders*, or any activity which the law makes criminal." *

But without going so far as to punish for holding an opinion, a government may legitimately take action against subversive activities; in fact, a campaign of opinion will rarely be sufficient to topple a regime. Regimes do not fall like ripe fruit, it is necessary to shake the tree. This is why opponents of the regime, to achieve their objectives, generally need recourse to illegal or even violent means. But then public order is disrupted or public services are interrupted or there may be violations of the personal and private rights of individuals (or of public officials or public corporations). In that case the interests of society are clearly at issue and the criminal law may in all good conscience intervene.

5. The state must *ensure justice*, the Rule of Law which is the fundamental requirement of any organized society. This is the highest of its tasks, especially worthy and especially difficult.

To do justice is the basic prerogative of any authority, of any head of a group (even of a family), within his field of authority. More even by the way it governs and the prosperity it brings to its people, a government attracts the respect and admiration, perhaps

* Italics added.

affection, of its peoples by the way in which it administers justice, and it also gains prestige in foreign eyes. A civilization may be judged by the way in which it administers justice. A glaring injustice is a blot of which a regime can never rid itself completely in the eyes of history. Justice must be done in accordance with certain moral requirements (perhaps not eternal, but certainly long lasting) and in accordance also with local or social conditions which require that all the conflicting elements must be weighed in the difficult task of deciding between the interests of society (it may be complex) and the protection of the individual (in his personal freedom, his civil liberty and his personality).

These are some of the essential considerations which seem to me to be the requirements of social existence and we must not lose sight of these in examining the problems raised by the impact of state security on the requirements of justice.

(1) The Desirability of a Distinction between Normal and Exceptional Times

All rules of social life (the most important of which are sanctions by the criminal law) impose restrictions on the freedom of individuals. The rule must allow the maximum of freedom that is compatible with the general interest and the harmonious adjustment of individual relations.

But exceptional circumstances may arise where the social balance and perhaps protection of members of society or the survival of society necessitate greater restrictions on freedom, stricter duties, swifter justice and more severe penalties. Such cases could be a dangerous epidemic, an economic crisis, or the disasters brought by storms or earthquakes. As far as the security of the state is concerned exceptional measures of this kind are especially necessary if the security of the state is in special danger. War is an example, the oldest and most classic. War led in the Roman Republic to a dictatorship and the temporary suppression of democratic freedom: *caveant consules ne respublica malum caperetur. Respublica*: this is clearly state security.

Libre Justice has recognized the need for special rules to deal with exceptional circumstances but these special rules can be laid down in advance and applied as the necessity arises. They must be an improved version, suitable for our time, of the old notion of a state of siege, which the republicans have never been without; no-one is surprised that in wartime stricter duties are laid down, especially so far as national defence is concerned. Apart from the case of actual war with another state, external tensions and severe internal disturbances giving rise to anxiety for the life of the nation may justify the use of special rules of greater severity, especially when the security of the state is in question.

(2) The Distinction between Danger to Internal and External Security

Internal security touches upon the very heart of the nation, the very existence of a national community. It has always been accepted that acts against the external security of the state in wartime must be punished mercilessly. In peacetime one may be more liberal, for the danger is less immediate. Nevertheless, there is a danger, and the infliction of the sentences provided for by the ordinary law for the activities of 1939 seem to have met with fairly general approval.

The internal security of the state appears, on the other hand, to concern rather the interests of the regime, for those who act against internal security generally seek not only to harrass the government but above all to get rid of it. Hence the idea that such offences are bound up with politics and as such should be judged according to a different system with different punishments and organized in a different way. Here we run into the problem of political considerations entering into the suppression of acts against the security of the state and especially of the political character of such criminal offences.

(3) The Distinction between Political Offences and Ordinary Crimes

The considerations set out above will perhaps lead one to think that only cases against the internal security of the state are political crimes and that acts against external security are ordinary crimes, but the 19th century tradition was that these two types of offences were both political crimes and they were punished in the same way. The *ordonnance* of June 4, 1960, goes back to this tradition.

Recourse to foreign help to assist in the overthrow of a regime, whether such help be sought or simply used, is a very old phenomenon and many recent examples can also be given. Is recourse to foreign help to be condemned in itself as an act directed against the nation? The answer to this question is not certain. One may conceive of foreign help being given in a disinterested way which when the struggle was over would result in neither loss of territory nor economic servitude; ideological sympathies may bring about disinterested foreign help, as was the case with the restoration of the monarchy and with more recent cases.

In these circumstances acts against external security are no worse than acts against internal security. Both seek the same object but by different methods: the overthrow of the regime. But in France, strong action has always been taken to prevent the advent of political regimes arriving or returning on the coat-tails of a foreign country, and it is still a powerful political weapon to accuse one's opponents of being agents of a foreign country.

However, the international conflict of ideologies easily leads

one to suspect that conspirators are seeking to upset the international order by the internal change of the regime that they are trying to bring about.

In this way, offences against internal security and offences against external security are very similar and nowadays are closer together than ever before. It may then be thought that they must come under the same rules, but some would wish these rules to have a political flavour and others would wish to see the rules of the ordinary criminal law.

What, moreover, is a *political offence* and why is it subject to special rules? This problem is far wider than that of state security. Thus, for example, press offences are considered as political offences whereas they do not necessarily threaten the internal security of the state and do no more than exceed the limits which the legislature had placed on freedom of expression.

The explanation for the special rules for political offences is less in the nature of the acts in question than in the fact that those committing such acts are not anti-social but merely anti-government. They are not base criminals, enemies of society, but intelligent men, progressive men, who seek the happiness of their fellow citizens and are sometimes forced to use illegal and even violent methods to achieve political, economic or social reform. In this way, the behaviour of the political criminal is essentially different from the behaviour of the ordinary criminal. Hence the need for different punishments for such offences, punishments which do not carry the stigma of ordinary punishments, are not as severe and could easily be pardoned.

(4) Criminal Offences of a Mixed Character

Some activities which bear all the appearance of ordinary crimes may have been committed in order to bring about a change of regime. Is this "worthy" purpose sufficient to bring it within the category of a political offence in that it indirectly aimed at the security of the state? Can political activity be considered as a kind of circumstance by way of excuse, or, at any rate, as giving a political complexion to acts which viewed externally are ordinary crimes?

Such cases would be destroying public facilities or assaults on the police during a demonstration, setting fire to public works or even other places to impress public opinion by publicly indicating these acts to be those of a terrorist organization; breaking and entering or hold-ups, as has been seen recently by the O.A.S., and as the Resistance itself used to do and especially as happened during the revolution and the "Vendée war"; lastly, assassination of political opponents or members of the government.

Such acts in the circumstances in which they are committed

must certainly concern state security, even though they do not as such come into the legal category of "acts against the security of the state".

(5) Procedure

The question arises whether political offences of a mixed character are to be dealt with according to ordinary criminal procedure or whether special courts should be set up with special methods of proof and their own rules.

The beginning of an answer to this question is the distinction between normal times and times of emergency but one may ask whether the very special character of these offences does not even in normal times require recourse to a procedure different from that of the ordinary law.

(6) Success and Failure

If an act against the security of the state is successful and if it achieves its object, the overthrow of the regime, the person who has been successful (either by himself or with co-conspirators acting with him or after him) is assured not only of impunity but also of glory and perhaps of power. This is extremely tempting. No ordinary criminal can hope for such good fortune. The game is worth the candle, especially for those whose passions are deeply roused. The throne or the scaffold . . . Political action in such a case is always collective and not individual and all is not lost if one person is caught and punished.

But it is difficult to stomach the idea that an act is worthy of praise if it succeeds and of execration if it fails. This kind of dualism does not square with the idea of justice, but there has never been an example of a new regime prosecuting those who brought it to power by illegal or even violent acts, as justice would seem to require. If need be, amnesties are used in doubtful cases; in this way a very wide amnesty was granted in respect of criminal acts carried out before the liberation if it could be shown that they had some connection, even remote, with the struggle against the invader.

But more often amnesties are necessary for the conquered more than for the conquerors. In the domain of political disturbances, public opinion accepts fairly regularly the practice of granting amnesties. Once the danger is over, the needs of national defence and even of defending the government no longer call for continued punishment, which has now become an inelegant kind of revenge. Magnanimity is better and should rightly raise the prestige of the regime which is able to resist and overcome the attacks of its enemies.

But, nevertheless, in one respect justice is not satisfied. When the crisis is at its height, the government, to defend itself, is obliged to hit hard, and amnesties do not bring back to life those who have been shot.

* * *

These are the main problems that the administration of justice appears to present concerning state security. They have existed for some considerable time and have not always been dealt with in the same way.

We shall now look at the way that these problems have been dealt with in the past before examining the provisions of the Laws of January 15, 1963, in which, for the first time, an attempt has been made to deal with the problem as a whole (even if this attempt does not appear to have been successful).

I am sometimes chided for taking too generous a view of the Laws in question and some have attributed them, a little hastily, in some way to me; the fact is that these provisions embody the ideas which came out in the colloquium held by *Libre Justice* in February 1962 and the only ideas put forward on that occasion which are not embodied in these Laws are my own, for the Laws do not remedy the defect to which I drew attention.

1. Until the 19th century, offences against state security were considered particularly serious and punished very severely. All early legislation considered treason as an unatoneable crime and all attempts to destroy the leader's authority were punished severely.

In Roman Law, such offences constituted the main part of *crimina publica*, and the state dealt with them of its own motion, whilst offences against individuals which were simple *delicta privata* were dealt with only on the initiative of the injured party. Under the Empire, the *crimen majestatis* was the supreme offence and for this crime the use of torture was authorized even against Roman citizens.

The laws of the barbarians embodied even more archaic ideas and the situation did not change under the feudal regimes or under the monarchies; everything prejudicial to the internal or external security of the state (but especially perhaps internal security) was the crime of *lèse-majesté*. Offences directly against the authority of the king amounted to a kind of sacrilege and parricide.

The French Revolution in itself scarcely modified this system. Foreign wars and internal insurrections were closely bound together. In addition, counter-revolutionary activities readily lead to the death penalty. Jacobin ideas made the suppression of political crimes one of the strictest aspects of the general criminal law. The political character of the offence or the political motive behind it aggravated the guilt of the accused.

But the many and swift changes which came later gave rise to doubt whether this way of dealing with political offences was just. The basic fact which we pointed out above made its impression. This was that success was the final vindication of the means employed. These ideas changed and different rules more favourable to political offenders were introduced; the death penalty was abolished in such cases. Simultaneously, the advance of liberal ideas brought with it greater freedom to express opinions. Political action can be taken in democratic institutions without recourse to revolutionary conspiracies; it is only extremists who will plot for "the Red revolution" if they are on the Left or try with Maurras and the Right "si le coup de force est possible".

It needed the development towards and then the outbreak of the world wars, the spread in Europe and then in the world of Communist and Fascist ideologies, before French law returned to Jacobin ideas on dangers threatening internal or external state security.

2. How are the great problems which I just mentioned tackled at the present day?

a) A Distinction Seems to be well Established

The Law on the state of siege has been in effect for a long time and has not been repealed. The state of war also involves certain changes in the law and especially in military criminal law. Recently a third system in derogation from that of the ordinary law has been created, the state of emergency. The Laws of January 15, 1963, base themselves on these three ideas in laying down provisions on crimes against state security. There is a difference in the laws, especially in procedure, according to whether or not a state of emergency has been proclaimed. They are also based on the idea of a state of war affecting the question of jurisdiction. Art. 697 of the Code of Criminal Procedure (enacted by the *ordonnance* of June 4, 1960) is still applicable; in time of war, crimes against state security, whether internal or external, are brought to trial and tried by military justice.

One of the great merits of the Laws of 1963 was to put an end to the *ad hoc* jurisdictions set up in previous years because of the emergency. Instead of improvising severe measures by doing away with the rights of the defence and selecting judges with regard to the persons they would have to judge, a state of affairs which has little relation to justice, the Laws of 1963 set up a permanent court the composition of which was established in advance; its jurisdiction and procedure (which vary according to whether there is or is not a state of emergency) are laid down for both cases in advance. Please God that this system will be maintained and that the mistakes of the earlier period will not be repeated.

b) The Distinction between External and Internal Security has been Considerably Diminished

The *décret loi* of July 29, 1939, had emphasized this distinction by providing that acts against external security were subject to the punishments of the ordinary law, whilst acts against internal security were punished as political crimes (because there was practically no opportunity of applying these provisions; but events in Algeria plainly showed how unfortunate this was).

The *ordonnance* of June 4, 1960, dealt expressly with the two kinds of acts against the security of the state and subjected them to the same punishments, the punishments for political crimes, but the death penalty was reintroduced for such offences. This *ordonnance* completely altered Articles 70-103 of the Penal Code. In one Chapter entitled "crimes against the security of the state", parts 1 and 2 of this Chapter deal with external security and parts 3, 4 and 5 with internal security. It is also to be observed that the composition of the Court of State Security is different in cases of crimes under parts 1 and 2, i.e., against external security (in such a case the majority of judges are military).

Apart from this the same system is maintained for all crimes against state security. Thus, e.g., the Court of State Security (set up in 1963) deals with crimes against external security in peace-time, whereas under the *décret loi* of 1939 these crimes were dealt with by military courts. This point is all the more noteworthy in that it meets the recommendation made in February 1962 at the colloquium held by *Libre Justice*.

c) In this Unified Jurisdiction the Political Character of Crimes is Shown by the Punishments Laid Down

These punishments are on the scale for political offences as amended by the *ordonnance* of June 4, 1960. In fact, the difference is slight. The main advantage is in the less harsh conditions of imprisonment, which used to be known as the régime for political prisoners and now as régime A. It should be pointed out in addition that a conviction for a political offence does not prevent giving a suspended sentence if another offence is committed, does not involve the implementation of a previous suspended sentence and does not give rise to constraint on the person to recover costs or fines. In principle there is no extradition for political offences, but the new extradition treaties with African States have departed from the strict traditional rule on this point.

d) The Problem of Mixed Offences has Remained the Most Difficult

These offences are on the one hand part of another offence

and on the other they are above all complex. Offences connected with another crime are judged according to the main crime and the rule against cumulative punishments means that the severer punishment is applied, which will generally be that for the main offence. But connected offences are important for reasons of procedure and jurisdiction. It has always been considered that the jurisdiction competent to deal with the main offence is also competent to deal with connected offences. This is a rule of general application and it has quite naturally been applied to the jurisdiction of the Court of State Security.

Difficulties arise especially in cases of complex crimes: an offence which is, when viewed externally, an ordinary crime is committed with a political intent or for a political motive or in the context of joint political action. Before 1963 the position was clear: mixed offences were regarded in French law as ordinary crimes from the point of view of prosecution, jurisdiction and punishment (except that more use was made of the powers of remission and amnesty); on the other hand, juries often showed special leniency with regard to certain mixed offences. Thus, in cases of murder, Caserio and Gorguloff, who assassinated Presidents of the Republic, were sentenced to death and guillotined at a time when the death penalty was abolished for political offences; the acquittal of Vilain and Germaine Berton was due to the leniency of the jury mentioned a moment ago. As less serious cases, offences of resisting or assaulting the police in the course of political demonstrations are generally prosecuted by the procedure applicable to cases of *flagrant-délit*, which implies that they are not viewed as political offences, since this procedure cannot be followed in the case of political offences.

In recent times, which have seen a marked increase in cases of this kind, the state has asked for the punishments for ordinary crimes but for the decision of such cases preferred special jurisdictions (special courts for the Vichy régime; the court for the trial of collaborators; specially constituted courts, first for the Algerian rebels, then for those involved in the Algiers coup d'état, members of the O.A.S., etc.). This system certainly presented many inconveniences but these would have been no less serious if the offences brought before these courts had been considered political and not ordinary. It is in this respect that the laws of 1963 are original and lead to a system which is in fact somewhat complicated. The Court of State Security has jurisdiction over certain mixed offences (set out in Article 698 (2) (c) of the Criminal Procedure Code) when the acts in question "are committed in connection with an individual or collective course of conduct which replaces or seeks to replace the authority of the state by an illegal authority". It will readily be seen that is indeed a question of state security.

At the same time it is necessary not to allow the complex nature of these crimes to obscure completely their aspect as ordinary crimes. Inasmuch as these acts are bound up with state security, it is for the state, in this case the *procureur général* of the Court of State Security, to have them brought before this Court but not himself to initiate a prosecution, a function which remains governed by the ordinary law. He follows the appropriate procedure, which involves the intervention of a special *juge d'instruction* for such cases. Once this instruction is completed, the *procureur général* decides whether the case should be brought before the Court of State Security (which is understandable in such cases, for it may well be that deciding in public, in the case of some crimes, would place the government in an awkward position). But this does not mean that the state may thus prevent prosecution of ordinary offences in the ordinary way. If the decree necessary for bringing these cases before the Court of State Security has not been made within a month, the *juge d'instruction* for this Court must decline jurisdiction as far as ordinary crimes are concerned, which means that the case must then be handed over to the *procureur de la république* of the ordinary court having jurisdiction over the case.

The working of this delicate procedure will need to be followed carefully but the principle behind it seems perfectly defensible: whether or not purely political offences are prosecuted is a matter entirely for the government, but mixed offences must be prosecuted in any event, either before the Court of State Security, if the government considers that they should be, or if not before the ordinary courts.

e) From a Procedural Point of View, the Question Arises Whether in Normal Times Acts Against State Security must be Tried According to the Special Procedure

It may also be asked whether it seems desirable to try such cases in a special court, but the principle of one national jurisdiction sitting in several divisions has met with the general approval of commentators on the grounds that the conduct in question may extend over a wide area and that consistency of decision appears essential. On the other hand, the composition of the Court of State Security, as laid down by the Laws of 1963, is more open to question; it must be emphasized, however, that these Laws show a concern to ensure that the judges are sufficiently independent. The practice had been not only to set up specially constituted courts but also to lay down a special procedure to deal with the case in hand. This was the case in particular with the courts set up in Algeria and then in metropolitan France to try cases of giving aid directly or indirectly to the rebels in the Algerian *départements* and finally to try those responsible for the Algiers coup d'état and the events that followed. In these

special procedures the normal guarantees of the defence increasingly disappear. There is a risk of a travesty of justice. But it must be said that the judges sitting in these courts have nevertheless shown their independence, as for example in the trial of Salan.

The laws of January 1963 show a fortunate tendency in the opposite direction and they come closer to the ordinary law, although not entirely; the rules relating to detention in police custody, release pending trial, the investigation of character, expert evidence, the presumption in favour of minors (notably to decide on extenuating circumstances), etc., do not apply before the Court of State Security. For this reason, I consider that this procedure errs against the side of liberalism and in particular is less favourable to the accused than the procedure in previous use before the permanent courts of the armed forces; but it may well be that this is a question of detail on which many improvements may be forthcoming.

f) The Final Problem is that the Punishment of Offences Against State Security is a Matter of Punishing the Losers Who Would Have Attained Power Had They Been Successful

A flagrant injustice is done to those who are executed, especially when their side triumphs in the end; all that can be done in this case is to erect statues to them (as happened, for example, in the case of Marshal Ney), but more often it is preferred not to make martyrs of them, for this may hinder national reconciliation.

Shall we ever see a new regime taking serious steps against those whose illegal conduct has brought it to power? Even in the case of mixed offences? Too often, up to now, one is content to draw a veil and to recall that omelettes are not made without breaking eggs.

But some progress is possible. Indeed, the Fifth Republic did not prosecute the authors of the coup d'état of May 13 and did not even condemn them. But it showed later that this impunity did not amount to an immunity for subsequent conduct. Doubtless one may think of setting up rules or imposing limits on the conduct permitted in cases of insurrection, Geneva conventions on civil war and coups d'état (this was precisely the object of a convention signed at Geneva in 1949); there would doubtless not be too much difficulty in agreeing to set up such rules, but how can one create sufficient sanctions and prevent the scandal of unscrupulous victors?

This problem is rather similar to that of war criminals. In both cases, the ideal would be that those whose acts go beyond permitted limits should be brought to trial, no matter to what side they belonged. That this ideal be realized is certainly all that would be wished by a Professor of Criminal Law.

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LEGAL ASPECTS OF CIVIL RIGHTS IN THE UNITED STATES AND THE CIVIL RIGHTS ACT OF 1964*

We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .

*Declaration of Independence, July 4, 1776*¹

The history of the United States of America is a running story of the long struggle, still in progress, fully to realize and to achieve the goal of equality as to fundamental human rights among all mankind, which was recognized in the above quoted expression of its Founding Fathers. The Civil Rights Act of 1964 is the latest, and a far-reaching, advance toward that goal. The continuing struggle now will be, primarily, in the implementation, acceptance and enforcement of the rules of law set forth therein. This Act was signed into law by President Lyndon Johnson of the United States on July 2, 1964, 188 years after the Declaration of Independence.

Upon the occasion of such signing, he gave an address in which he referred to the "long struggle for freedom" which began with the Declaration of Independence. He said that struggle was a "turning point in our history", that the ideals proclaimed in that Declaration "still shape the struggles of men who hunger for freedom", and that it was up to each generation "to renew and enlarge" the meaning of "that freedom". His statement continued:

* This Article supplements the co-author's earlier article "Legal Aspects of Civil Liberties in the United States and Recent Developments", *Journal of the International Commission of Jurists*, Vol. II No. 1 (1959) pp. 81-144. In the United States the subject matter of "Civil Rights" is generally, identified with various discriminatory practices on the grounds of race, colour, religion, national origin or sex. (Except where proper names and direct quotations are employed, English spelling has been followed - Ed.).

¹ Punctuated as in the original document; 1 U.S. Stat. p. 1; 1 U.S.C.A., Const. p. 7.

We believe that all men are entitled to the blessings of liberty – yet millions are being deprived of those blessings, not because of their own failures but because of the color of their skin.

The reasons are deeply inbedded in the history and tradition and the nature of man. We can understand without rancor or hatred how this all happened. But it cannot continue.

The purpose of this law is simple. It does not restrict the freedom of any American so long as he respects the rights of others. It does not give special treatment to any citizen. It does say the only limit to a man's hope for happiness and for the future of his children shall be his own ability.

It does say that those who are equal before God shall now also be equal in the polling booths, in the classrooms, in the factories and in hotels and restaurants, and movie theatres, and other places that provide service to the public.

I'm taking steps to implement the law under my constitutional obligation to take care that the laws are faithfully executed.²

One Negro leader called the new civil rights law the "Magna Carta of human rights";³ another called it "the second emancipation of the American Negro";⁴ still another said it was an "assertion that the American people and Government do intend to put into practice the ideals of the Declaration of Independence and of the Emancipation Proclamation";⁵ Senator Hubert H. Humphrey said the Civil Rights Bill of 1964 was "the greatest piece of social legislation of our generation".⁶

The *New York Times*, in its lead editorial on July 5, 1964, made a significant statement, reading in part:

When the Founding Fathers of the United States proclaimed 188 years ago that all men are created free and equal and that in consequence this nation should assume a separate and equal station among the powers of the earth, they unleashed forces that continue to change the world. For the revolution they started . . . continues its inexorable march both in this country and around the globe. It is freeing men and nations and keeps the torch of liberty burning even where liberty is still suppressed.

On this Independence Day weekend in 1964 we have special reason to be proud of it. The civil rights bill that President Johnson has just signed into law marks another milestone in this revolution. In a manner which

² *New York Times*, July 3, 1964, p. 9.

³ Roy Wilkins, Executive Secretary of the National Association for the Advancement of Colored People.

⁴ Rev. Fred L. Shuttlesworth, President of Alabama Christian Movement for Human Rights.

⁵ James Farmer, National Director of Congress of Racial Equality; (See *New York Times*, July 3, 1964, p. 9).

⁶ *New York Times*, June 20, 1964, p. 10.

the nation's founders can scarcely have foreseen, though some did have a vision of it, it establishes a legal framework for the overthrow of the despotism, not of a king, but of prejudice, and extends freedom and equality to all men and women, irrespective of race, color or creed.

What Jefferson put down in the Declaration of Independence, what Lincoln expanded in the Emancipation Proclamation, what multitudes of dedicated people labored to bring about, is now the law of the land.⁷

PART I

THE CIVIL RIGHTS ACTS OF 1964

(a) Legislative History

The original version of the Bill was introduced into the House of Representatives on June 20, 1963. Six Congressional Committees, sitting for 81 days, heard 269 witnesses; the printed transcript of the hearings covered 5,791 pages. With amendments, this Bill finally passed the House of Representatives on February 10, 1964, after nine days of debate on the floor. It then went on to the Senate Calendar on February 26, 1964. When called up for debate on March 9, 1964, it evoked a filibuster of record length, led by Senators from Southern States, which was finally broken on June 10, 1964, when the Senate voted for closure of debate.

During the proceedings in the Senate, a new and modified version, known as the "Dirksen-Mansfield Amendment", was evolved, which passed the Senate on June 19, 1964. In the Senate there were 83 days of debate, filling 2,890 pages of The Congressional Record. The House of Representatives then passed the Senate version on July 2, 1964. The President signed the Bill on that same day, enacting it into law.⁸

(b) Brief Summary and Analysis

The Civil Rights Act of 1964 comprises eleven parts called "Titles". The two major titles are Title II, relating to discrimination in places of public accommodation, and Title VII, relating to equal employment opportunity.

Generally, the former prohibits discrimination in hotels, restaurants, gasoline stations and places of amusement on the basis of race, colour, religion or national origin; and the latter prohibits discriminations by employers, labour unions and employment agencies on those grounds and, also, because of sex. Another major

⁷ *New York Times*, July 5, 1964, p. 8 E.

⁸ Public Law 88-352, 88th Congress, H.R. 7152, July 2, 1964.

aspect of the Act is its design throughout to provide effective legal remedies in Federal courts and through Federal officials and agencies for violations of the law.

The Act is long and complicated. Only a brief summary and analysis can be set forth here.

(1) *Title I – Voting Rights*

This Title deals with voting and amends the Civil Rights Acts of 1870, 1957 and 1960, described *infra*. It seeks to assure that no qualified voter will be denied his constitutional right to vote because of his race or colour, by requiring States to use non-discriminatory standards for qualifying all voters, and by providing additional enforcement measures.

More specifically, it prohibits State election officials acting in Federal elections from applying different standards, practices or procedures for registering white and Negro voting applicants, from disqualifying applicants because of inconsequential errors or omissions on their forms, and from employing literacy tests as a qualification for voting unless the test is in writing and a certified copy of the test questions and answers is made available to the applicant. It makes a sixth grade education a rebuttable presumption of sufficient literacy and intelligence for voting in Federal elections.

It permits the United States Attorney General or defendant State officials, in a suit involving a pattern or practice of discrimination in voting, to request a trial by a three-judge Federal Court, and it provides for a prompt hearing of the case in that court and for an appeal directly to the United States Supreme Court.

This law does not affect a State's right to set voter qualifications – for example, it does not forbid a poll tax or literacy tests – but it does prevent the use of discriminatory standards as to white and Negro voting applicants.

(2) *Title II – Injunctive Relief Against Discrimination in Places of Public Accommodation*

At the outset, this Title provides in Section 201(a):⁹

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

⁹ This provision is essentially similar to the opening provision of the Civil Rights Act of 1875, *infra*.

Section 201(b) then defines "a place of public accommodation":

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

1. any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
2. any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
3. any motion picture house, theatre, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
4. any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Examples of establishments covered under (4) would be a barber's shop in a hotel or a lunch counter in a department or drug store.

The Act in Section 201(c) defines "commerce" as:

travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

This section states that the operations of an establishment "affect commerce" if it is: an establishment described in paragraph (1) above, that is, inns, hotels and other lodging places; an establishment described in paragraph (2) above, that is, restaurants, lunch rooms and gasoline stations, if it serves or offers to serve interstate travelers or if a substantial portion of the food it serves, or gasoline or other products it sells, has moved in commerce; an establishment described in paragraph (3) above, and it "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce"; or an establishment described in paragraph (4) above, and it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce.

The foregoing definition and application of the word "commerce" is of particular importance, because under the Constitution of the United States, Congress is given exclusive power "to regulate commerce with foreign nations and among the several States".¹⁰ The scope and application of this "commerce clause" has heretofore been the subject of much litigation in the United States, as will be seen hereafter.

Section 201(d) provides as to "State action", that:

Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

And Section 202 provides:

All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

This definition of "State action" is also of great importance because the Fourteenth Amendment of the Constitution is a prohibition against "State action" only.

Section 201(e) states that the Act does not apply "to a private club or other establishment not in fact open to the public".

The Act forbids a person to deprive anyone of any right or privilege secured by Title II, to intimidate, threaten or coerce anyone for the purpose of interfering with such rights or privileges, or to punish anyone for exercising or attempting to exercise such rights or privileges, or to attempt to do any of such acts.

The Act further provides that a Federal civil action for preventive or injunctive relief may be brought by any "person aggrieved" against any one who has engaged, or, it appears, is about to engage, in any act or practice forbidden by Section 203.

The United States Attorney General may intervene in such an action if he certifies that the case is of "general public importance". The Federal Court may stay the action pending the outcome of State enforcement proceedings, appoint an attorney for the aggrieved party, permit the filing of suit without the payment of fees, costs or security, and allow the prevailing party a reasonable attorney's fee as part of the costs.

If a State or political subdivision thereof has laws prohibiting

¹⁰ U.S. Constitution, Art. I, Sect. 8, subd. (3).

discrimination in public accommodations and authorizing a State or local authority to grant relief therefrom in a civil or criminal action, the State authorities must be given thirty days' notice by the aggrieved person of any alleged violation of the Act, before a Federal action may be brought. If the alleged violation occurs in a State having no local laws forbidding such acts or practices, the Federal action may be started immediately, and without this prior notice.

The Federal Court may refer the matter to the Community Relation Service (established by Title X) for a period not exceeding 120 days if it believes there exists "a reasonable possibility of securing voluntary compliance". The Service is authorized to investigate the complaint, to hold confidential hearings thereon and to effect, if possible, a "voluntary settlement between the parties".

The Act further provides that the United States Attorney General may institute in a Federal Court an action for such preventive or injunctive relief, whenever he has "reasonable cause to believe that any person or groups of persons is engaged in a pattern or practice of resistance to the full enjoyment" of any of such rights, and such pattern or practice is intended to deny the full exercise of said rights. He may request a three-judge Federal Court to hear and determine the case; and an appeal from its decision to the Supreme Court is permitted.

While the remedies thus provided are "the exclusive means of enforcing the rights based on this title", other, not inconsistent, remedies available under State or Federal laws may be pursued to vindicate and enforce rights against discrimination in public accommodations.

(3) Title III - Desegregation of Public Facilities

Under the already established law in the United States, segregation is legally forbidden in any public facility owned, operated or managed by or for a State or any of its political subdivisions.

This Title authorizes the United States Attorney General to bring an action in a Federal Court "against such parties and for such relief as may be appropriate", upon written complaint from a person who claims "he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof", provided the Attorney General believes the complaint is meritorious, the complainant is unable to maintain his own legal proceedings for relief, and such an action "will materially further the orderly progress of desegregation in public facilities."

A person is deemed unable to maintain his own legal proceedings if he cannot finance the expense of litigation or obtain effective legal representation, or if bringing such litigation would "jeopardize the personal safety, employment, or economic standing" of himself, his family, or their property.

Preserved is the right of an aggrieved person to bring suit on his own for such discrimination in any court, State or Federal.

(4) Title IV - Desegregation of Public Education

This Title codifies and implements decisions of the United States Supreme Court establishing that segregation in public education is illegal and unconstitutional.

The definitions set forth in this Title are significant.

"Desegregation" is defined to mean "the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin"; but it does not mean "the assignment of students to public schools in order to overcome racial imbalance".

"Public school" is defined to mean "any elementary or secondary educational institution", and "public college" to mean "any institution of higher education or any technical or vocational school above the secondary school level", provided that such school or college is operated by a State, or by a State subdivision or agency, or wholly or predominantly from or through the use of funds or property of the government or derived from a governmental source.

"School board" means "any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system."

The Commissioner of Education is authorized (1) to conduct a survey and to make a report to the President and Congress within two years concerning discrimination or segregation "by reason of race, color, religion or national origin in public educational institutions at all levels" in the United States and its Territories and Possessions; (2) upon request of school boards and other governmental public education agencies, to render technical assistance of various kinds in the preparation, adoption and implementation of plans for the desegregation of public schools; (3) to arrange with institutions of higher education for setting up training institutes, at governmental expense, to enable elementary and high school teachers and administrators to "deal effectively with special education problems occasioned by desegregation"; and (4) upon the request of school boards, to make grants to pay for the cost of training teachers and other school personnel in dealing with problems

incident to desegregation and of employing specialists to give advice on such problems.

The United States Attorney General is authorized, upon receiving a written complaint, to bring legal proceedings in Federal Courts against school boards or public college authorities to effectuate "the orderly achievement of desegregation in public education". This is without prejudice to the right of any person to sue for or obtain such relief in any court. However, he must give notice of the complaint to the school authorities and give them a reasonable time to correct the conditions alleged in the complaint before proceeding with the action. Here, also, the Attorney General may aid a person unable to maintain his own litigation.

(5) Title V - Commission on Civil Rights

This Title extends the life of the Civil Rights Commission, due to expire this year, to January 31, 1968, and requires the Commission to make a final report of its activities, findings and recommendations before that date.

It amends the Civil Rights Act of 1957 and the "Rules of Procedure of the Commission Hearings" so as to provide additional procedural safeguards consistent with due process of law.

The Commission is now charged with these duties; (1) to investigate claims that United States citizens generally, and specifically in Federal elections, are being deprived of their right to vote and to have their votes counted because of their race, colour, religion, or national origin; (2) to study and collect information concerning legal developments constituting, and to appraise the laws and policies of the Federal Government with respect to, denials of equal protection of the laws under the Constitution because of race, colour, religion, and national origin or in the administration of justice; (3) to serve as a national clearinghouse for information in respect of discrimination because of race, colour, religion or national origin in the fields of voting, education, housing, employment, use of public facilities, and transportation, or in administration of justice.

The Commission is forbidden to investigate any membership practices or internal operations of any fraternal or religious organization, any college fraternity or sorority, or any private club.

(6) Title VI - Nondiscrimination in Federally Assisted Programmes

This Title commences with this sweeping statement (Section 601):

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

This statement, however, is subject to certain qualifications, such as that Federal programmes or activities involving a contract of insurance or guaranty, which include the extensive home mortgage programmes of the Federal Housing Administration and the Veterans Administration, are exempted from the Act.

Each other Federal department or agency which extends any sort of financial assistance to any programme or activity is required to draw up rules, to be approved by the President, to accomplish the purposes of this Title. The department or agency shall seek voluntary compliance from the assisted programme or activity, but if co-operation is not achieved, funds may be cut off after a hearing and court review.

(7) Title VII – Equal Employment Opportunity

By this Title, discrimination on the basis of race, colour, religion, sex or national origin, is “an unlawful employment practice” and forbidden: (1) to employers, in the employment of individuals or in any terms or conditions of such employment; (2) to employment agencies, in failing or refusing to refer employment or in classifying applicants for employment; (3) to labour organizations or unions, in excluding or expelling individuals from their membership, or in limiting, segregating or classifying their membership or in referring individuals for employment in any way which would deprive or limit his employment opportunities or adversely affect his status as an employee, or in causing an employer to so discriminate; (4) to any employer, labour organization or joint labour-management committee controlling apprenticeships or training programmes, in the admission or employment of persons in any programme to provide apprenticeship or other training.

Other unlawful employment practices by an employer, employment agency or labour union are these: (1) to discriminate against a person as a punishment for opposing or making charges against employment practices made unlawful by this Title; and (2) to public “help-wanted” advertisements indicating any preference or limitation based on race, colour, religion, sex or national origin, except for those jobs where this is a genuine occupational qualification.

Employers, employment agencies and unions will not be regarded as engaging in “an unlawful employment practice” and discrimination in certain situations: (1) in instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that business; (2) in the instance of religious educational institutions where members of a particular religion are employed by schools and colleges which are owned, supported, controlled, or managed by that religion or in which the curriculum is directed toward the propagation of a

particular religion; (3) in cases involving national security; (4) in instances involving individuals who are members of the Communist party or organizations listed as Communist-fronts; (5) in instances of war veterans who may be given preference under existing laws, and Indians, who may be given preference in a business operated on or near an Indian reservation.

Certain pay differentials are permissible, if their intent is not discriminatory, as for example in furtherance of seniority or merit systems, or for incentive bonuses or piecework.

Discrimination in reverse, or "preferential" hiring, is forbidden. That is, a Negro or Chinese cannot be favoured because of his race and because an employer is then short of such employees.

An employer, employment agency or union is not required under the Act to change existing imbalance in the percentages of persons on the job, referred for employment, or in the union.

The Act establishes an "Equal Employment Opportunity Commission", appointed by the President. It has these powers: (1) to co-operate with, and with their consent to make use of, regional, State and local agencies, public and private, and individuals; (2) to pay witnesses who testify before the Commission or on depositions; (3) to furnish technical assistance, on request, to employers, employment agencies, or unions, to further their compliance with the Act or with an order of the Commission; (4) to offer conciliation in cases where employees or union members refuse to co-operate in effectuating the provisions of the Act; (5) to make and publish technical studies to effectuate the Act; (6) to refer to the Attorney General cases requiring court action and aid him in the prosecution thereof; (7) to issue procedural regulations relating to proceedings before it and requirements concerning record keeping and reports by employers, employment agencies and unions; (8) to make an annual report of its activities and to recommend means of eliminating discrimination; and (9) to investigate filed charges and to conduct hearings thereon.

To the end of effectively preventing unlawful employment practices, the Act provides both for proceedings before the Commission and court action by the Attorney General:

(a) Any aggrieved person or any Commission member may file with the Commission a written charge of an alleged unlawful employment practice by an employer, employment agency or union, who must be given a copy thereof privately, not publicly. After it has confidentially investigated the charge, the Commission will endeavour to eliminate the unlawful practice, informally and off the record, by conference and conciliation. If the alleged unlawful employment practice occurred in a State which has a fair employment practices law, the aggrieved person must first bring proceedings under the State law and wait until 60 days thereafter before filing

a charge with the Commission; and, in respect of such a charge filed by a Commission member, the Commission, before taking action thereon, must refer it to State officials and afford them a reasonable time, not less than 60 days, to act under such State law to remedy the practice alleged. If the State officials do not remedy it promptly and if the Commission thereafter is not successful in its efforts to secure voluntary compliance, the aggrieved person may bring a civil action for injunctive and other relief in a Federal court against the offending party, and the Court may appoint an attorney to represent him and may permit the filing of suit without costs, fees or security. The Attorney General may intervene therein. Proceedings in the action may be stayed for a brief period pending the termination of State proceedings or the efforts of the Commission to obtain voluntary compliance. Federal courts are given jurisdiction for actions brought under this title.

(b) Whenever the Attorney General has reasonable cause to believe any persons are engaged in a pattern or practice of resistance to the full enjoyment of the rights secured by this title, he may bring action in a Federal court for injunctive and other relief against the offending persons, request a prompt trial by a three-judge court and appeal from its decision to the Supreme Court.

The Act does not exempt or relieve any person from liability or punishment under present or future State laws, other than any State laws which purport to require or permit the doing of any act which would be an unlawful employment practice under this Title. Everyone subject to this Title is required to post notices, prepared or approved by the Commission, setting out excerpts from or a summary of the Act's pertinent provisions. This Act also directs the Secretary of Labor to study and report to Congress on arbitrary employment discrimination against the elderly, and to make recommendations for ending such discrimination.

The provisions of this Title prohibiting unlawful employment practices (Sections 703, 704) and providing remedies before the Commission and in Federal Courts to effectuate the end of such practices (Sections 706, 707) become effective one year after the date of its enactment. All other sections are effective immediately.

All employment agencies are covered on July 2, 1965, but relatively small employers and labour unions and organizations come under the Act even more gradually. As of July 2, 1965, employers with 100 or more employees and unions with 100 or more members (and all unions maintaining hiring halls) are covered; on July 2, 1966, the number of employees or members required for coverage scales down to 75; the following year, to 50; and on July 2, 1968, and thereafter, to 25.

Employers with 24 or fewer employees and labour unions with 24 or fewer members are not covered by the Act. Tax exempt

private membership clubs are not covered. Provision is made for the President to convene conferences of leaders of the groups affected by this Title and of Federal and State officials to the end of obtaining the "fair and effective administration of this title."

(8) Title VIII – Registration and Voting Statistics

This Title directs the Secretary of Commerce and the Census Bureau, in the areas of the country selected by the Commission on Civil Rights, to compile statistics on registration and voting in any statewide primary or general election since January 1, 1960, in which members of the House of Representatives are nominated or elected. The survey is to include a count of persons of voting age by race, colour and national origin, and the extent of registration and of voting participation in the area; but no person shall be compelled to disclose his race, colour, or national origin or shall be questioned about his political party affiliation or how or why he voted.

The statistics thus obtained could be used to enforce the provision of the Fourteenth Amendment that States that discriminate in voting shall lose seats in the House of Representatives.

(9) Title IX – Intervention and Procedure After Removal in Civil Rights Cases

Hereunder, the United States Attorney General may intervene on behalf of the United States, in any case brought in a Federal Court seeking relief from a denial of equal protection of the laws under the Fourteenth Amendment on account of race, colour, religion, or national origin, if he certifies the case to be of "general public importance".

The United States Code¹¹ is amended so that, hereafter, in Civil Rights Cases, the Federal Courts of Appeal may review the act of a lower Federal court in remanding such a case to a State court. Heretofore, a defendant in a State court case involving his civil rights could transfer the case to a lower Federal court; but if the lower Federal court then decided it did not have jurisdiction and sent the case back to the State court, that ended the matter. The provision for review changes this.

(10) Title X – Community Relations Service

Established as part of the Department of Commerce is a new Federal agency called the "Community Relations Service". The Service will provide assistance and mediation services to communi-

¹¹ Title 28, § § 1447 (d) and 1443.

ties and persons therein in resolving disputes or difficulties relating to discriminatory practices based on race, colour or national origin which impair their rights under the Federal Constitution or laws or which may affect interstate commerce. It will offer its services in cases of such disputes or difficulties "whenever, in its judgment, peaceful relations among the citizens of the community involved are threatened thereby". Also, in performing its functions, it will "seek and utilize the co-operation of appropriate State or local, public, or private agencies".

Its activities must be conducted "in confidence and without publicity", and it must make an annual report of its activities to Congress.

(11) *Title XI – Miscellaneous*

In any proceeding for criminal contempt arising under Titles II, III, IV, V, VI or VII (including public accommodations, public facilities, public schools, actions by the Commission on Civil Rights, Federally assisted programmes, and fair employment practices), the accused is entitled to a trial by jury.* This does not apply to contempts committed in the presence of the court or so nearby as to obstruct justice, or to the disobedience of any officer of the court in respect of orders or process of the court. The penalty for such a criminal contempt, upon conviction, is a fine or imprisonment. There is a provision against "double jeopardy" in respect to such a criminal contempt charge.

Finally, there are provisions (1) that nothing in this Act is to be construed to indicate that Congress has pre-empted the field covered by the Act to the exclusion of State laws on the same subject matter, or as invalidating any provision of State law unless such provision is inconsistent with any of the purposes or provisions of the Act, and (2) that if any provision of the Act is held invalid the remainder will not be affected thereby.

PART II

BRIEF BACKGROUND HISTORY OF FEDERAL CIVIL RIGHTS LAWS IN THE UNITED STATES

(a) The American Declaration of Independence

On July 4, 1776, the representatives of the then thirteen united States, meeting in a General Congress, approved and published the Declaration of Independence, which contained the passage quoted

* The Civil Rights Law of 1957 already provides for jury trials in contempt proceedings involving voting rights; see *infra*.

at the beginning of this article.* The final draft adopted by Congress modified, in certain respects, the earlier drafts written by Thomas Jefferson; but every draft set forth, in essentially identical language, the "self-evident truths" that all men are created equal and are endowed by their Creator with certain unalienable rights, among which are life, liberty and the pursuit of happiness.¹²

This Declaration expressed the then prevalent natural rights philosophy. This concept of the equality of all men appeared in the writings of John Locke¹³ and in the earlier Virginia Declaration of Rights¹⁴. The Declaration, in this concept, expressed an American ideal. One modern historian has stated that it contains "the essential ideas of American democracy"; and that "the history of American democracy is a gradual realization, too slow for some and too rapid for others, of the implications of the Declaration of Independence."¹⁵

It provided no frame of government, but merely asserted the principles upon which a just government should rest. It did not have the force of law. Formal government for this union of States was set up under the "Articles of Confederation", which were finally approved on July 9, 1778, and remained in force until the Constitution became effective.

It is a matter of law, as well as of historical knowledge, that at the time of the American Revolution, and for some time thereafter, all men were not, in law or in fact, equal, because in a number of such States slavery and involuntary servitude were legally still in existence. In his original drafts of the Declaration, Jefferson had excoriated the English King for waging "cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people, who never offended him, captivating and carrying them into slavery in another hemisphere . . ." These words were omitted by Congress in the draft finally adopted, at the instance of some Southern delegates.¹⁶ But they emphasize the

* Two days earlier, on July 2, 1776, the Continental Congress had adopted a resolution declaring that "these United Colonies are, and by right ought to be, free and independent States", and totally dissolving all political connection between them and Great Britain.

Journals of Congress Ford ed., V, 424, 507; Becker, *The Declaration of Independence* (1958) 3.

¹² Becker, *The Declaration of Independence* (1958), pp. 142, 161, 175, 186.

¹³ *Id.* at pp. 24, et seq.; John Locke, *Second Treatise of Civil Government*, Book II, § 4, Works (Ed. 1812); Perry, *Puritanism and Democracy* (1944), pp. 126-7.

¹⁴ Rossiter, *Seedtime of the Republic* (1953), p. 399.

¹⁵ Perry, *Puritanism and Democracy* (1944), pp. 130, 133.

¹⁶ Becker, *supra*, pp. 146 166, 180; Padover, *The Complete Jefferson* (1943), pp. 893, 1132; Kimball, *Jefferson, The Road to Glory, 1743 to 1776* (1943), p. 300; Padover, *A Jefferson Profile* (1956), p. 300.

fact that the slavery system had been introduced in and imposed upon the American colonies by the mother country. Jefferson himself owned slaves but was opposed to slavery and, without success, urged laws for the emancipation of the slaves.¹⁷

(b) The Original Constitution of the United States

The Declaration of Independence was not carried into the original Constitution of the United States, which was adopted in 1787 and ratified in 1789. The Constitution did not outlaw slavery. Rather, it contained certain provisions which tacitly recognized the legal existence of slavery in parts of the United States. Neither the word "slavery" nor the word "slave" was used in the Constitution, but the existence of slavery, at the time of its adoption, was clearly recognized therein.

Slavery was then dying out in the Northern States, but to obtain the adherence of the Southern States to the new system of government it was necessary to legally recognize the institution of slavery and to make certain concessions to the slave-holding States. Thus, slavery was tacitly recognized (in non-slave terms) in Article IV, § 2, Par. 3, providing for the return of runaway slaves to their owners; and in Article I, § 9, Par. 1, reserving the right of States to import slaves, and forbidding, until 1808, any national legislation to prohibit their importation; and in Article I, § 2, Par. 3, providing that for the apportionment for representatives among the States according to population all "free persons", but only three-fifths of all "other persons", were to be enumerated.

These constitutional provisions were thereafter implemented by court decisions,¹⁸ and by Fugitive Slave Laws passed by Congress in 1794 and 1850 designed to help slave holders recover their fugitive slaves.¹⁹ (Upon adoption of the Thirteenth Amendment, in 1865, which abolished slavery and involuntary servitude, these Constitutional provisions statutes and decisions became obsolete.)

(c) The Northwest Ordinance and Missouri Compromise

In 1787 the Continental Congress adopted the "Northwest Ordinance"²⁰ for the government of Territory of the United States northwest of the Ohio River, which provided that "there shall be

¹⁷ Jefferson, *Notes on Virginia*; Malone, *Jefferson the Virginian* (1948), pp. 141, 264-9; Malone, *Jefferson and the Ordeal of Liberty* (1962), pp. 207-8; Kimball, *Jefferson, The Road to Glory, 1743 to 1776* (1943), pp. 223-4, 207; Padover, *The Complete Jefferson* (1943), pp. 89-90, 109, 523, 661-6, 677-8, 1149-50, 1288.

¹⁸ *Prigg v. The Commonwealth of Pennsylvania*, 16 Peters (41 U.S.) 539, 611 (1842); *Ableman v. Booth*, 21 Howard (62 U.S.) 506 (1858).

¹⁹ 1 U.S. Stat. 302; 9 U.S. Stat. 462.

²⁰ 1 U.S. Stat. 50-51.

no slavery nor involuntary servitude in said Territory . . ." Thus, the States carved out of this Territory²¹ became non-slave States.

Following the ratification of the Constitution (1789) and up to the start of the Civil War (1861), the expedient compromise was adopted of admitting into the Union a free State and a slave State so as to maintain the balance between the two groups of States. This practice caused increasing bitterness and conflicts and required several variances.

In 1820, under the famous Missouri Compromise, Missouri was admitted as a slave State and Maine as a free State²², with the proviso that, in all other Territory within the Louisiana Purchase lying north of 36° 30' north latitude, slavery and involuntary servitude were to be forever prohibited. This Missouri Compromise later was expressly repealed by the Kansas-Nebraska bill of 1854 and was held to have been unconstitutional by the Supreme Court in the *Dred Scott* decision²³, *infra*. It was important as the first Congressional exclusion of slavery from public territory acquired after the adoption of the Constitution.

From 1789 to 1861, 21 new States were admitted into the Union, 12 free and 9 slave.

(d) The Dred Scott Decision (1857)

In 1857 the Supreme Court handed down the famous *Dred Scott* decision²⁴, consisting of 240 printed pages of opinions, which aroused great criticism of the Court and widened the cleavage over the slavery issue.

Dred Scott, a Negro slave, had been taken by his master, an army surgeon, from Missouri, a slave State, to reside for several years, first, in 1834, to a military post in Illinois, a free State (where slavery had been forbidden under the Northwest Ordinance of 1787) and later, in 1836, to a military post in Fort Snelling in the free Wisconsin Territory (where slavery was prohibited by the Missouri Compromise). Scott married Harriet, a Negro slave, at Fort Snelling and they had two children. Later Scott and his family were removed by his master back to Missouri and, eventually, sold as slaves to Sandford, who claimed and imprisoned them. Scott brought suit in a Federal Court to obtain his freedom, asserting he had become free because of his temporary residence in a free State and a free Territory.

The Supreme Court held that: (1) a Negro whose ancestors were brought to this country and sold as slaves, whether or not he

²¹ Michigan, Wisconsin, Illinois, Indiana and Ohio.

²² 3 U.S. Stat. 545.

²³ *Dred Scott v. Sandford*, 19 Howard (60 U.S.) 393, 452 (1857).

²⁴ *Ibid.*

had become free, was not a "citizen" within the meaning of the United States Constitution, and was not, therefore, entitled to all the rights, privileges and immunities guaranteed therein to citizens, including the right to sue, and Dred Scott was not, therefore, a "citizen" of Missouri or of the United States and was not entitled to bring suit; (2) Dred Scott's temporary residence in free territory had not made him free upon his return to Missouri, a slave State, since his status was determined by the laws of Missouri where he resided when the question of his freedom was raised; and (3) the Missouri Compromise was unconstitutional because Congress had no authority under the Constitution to enact a law prohibiting a citizen from holding and owning slaves as private property in a Territory (such as the Louisiana Purchase) acquired by the United States, while it remained a Territory.

Apropos the above quoted statement in the Declaration of Independence, regarding the equality of all men, the Supreme Court stated that the then slaves "were not intended to be included" in it, even though these "general words (in the Declaration) would seem to embrace the whole human family".

Vigorous dissenting opinions were filed by other members of the Court and several statements therefrom are pertinent here. One dissenter said, "All slavery has its origin in power, and is against right"; another said, "It is not true, in point of fact" that the Constitution "was made exclusively by the white race" or "for the white race", as is obvious from its "Preamble" and from the fact that free coloured persons were then citizens of a number of the States; and that slavery is "contrary to natural right".

(e) The Civil War (1861-1865)

The American Civil War was fought over the slavery issue, as well as to save the Union divided over that issue. This was then both a racial and an economic issue. The basic question was whether slavery in the United States was to be abolished. The Civil War was fought between the 11 Southern "Confederate", slave States²⁵ and the remaining 23 Northern and Border "Union" States, five of which remained loyal to the Union but were then "slave" States.²⁶

The Civil War ended on April 9, 1865, with the surrender of the Southern States.

²⁵ Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia.

²⁶ The 18 non-slave "Union" States were: California, Connecticut, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Wisconsin. The 5 Border "Union" slave States were: Delaware, Kentucky, Maryland, Missouri, and eventually during the War, West Virginia.

(f) The Emancipation Proclamation

On September 22, 1862, during the Civil War, Abraham Lincoln, as President of the United States and Commander-in-Chief of its Army and Navy, issued a preliminary proclamation²⁷ stating that on January 1, 1863, all persons held as slaves within any State which should then be in rebellion against the United States "shall be then, thenceforth, and forever free" and that the United States Government "will recognize and maintain the freedom of such persons" and would do nothing to repress such persons "in any efforts they may make for their actual freedom".

On January 1, 1863, Lincoln issued the "Emancipation Proclamation"²⁸ wherein he designated the States then in rebellion (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi,* North Carolina, South Carolina, Texas and Virginia); and declared "that all persons held as slaves" in those States "are, and henceforward shall be, free" and that the United States "will recognize and maintain the freedom of said persons". Therein he enjoined the freed slaves "to abstain from all violence, unless in necessary self-defense" and urged them to "labor faithfully for reasonable wages". And on this "act of justice" he invoked "the considerate judgment of mankind and the gracious favor of Almighty God".

(g) The Thirteenth Amendment

The abolition of slavery throughout the United States was written into the fundamental law of the land by the adoption of the Thirteenth Amendment to the Constitution, which had passed both Houses of Congress, by January 31, 1865, and was ratified on December 18, 1865. It provides in Section 1:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.²⁹

This Amendment gave Constitutional sanction to President Lincoln's "Emancipation Proclamation". It nullified all State laws which established or upheld slavery. It constitutes a restraint on Congress, on the States and on individuals.

²⁷ 12 U.S. Stat. 1267-8.

²⁸ 12 U.S. Stat. 1268-9.

* The slaves in the several "slave" States not "then in rebellion" were freed otherwise - either by State action or by the Thirteenth Amendment.

²⁹ 13 U.S. Stat. 567, 774.

(h) The Civil Rights Act of 1866 *

Congress passed, on March 13, 1866, "An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication".³⁰ The Bill was vetoed by President Andrew Johnson but was repassed over his veto by Congress and became law on April 9, 1866. In Section 1, it declared to be citizens of the United States "all persons born in the United States" (except Indians not taxed) and that:

such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

The Act further provided, in Section 2, that any person who, "under color of any law, statute, ordinance, regulation or custom", deprived any inhabitant of any State or Territory of any right secured or protected by the Act should be guilty of a crime and subject to criminal penalties.

By this Act the Federal Courts were given jurisdiction over offences thereunder, with provision for a final appeal to the United States Supreme Court. Federal law was to control. Federal officers were authorized to institute and prosecute suits thereunder. The Federal armed forces were authorized to be used to enforce and to prevent violations of the Act.

This statute, among other things, specifically overruled the decision of the Supreme Court in the *Dred Scott* case, *supra*.

(i) The Fourteenth Amendment

The Fourteenth Amendment became part of the Constitution upon being passed by both Houses on June 16, 1866, and ratified on July 9, 1868. It provides, in pertinent part, as follows:

* In this context reference should be made, also, to the Freedmen's Bureau Acts passed by Congress in 1865-6, designed, among other things, to protect the freed Negroes in the free enjoyment of the civil rights and immunities belonging to white people and against discriminations on account of race, colour or previous condition of slavery. (See 13 U.S. Stat. 507, Mar. 3, 1865; 14 U.S. Stat. 173, July 16, 1866; another such Act passed February 19, 1866 was vetoed by President Johnson; Konvitz, *A Century of Civil Rights* (1961) 43-48).

³⁰ 14 U.S. Stat. 27-30.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.³¹

The prohibitions of this Amendment are directed against discriminatory State actions, which embrace the acts of a State by any of its officials or agencies, legislative, judicial or executive.³² Discrimination by private individuals was declared by the Supreme Court to be beyond the scope of this Amendment.³³

(j) The Fifteenth Amendment

The Fifteenth Amendment, which passed both Houses on February 26, 1869 and was ratified on February 3, 1870, provided as follows:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.³⁴

The Nineteenth Amendment,³⁵ which was adopted on August 26, 1920, in effect added the word "sex" to the Fifteenth Amendment. It provided, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex", thus giving women the right to vote.

The Fifteenth and Nineteenth Amendments are directed against governmental action, State and Federal, and not against individual action.

Each of the Thirteenth, Fourteenth, Fifteenth and Nineteenth Amendments has a specific provision giving Congress the power to enforce its provisions "by appropriate legislation".

(k) The Civil Rights Act of 1870

Shortly after the ratification of the Fifteenth Amendment, Congress, on May 31, 1870, enacted "An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for other Purposes"³⁶. It declared that all citizens of the United States, otherwise qualified by law to vote at any elec-

³¹ 14 U.S. Stat. 708-11.

³² *Ex Parte Virginia*, 100 U.S. 339, 347 (1880).

³³ *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

³⁴ 15 U. S. Stat. 346; 16 U.S. Stat. 1131.

³⁵ 41 U.S. Stat. 1823.

³⁶ 16 U.S. Stat. 140.

tion by the people in any State or Territory or territorial subdivision thereof, "shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or Territory . . . to the contrary notwithstanding." It also required that all citizens should be given the "same and equal opportunity" to perform any act required as a prerequisite for voting, and to become qualified to vote without distinction of race, colour or previous condition of servitude.

Criminal penalties were provided against persons who interfered with another person's right to vote or to qualify to vote or who intimidated another person with intent to prevent him from so voting or qualifying to vote. Federal officers were given powers to prosecute violations; Federal Courts were given jurisdiction over all cases arising under this action. The President was authorized to use the Federal Armed Forces to enforce judicial decrees. It provided, in Section 16, that all persons shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of personal property as is enjoyed by white citizens and shall be subject to like punishments, taxes and exactions of every kind, and none other, any law or custom to the contrary notwithstanding.

Criminal penalties were provided in Section 17, against any person who "under color of any law, statute, ordinance, regulation or custom" subjected any other person to the deprivation of any right secured or protected by said Section 16, or to different punishment or pains, by reason of his colour or race.*

This Act then re-enacted the Civil Rights Act of 1866, with a provision that Section 16 and 17 of this Act were to be enforced according to the provisions of the 1866 Act. It was further provided that in Congressional elections, it was a crime for any person to vote illegally, or to permit or commit various stated illegal acts in the election process, or to prevent any qualified voter from qualifying to vote and from fully exercising the right of suffrage, or to induce any election official to act illegally in the election process.

(I) The Civil Rights Act of 1871

On February 28, 1871, Congress passed another detailed Act, amending the Act of 1870, to the end, among others, of further

* These provisions (§§ 16 and 17) were similar to Sections 1 and 2 of the 1866 Act; but that Act had been passed before the adoption of the 14th and 15th Amendments to the Constitution.

protecting Negroes in their voting rights.³⁷ On April 20, 1871, Congress passed yet another long Act to enforce the provisions of the Fourteenth Amendment and for other purposes.³⁸

It provided, among other things, that any person who under colour of any law, statute, ordinance, regulation, custom or usage of any State, should deprive any person of his rights, privileges or immunities secured by the United States Constitution should be liable to the injured party in a legal action brought in the Federal Courts.

(m) The Civil Rights Act of 1875

On March 1, 1875, Congress passed "An Act to Protect all citizens in their civil and legal rights."³⁹

Congress enacted this law in the belief that it was implementing the Fourteenth Amendment "by appropriate legislation"; see *supra*. This measure was pending in Congress for five years before its adoption and was bitterly opposed.

In its Preamble, this statute stated that "it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law."

The statute itself provided in Section 1: "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." (The striking similarity between this provision and the provision in the "Public Accommodations" Title of the Civil Rights Act of 1964 will be seen.)

This Act further provided in Section 2 that any person who should violate the last quoted section "by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities or privileges", would be liable to civil and criminal penalties. It was also provided that no citizen, otherwise qualified, should be

³⁷ 16 U.S. Stat. 433.

³⁸ 17 U.S. Stat. 13.

³⁹ 18 U.S. Stat. 335.

disqualified for jury service in any State or Federal Court "on account of race, color, or previous condition of servitude".

The Federal Courts were given jurisdiction over cases arising under this Act, and any violations thereof and any failures to prosecute thereunder were subject to civil and criminal penalties.

This was the last legislation enacted by Congress to protect the civil and political rights of Negroes until Congress enacted the Civil Rights Acts of 1957 and 1960.

(n) The Civil Rights Cases of 1883

Eight years after the enactment of the Civil Rights Act of 1875, the Supreme Court held it to be unconstitutional in one of the most important and far-reaching decisions in American constitutional law.⁴⁰ This decision is of vital significance in relation to the constitutionality of the Civil Rights Act of 1964.

Five cases were involved, two for denying Negroes accommodations and privileges of an inn or hotel; two for denying to persons, one a Negro and another whose colour was not stated, the accommodations and privileges of a theatre; and one for the refusal of a train conductor to permit a Negro woman to ride in a ladies' car of the railroad. The primary issue was the constitutionality of the "public accommodations" Sections (§ 1 and 2) of the Civil Rights Act of 1875, mentioned above.

The Supreme Court held that those Sections were unconstitutional enactments and were not authorized by either the Thirteenth or Fourteenth Amendments. The Fourteenth Amendment, the Courts held, is "prohibitory upon the States" and "State action of a particular character is prohibited"; but it does not cover the invasion of an individual's rights by another individual. In other words, the Court stated that the Fourteenth Amendment prohibited the invasion of a person's civil rights by the States or by State action but did not protect the invasion of an individual's civil rights by other individuals unaided by State authority. Congress, it said, could not create a code of municipal law for the regulation of private rights between man and man in society, but was limited by the Constitution to the "enactment of corrective legislation" to the end of counteracting or nullifying State laws or actions which violate the prohibitions of the Fourteenth Amendment.

The Court further held that the Thirteenth Amendment did not apply because it relates only to slavery and involuntary servitude, which it abolishes; and the denial, by act of an individual owner, of equal accommodations in inns, public conveyances and public amusement places, even if founded on race or colour, "imposes no

⁴⁰ *Civil Rights Cases*, 109 U.S. 3 (1883).

badge of slavery" or "involuntary servitude" upon the party discriminated against.

Justice Harlan rendered a famous dissenting opinion, which began:

I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. 'It is not the words of the law but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul'.

In Justice Harlan's opinion: the Thirteenth Amendment not only outlawed slavery, but also all of the burdens and disabilities thereof, such as discrimination in the use of public accommodations, which are the badges and incidents of slavery; Congress had power to pass laws to protect Negroes from being deprived of civil rights granted to all freemen in a State and such laws may operate against a State, its officers and agents and against individuals who exercise public functions under State laws or licence; operators of inns, public conveyances and public amusement places are in a sense performing a public function and are subject to public control or regulation; a licence from the public to operate an amusement place, an inn or a carrier imparts in law the equality of right at such places among all members of that public, and the coloured race is part of that public; Negroes are citizens and, under the Fourteenth Amendment, are entitled to all privileges and immunities of citizens in the several States, including freedom from race discrimination in respect of civil rights enjoyed by white citizens and from discrimination practised by the State or its officers or by individuals exercising public functions or authority, such as carriers, inn keepers or amusement place owners; Congress has the power by direct and positive legislation to protect State citizenship, not only against State interference, but against all interference.

It seems clear, in retrospect, that if Justice Harlan's opinion had then prevailed, the cause of civil rights in the United States would have been advanced much further and more rapidly.

(o) The "Separate but Equal" Doctrine

Established: Plessy v. Ferguson (1896)

In 1896, in another far-reaching decision⁴¹ of constitutional law, the Supreme Court approved the doctrine that "separate but equal" facilities for the white and coloured races met the Federal constitutional requirements of due process and equal protection.

It held that a Louisiana statute which required railroad companies, operating in intrastate commerce only, to furnish equal but separate accommodations for the white and coloured races,

⁴¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

either in separate coaches or in divided coaches, was not in conflict with either the Thirteenth or Fourteenth Amendments. Pursuant to that statute, Plessy, a person of mixed coloured blood, was, while a train passenger, ejected from a coach seat reserved for white people.

The Court said such practices did not constitute "slavery" or "involuntary servitude", within the Thirteenth Amendment, and that the enforced separation of the races, as applied to the internal commerce of a State, neither abridged the privileges or immunities of the coloured man, nor denied him the equal protection of the laws, within the meaning of the Fourteenth Amendment.

The Court rejected the argument "that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by enforced commingling of the two races"; and it considered the "underlying fallacy" of plaintiff's argument to be "the assumption that the enforced separation of the two races stamps the coloured race with a badge of inferiority". It approved, by dictum, similar separation of the races in schools and theatres. It cited with approval several earlier state cases to the same effect, primarily a Massachusetts case⁴², wherein the "separate but equal" doctrine was first enunciated and was applied in upholding a racially segregated public school system in Boston.

Justice Harlan wrote another eloquent dissent which, in the light of subsequent events, was most significant and prophetic. He said the Louisiana statute was "hostile to both the spirit and letter of the Constitution of the United States". His opinion stated, *inter alia*:

... But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. (p. 559).

... What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? (p. 560).

... The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of

⁴² *Roberts v. City of Boston*, 5 Cush. (59 Mass.) 198 (1849).

the war (Civil War) under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. (pp. 560-561).

... We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done. (p. 562).

This decision sanctioned and furthered the practice, primarily in Southern States, of establishing separate facilities for Negroes and for whites in public accommodations and public facilities.

The Supreme Court followed and laboured with this decision for over half a century, but finally overruled it in 1954 in the "School Segregation Cases"⁴³.

(p) The Commerce Clause of the U.S. Constitution and the Interstate Commerce Act

The Constitution provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States; and with the Indian Tribes".⁴⁴

Implementing that provision, Congress passed the Interstate Commerce Act on February 4, 1887,⁴⁵ an Act which has since been extensively amended. It provides⁴⁶ that it is unlawful for a common carrier by rail "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . ." These provisions are of great importance in relation to the Civil Rights Act of 1964 and the power of Congress to enact legislation to prevent discriminatory practices in the field of "interstate commerce".

(q) The Civil Rights Act of 1957

On September 9, 1957, President Eisenhower signed into law the Civil Rights Act of 1957⁴⁷, which was the first civil rights legislation enacted by Congress since 1875. It was designed to "provide means of further securing and protecting the civil rights of persons within the jurisdiction of the United States".

It created a "Commission on Civil Rights" as a full time Federal agency with powers to issue subpoenas and to conduct hearings

⁴³ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁴⁴ Art. I, Sec. 8, Cl. 3; 1 U.S. Stat. 12, 13.

⁴⁵ 24 U.S. Stat. 379.

⁴⁶ 49 U.S.C.A., Sec. 3(1).

⁴⁷ 71 U.S. Stat. 634.

under stipulated rules of procedure. The Commission was given the duty: (1) to investigate complaints that certain citizens are "being deprived of their right to vote and have that vote counted by reason of their color, race, religion or national origin"; (2) to study and collect information "concerning legal developments constituting a denial of equal protection of the laws under the Constitution"; (3) to appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution; and (4) to file a report of its activities and recommendations within two years.

An additional Assistant Attorney General was provided for its work with power to institute legal proceedings in Federal Courts to prevent interferences with the right to vote. The Act also provided trial by jury for proceedings to punish criminal contempts of court growing out of civil rights cases.

The Commission on Civil Rights did submit its detailed report, consisting of 668 pages, on September 9, 1959, including many findings and recommendations concerning the status of civil rights in the United States.

(r) The Civil Rights Act of 1960

This Act⁴⁸ became law on May 6, 1960, after a long filibuster in Congress. Primarily, it provided further protection for the citizen's right to vote, by requiring election officials to preserve for 22 months and to make available to the Attorney General, upon demand, all papers and records relating to applications to vote, registrations, payments of poll tax and other records necessary to voting in any Federal election, and by providing for court-appointed voting referees to investigate and report on complaints concerning denials of opportunity to register and to vote.

(s) The Existing Federal Civil Rights Law

Prior to the enactment of the Civil Rights Act of 1964, there was, and still is, in existence a body of Federal statutory law relating to "civil rights" which was codified in Chapters 20, 20A and 21 of the United States Code Annotated.⁴⁹ These statutory provisions have been derived from all of the prior Federal Civil Rights Acts insofar as that legislation was not superseded by later laws or was not declared invalid by the courts.

To be continued

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⁴⁸ 74 U.S. Stat. 86.

⁴⁹ 42 U.S.C.A., Chapters 20, 20A, 21.

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THE RULE OF LAW IN THE SOMALI REPUBLIC*

INTRODUCTION

The Somali Republic is situated in the Horn of Africa and covers an area of 230,000 square miles; its population is estimated at about 3,000,000. It is composed of the former British Protectorate of Somaliland and the former Trust Territory of Somalia under Italian administration. The Somaliland Protectorate became independent on June 26, 1960 – the Trust Territory of Somalia on June 30, 1960 – and both joined on July 1, 1960, to form the Somali Republic. When the duly elected representatives of the Legislative Assemblies of Somaliland and Somalia, meeting jointly on July 1, 1960, proclaimed the Union of Somaliland and Somalia in the Somali Republic, the Constitution which was approved by the Constituent Assembly of Somalia was extended to the whole territory of the Republic. The Constitution of the Somali Republic states that Somalia is a “democratic . . . Republic” [Article 1(1)] and that “the organization of the State and the relationships between the State and other persons, public and private, shall be governed by law” [Article 5(1)]. The Constitution thus embodies the principle of the Rule of Law. The purpose of this paper, therefore, is to examine the Constitution and the laws enacted since Independence to see how far the Rule of Law is established in the Somali Republic.

The plan of the paper is as follows. Firstly, an attempt is made to define the concept of the Rule of Law including its substantive content and procedural aspect.

Secondly, the subject of the Rule of Law in the Somali Republic is examined with reference to the following questions:

1. Was the Constitution of the Somali Republic adopted freely?
2. Has the Legislative body been established in accordance with the will of the people, and does it embody the principle of democratic representation?

* This is the revised and edited text of a lecture given by the author to the participants of a Seminar on “Administrative Management” for Directors General held at the University Institute of Somalia, Mogadiscio, on the May 14 and 15, 1964.

3. Are the fundamental human rights written and entrenched in the Constitution?
 4. Is there a proper distribution of power to ensure the Rule of Law?
 5. How far is the right to personal liberty safeguarded in the Republic?
 6. How far is the independence of the Judiciary guaranteed?
- Finally, some concluding observations are set out very briefly.

CONCEPT OF THE RULE OF LAW

The Rule of Law is a complex concept. According to the distinguished jurist, Dicey, the term Rule of Law meant that no one was above the law and that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land".¹

The Rule of Law has since acquired a wider meaning. Today it is recognized as a dynamic concept "which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized."²

The Rule of Law has two aspects.³ In the first place it is necessary to distinguish the *substantive content* of the Rule of Law, that is to say, the conception which each society has of it. Secondly, it is necessary to look at the legal institutions, procedures and traditions – in a broad sense – the *procedural machinery* which is necessary to give practical reality to each society's conception of the Rule of Law.

Substantive Content of the Rule of Law

The concept of the Rule of Law is based upon the values of a free society, by which is understood a society providing an ordered framework within which the free spirit of all its individual members may find fullest expression. A free society is one which recognizes the supreme value of human personality and conceives of all social institutions, and the State in particular, as the servants rather than masters of the individual.

¹ Dicey's *Law of the Constitution*, 10th ed., p. 188.

² See the *Declaration of Delhi* adopted by the International Congress of Jurists held in New Delhi in January 1959 under the aegis of the International Commission of Jurists, *The Rule of Law in a Free Society*, International Commission of Jurists, Geneva (1959), p. 3.

³ This is a summary of the "Meaning of the Rule of Law" given by Mr. Norman S. March in the *Working Paper*, see *Ibid.*, pp. 191–195.

A free society is thus primarily concerned with the rights of the individual. Such rights may be of two kinds. Broadly speaking, in the historical development of free societies, the main emphasis has been laid on the right of the individual to assert his freedom from State interference in his spiritual and political activities, a freedom which finds expression in such classic rights as freedom of worship, speech, and assembly. We must however distinguish between the formal expression of rights and the realization of such rights. For instance, for large sections of the population who lack minimum standards of education and economic security, fundamental rights may seem a shadow rather than substance. It is for this reason that much more emphasis is being placed on the achievement of social and economic wellbeing, rather than on political rights alone. In a meaningful sense therefore, fundamental rights now include many "new rights", so to speak. These latter are concerned with the claim of every individual on the State to have access to the minimum material means whereby he may at least be in a position to take advantage of his spiritual and political freedom. Both kinds of individual rights – the political and the socio-economic – are essential in a free society.

Procedural Aspect of the Rule of Law

Turning now to the question of the procedural machinery, it will probably be agreed (without commitment to any dogmatic theory of separation of powers) that the proper distribution of power is a cardinal problem for a free society which wishes to preserve the initiative and dignity of its individual members.

RULE OF LAW AND THE LAW OF LAGOS

In January 1961, the first African Conference on the Rule of Law was held in Lagos under the aegis of the International Commission of Jurists. In that Conference 194 Judges, practising lawyers, and teachers of law from 23 African nations as well as 9 other non-African countries participated. This Conference adopted what is known as the *Law of Lagos*.⁴ The *Law of Lagos* declares that:

the Rule of Law cannot be fully realized unless legislative bodies have been established in accordance with the will of people who have adopted their Constitution freely;

in order to maintain adequately the Rule of Law all Governments should adhere to the principle of democratic representation in their Legislatures; the fundamental human rights, especially the right of personal liberty, should be written and entrenched in the Constitutions of all countries

⁴ *African Conference on the Rule of Law*, International Commission of Jurists, Geneva (1961), p. 11.

and that such personal liberty should not in peacetime be restricted without trial in a court of law.

According to *The Law of Lagos* the following conditions have to be fulfilled in order to realize fully the Rule of Law:

1. The Constitution should be adopted freely.
2. The Legislative body should be established in accordance with the will of the people.
3. The fundamental human rights should be written and entrenched in the Constitution.
4. There should be a proper distribution of power in the State.
5. The right to personal liberty should be adequately safeguarded.

In view of the conditions laid down by the *Law of Lagos* for the realization of the Rule of Law, the subject of the Rule of Law in the Somali Republic could be examined with reference to the following questions:

1. Was the Constitution of the Somali Republic freely adopted? (Section "A").
2. Has the Legislative body been established in accordance with the will of the people, and does it embody the principles of democratic representation? (Section "B").
3. Are the fundamental human rights written and entrenched in the Constitution? (Section "C").
4. Is there a proper distribution of power to ensure the Rule of Law? (Section "D").
5. a) How far is the right to personal liberty safeguarded in the Republic? (Section "E").
b) Since an independent Judiciary is an indispensable requisite of a free society, we have to examine how far the independence of the Judiciary is guaranteed in the Somali Republic. (Section "F").

THE SOMALI REPUBLIC

(A) ADOPTION OF THE CONSTITUTION

1) Was the Constitution of the Republic adopted freely?

As referred to earlier, the Constitution was approved on June 30, 1960, by the Constituent Assembly of Somalia, while Somalia was still under Italian administration. When the elected representatives of the Legislative Assemblies of Somaliland and Somalia proclaimed the formation of the Somali Republic, the President of the Legislative Assembly, acting as the Provisional President of the Somali Republic, promulgated the Constitution on July 1, 1960, and the Constitution provisionally came into effect throughout the Republic from that date. Under Article 111 of the Transitional and Final Provisions of the Constitution, it was required that within one year from the coming into force of the Constitution, it should

be submitted to a popular referendum. The Constitution was approved by popular referendum on June 20, 1961, by an overwhelming majority of 90.6 per cent of those who voted.

(B) NATIONAL ASSEMBLY

2) Has the Legislative body been established in accordance with the will of the people, and does it embody the principle of democratic representation?

The legislative power in the State is vested in the National Assembly direct, (Article 49 of the Constitution) which consists of deputies elected by the people by universal, free and secret ballot, and of certain deputies by right, who are former Presidents of the Republic. The *number* of deputies is fixed by law and is at present set at 123 (Article 1, Political Elections Law, Law No. 4, January 22, 1964). National elections are conducted on the basis of the "list" system (Article 7). Every citizen who has the right to vote and who in the year of the election is not less than 25 years old is eligible to become a deputy. Members of the Judiciary, members of the Armed Forces or Para-military Organizations, Regional Governors, District Commissioners and Heads of Sub-Districts are ineligible to be elected as deputies. However, such grounds of ineligibility shall not apply if the services of the person concerned have been terminated before the presentation of the lists of the candidates. During their term of office, deputies *should not* hold any of the offices referred to earlier and shall not be *Chairmen of Local Councils* or *Members of District or Local Councils* or employees of the State or other public bodies. Where a deputy does not opt for his new office within fifteen days from his appointment or election to such office, he will automatically forfeit such office (Articles 2, 3, 4).

Each legislature is elected for a period of *five years* starting from the date of the proclamation of the electoral results, and any modification of this term of office shall have no effect on the duration of the Legislature during which such decision is taken (Article 52 of the Constitution). The Assembly may be dissolved before the end of its term of office by the President of the Republic whenever:

1. it cannot discharge its functions, or
2. discharges them in a manner prejudicial to the normal exercise of legislative activity,

after the President has heard the opinion of the President of the National Assembly [Article 63(1) of the Constitution].

No such dissolution shall however take place *during the first year in office of the National Assembly or during the last year in*

office of the President of the Republic [Article 53(3)]. However, under Article 53(4), the retiring Assembly will retain its power in all cases until the proclamation of the electoral results for the new Assembly.

The National Assembly is thus based on democratic representation and reflects the will of the people.

(C) FUNDAMENTAL HUMAN RIGHTS

3) Are the fundamental human rights written and entrenched in the Constitution?

The fundamental human rights are written and entrenched in the Somali Constitution. The rights guaranteed by the Constitution include not only civil and political rights, but social, economic, educational and cultural rights.

The Constitution divides the fundamental rights into four categories:

1. Fundamental rights of the citizen.
2. Fundamental rights of man.
3. Social rights.
4. Judicial guarantees.

The fundamental rights of the citizen include: the right to vote (Article 8), the right of access to public office (Article 9), the right to petition (Article 10), the right of residence (Article 11), the right of political association (Article 12), the right to form trade unions (Article 13), and the right to economic initiative (Article 14).

The fundamental rights of man include: the right to life and personal integrity (Article 16), the right to personal liberty (Article 17), the right to extradition and political asylum (Article 19), limits to personal service and personal levy (Article 20), freedom of domicile (Article 21), freedom of correspondence (Article 22), social equality (Article 23), right to property (Article 24), freedom of assembly (Article 25), freedom of association (Article 26), the right to strike (Article 27), freedom of opinion (Article 28), freedom of religion (Article 29), and the right to personal status (Article 30).⁵

Social rights include: protection of the family (Article 31), the provision of welfare Agencies (Article 32), protection of public health (Article 33), safeguarding of public morals (Article 34), the provision of public education (Article 35), protection of labour

⁵ Article 30 of the Constitution guarantees that in certain matters such as marriage, divorce, maintenance, guardianship and succession, the Personal Law of the parties concerned shall apply. In respect of the above matters, Muslims will be governed by Shariat Law.

(Article 36), provision of social security and social welfare (Article 37).

Judicial guarantees include: right to institute judicial proceedings (Article 38), protection against acts of public administration (Article 40), civil responsibility of the State for the acts of its officials and employees (Article 40), right of defence in legal proceedings (Article 41), right to free legal aid (Article 41).

It is further provided in Article 7 that the laws of the Republic should comply in so far as possible with the principles of the Universal Human Rights adopted by the General Assembly of the United Nations on December 10, 1948.

(D) DISTRIBUTION OF POWER IN THE REPUBLIC

4) Is the distribution of political and State power such as to ensure the Rule of Law?

THE LEGISLATURE AND THE RULE OF LAW

The underlying conception of the Rule of Law presupposes that the law serves the people. The "people" is not necessarily identical with the will of the majority, but it is equally true or even more true that the will of the minority cannot represent the people. Democratic government presupposes not only acceptance of the will of the majority but also tolerance of the minority. In a society under the Rule of Law both majority and minority alike accept minimum standards or principles which represent the basic duties of society to every member thereof. Whatever the law-making authority, and whatever the formal restrictions which may or may not be placed on its legislative powers, it will, in a society under the Rule of Law, respect the minimum rights of the individual and the corresponding duties of society as a whole.

The Rule of Law therefore implies *certain limitations on the legislative power.*

Limitations:

In the Somali Republic there are, firstly, the absolute limits on legislative power which are derived from the Constitution itself and secondly, limits derived from the power of judicial review vested in the Supreme Court constituted as the Constitutional Court.

1) Limitations derived from the Constitution

a) Amendments to the Constitution⁶

One of the limitations on the legislative power derived from

⁶ Since independence, two amendments to the Constitution have been adopted.

(i) Article 95(3) provided as follows:

"Military Tribunals may be established only in time of war."

the Constitution is the particular procedure provided for amendment. Under Article 104 of the Constitution, an amendment of the Constitution could be adopted by the National Assembly on the proposal of:

- (i) at least one-fifth of its members,
- (ii) the Government, or
- (iii) 10,000 voters

by means of two successive ballots held at an interval of not less than three months, approval requiring on absolute majority of the deputies on the first ballot and two-thirds majority on the second ballot.

b) Limitations on Amending Power

Secondly, under the Constitution there were certain limitations on the power of amendment itself. Article 105 provides that amendment cannot be adopted for the purpose of:

- (i) modifying the republican and democratic form of the State, or
- (ii) for restricting the fundamental rights and freedoms of the citizens and of man, guaranteed by the Constitution.

c) Prohibition against retroactive Penal Legislation

Thirdly, retroactive penal legislation is prohibited both under the Constitution as well as by the Somali Penal Code (Article 2). Article 42 of the Constitution provides that no person shall be condemned for an act which was not punishable as an offence under the law in force at the time when it was committed, nor shall a heavier penalty be imposed than the one applicable at the time.

On January 9, 1963, the above provisions were amended as follows:

"The jurisdiction of military tribunals in time of war shall be established by law. In time of peace, they shall have jurisdiction only in respect of military offences committed by members of the Armed Forces."

(ii) Article 29 provided as follows:

"Freedom of Religion

Every person shall have the right to freedom of conscience and freedom to profess his own religion, to worship it and impart its teaching subject to any limitation which may be prescribed by law for the purpose of safeguarding morality, public health and order".

In June 1963, the above provision was amended as follows:

"Every person shall have the right to freedom of conscience and freely to profess his own religion and worship, subject to any limitations which may be prescribed by law for the purpose of safeguarding morality, public health and order. However, it shall not be permissible to spread or propagandize any religion other than the religion of Islam."

d) *Equality before the Law*

Fourthly, Article 3 of the Constitution provides that:

All citizens, without distinction of race, national origin, birth, language, religion, sex, economic or social status or of opinion shall have equal rights and responsibilities before the law.

This provision is a safeguard against any kind of discrimination between citizens. As a general principle limiting the competence of the Legislature, "Equality before the Law" means simply this: the law passed by the Legislature must not discriminate between citizens except in so far as such discrimination can be justified on a rational classification consistent with the progressive enhancement of human dignity within a particular society. The essential value of insisting on equality before the law lies in the necessity which it places on the Legislature to justify its discriminatory measures by reference to a general scale of moral values. Equality before the Law is thus the opposite to arbitrariness, and lies at the root of the Rule of Law.⁷

2) *Judicial Review*

The constitutional limitations on legislative power which were discussed earlier have to be finally interpreted and decided by an independent judicial tribunal. Judicial review of legislation has therefore become an essential part of the Rule of Law. In the Republic, the power of judicial review is vested in the Supreme Court constituted as the Constitutional Court.

Article 98(1) of the Constitution provides that:

The laws and provisions having the force of law shall conform to the Constitution and to the general principles of Islam.

Article 98(2) provides that the constitutionality of laws and provisions having the force of law, in form or substance, may be raised before the Supreme Court constituted as the Constitutional Court in the course of a judicial proceeding:

- (i) at the request of the interested party,
- (ii) at the request of the Public Prosecutor, or
- (iii) at the request of the Court,

even though a partial decision depends on the application of the disputed legislative provision.

When the Supreme Court is constituted as the Constitutional Court, it consists of the members of the Supreme Court with two additional members appointed for a period of three years by the President of the Republic on the proposal of the Council of Ministers, and two more additional members elected for the same period by an absolute majority of the National Assembly.

⁷ See Working Paper, *The Rule of Law in a Free Society*, *op. cit.*, pp. 212, 213.

In deciding on constitutionality, the Constitutional Court should concern itself with the *formal and substantial conformity* of the law or provisions in question with the provisions of the Constitution, without consideration of political implications or the propriety of the use of any discretionary powers of the Legislature [Article 1(2) of the Annex to the Law on the Organization of the Judiciary (Legislature Decree No. 3 of June 12, 1962)]. If the Constitutional Court finds that the impugned law or provision having the force of law is unconstitutional, the court shall declare it unconstitutional [Article 6(2) Annex] and it shall cease to be in force on the day of the publication of the judgment declaring it unconstitutional, [Article 6(4) Annex]. The *decisions* of the Constitutional Court are *binding* on other courts [Article 2(b) Annex]. Where a presiding Judge considers that a petition is not manifestly unfounded or has some bearing on the principal case, or where he raises the question of constitutionality on his own motion, he should refer the case to the Constitutional Court and suspend judgment in the principal case pending the decision of the Constitutional Court [Article 4(2)(b) Annex].

Until now the Constitutional Court has not been formally constituted. However the constitutionality of certain provisions of law were raised before the Supreme Court in two cases, *Somali National Congress v. the State*⁸ and *Ahmed Muddie Hussen and others v. the Minister of Interior*.⁹

In *Somalia National Congress v. the State*, the constitutionality of four provisions of the *Local Administration and Local Council Election Law, Law No. 19 of August 14, 1963*, were challenged before the Supreme Court.

The appellant contended

- a) that the provision stating that *no vote shall be taken when only one list is presented* in an electoral district [Article 7(3) of the Annex to the Local Administration law],
- b) that the provision requiring that *each list of candidates should be signed by a certain number of voters* [Article 10(1) of the Annex],
- c) that the *powers attributed to the Mayor on matters concerning the presentation of the lists when he himself is a candidate* in another list and therefore an interested party (Article 10 Annex), and
- d) that the obligation to make a *security deposit* [Article 11(1) Annex],

⁸ *Somali National Congress v. the State*, see Judgment of the Supreme Court delivered on November 5, 1963.

⁹ *Ahmed Muddie Hussen and others v. the Minister of Interior*, see Judgment of the Supreme Court delivered on March 7, 1964.

were contrary to the principle relating to the right to vote embodied in Article 8 of the Constitution which is as follows:

1. Every citizen who possesses the qualifications required by law shall have the right to vote.
2. The vote shall be personal, equal, free and secret.

It was the appellant's case that the impugned provisions of the Annex to the Local Administration and Local Elections Law render the constitutional principle establishing the right to vote nugatory and hence unconstitutional.

Since the Constitutional Court was not established, the question that the Full Bench of the Supreme Court had to consider was whether it could exercise jurisdiction on constitutional matters before the Constitutional Court was constituted. Neither in the Constitution nor in the Law on the Organization of the Judiciary is there any specific provision authorizing a *provisional solution* of the problem. The Supreme Court, in its judgment of November 5, 1963, while upholding the constitutionality of the impugned provisions, held that pending the constitution of the Constitutional Court "the ordinary court can exercise jurisdiction on constitutional matters subject to the condition that its judgment will have only a limited effect, and not a general one as would be the case if the judgments were of the Supreme Court constituted as the Constitutional Court".

In the second case, *Ahmed Muddie Hussen and others v. the Minister of Interior*,¹⁰ a petition was filed to annul the decree issued on January 2, 1964, by the Minister of Interior dissolving the Local Council of Mogadiscio. The State Attorney raised the question of the constitutionality of Article 44 Paragraph (4) of the Local Administration and Local Council Elections Law attributing to the Supreme Court alone, without any right of appeal, the power to hear petitions challenging the legality of the dissolution of a Local Council. He contended that, while Article 97, paragraph (3), of the Constitution provides for appeals against judicial decisions, under Article 44, paragraph (4), of the Local Administration and Local Council Election law, no appeal is provided against the decision of the Supreme Court, and that therefore Article 44, paragraph (4), of the Local Administration and Local Council Election Law violates Article 97, paragraph (3), of the Constitution. He further requested that the hearing of the petition be suspended pending the formation of the Constitutional Court. The Supreme Court, relying on the proceedings of the Constituent Assembly relating to the matter, stated that the framers of the Constitution did not intend to provide for an appeal in this matter as well as against decisions of the Supreme Court constituted as the Consti-

¹⁰ This case is discussed in detail later under the heading: "Remedies against arbitrary action of the Executive".

tutional Court and as the High Court of Justice. The Supreme Court, following its previous decision in *The Somali National Congress v. the State*, held that it could decide on the question of constitutionality raised in this case, and that such decision would have only limited effect.

THE EXECUTIVE AND THE RULE OF LAW

1) Remedies against arbitrary action by the Executive

The power to govern, that is, to initiate and then execute the laws which have been duly passed by the representatives of the people, cannot in a free society be exercised arbitrarily. Those who exercise such powers must act within the law and be responsible for their actions to the people, through the control exercised by the representatives of the people in the law-making assembly and by the free choice by the people of the effective head of the Executive.

The *Government*, in whom the executive function is vested, is composed of the Prime Minister and the Ministers. The Prime Minister is appointed by the President of the Republic. The President of the Republic who is the formal Head of State, is himself elected by the National Assembly on a two-thirds majority. The Ministers are appointed by the President of the Republic on the advice of the Prime Minister. The Government has to obtain the confidence of the National Assembly within 30 days of its formation.

In all modern societies, the Executive is necessarily entrusted with wide powers in the application of laws. The application of laws involves in the first place a consideration of the ways and means by which the Executive can be compelled to carry out duties which the law imposes.

a) *Judicial Review of Administrative Action*

Article 94 of the Constitution and Article 10(4) of the Law on the Organization of the Judiciary (Legislative Decree No. 3 of June 12, 1962) provide that a *petition to the Supreme Court in administrative matters* shall lie against final administrative decisions on questions of law, and where expressly provided for, on questions of facts also. Article 10(4) of the Judiciary Law further provides that the Public Administration shall be bound to comply with the judgment of the Supreme Court within the timelimit which may be stipulated by the Court; where the Public Administration fails to comply with a judgment, the Supreme Court shall, at the instance of the party concerned, take the necessary action to carry out its judgment.

An interesting case in administrative law arose in *Ahmed Muddie Hussen and Others v. the Minister of Interior*, which has

been referred to earlier. The election of the Local Council of Mogadiscio took place on November 26, 1963, and the newly elected Council met for the first time on January 2, 1964, and elected by lot Ahmed Muddie Hussen as its Mayor. The same day, the Minister of Interior, in exercise of the powers vested in him under Article 44, paragraph (1), of the Local Administration and Local Election law, issued a decree dissolving the Local Council and appointing a Special Commissioner. Later, a fresh election to the Local Council was also ordered. The decree dissolving the Local Council stated that the previous Municipal Council, of which Ahmed Muddie Hussen was the Mayor, was dissolved on August 28, 1962, by the Minister of Interior on the grounds that there were allegations of grave administrative deficiencies and irregularities, that since the new Council had again elected Ahmed Mullie Hussen as the Mayor, there was no guarantee that the Council with Ahmed Muddie Hussen as the Mayor would function any better.

Article 44, paragraph (1), of the Local Administration and Local Election Law provides that where a Council cannot perform its functions, or persistently makes default in performing the duties imposed on it by law, or exceeds or abuses its powers, the Minister of Interior may by decree dissolve the Council.

The main question on the merits that the Supreme Court had to consider was whether the power vested in the Minister under Article 44, paragraph (1), of the Local Administration and Local Council Elections law was properly exercised by the Minister. The State Attorney contended that the first condition for dissolution of the Council laid down in the law, viz., inability to perform its functions, was generic and not subject to any specific limitation, as it was based on a broad power of discretion on the part of the Public Administration, and that the Public Administration was not bound to give reasons. The Court did not agree with the above interpretation. The Court said that even though the Public Administration had discretion in the exercise of the power vested by Article 44 paragraph (1) such discretion should be exercised within legal limits. In other words, whether or not to issue such a decree is within the discretion of the Public Administration, but once the Public Administration decides to issue such a decree, the grounds stated for the dissolution should be legally tenable. Secondly, the Supreme Court held that the expression "where a Council cannot perform its functions" could not be interpreted in any other way than impossibility to perform its duties imposed by law. This impossibility, the Court said, should be evaluated *a posteriori*, that is, after taking into account how the Local Council performed its functions and not on the basis of a probability. In the instant case, the Court said that the grounds stated in the impugned decree were based on an *a priori* judgment of how the Council would perform its functions.

It would appear that the Public Administration thought that a previous Council with Ahmed Muddie Hussen as its Mayor did not perform its functions properly and that the new Council with the same person as the Mayor would do likewise. In the circumstances, the Supreme Court came to the conclusion that the law was not properly applied by the Public Administration. The Supreme Court annulled the impugned decree. Following the judgment of the Supreme Court, the Minister of Interior reinstated the dissolved Local Council. This case indicates not only the effectiveness of the remedy provided against the administrative action, but also the readiness on the part of the Executive to comply with the judgment of the Supreme Court, both of which are the *sine qua non* of the Rule of Law in a free society.

b) Civil and Criminal actions against the Executive

If the subordination of the Executive to the law is ultimately to serve the individual member of the Society, individuals *who have suffered damage as the result of the illegal acts of the Executive* must be given a remedy in damages, or in certain cases, by way of criminal prosecution. Article 5 of the Civil Service Law (Law No. 7 of March 15, 1962) provides that where any right of third parties has been violated as a result of acts or omissions done by an officer wilfully or through gross negligence in the performance of his official duties, the Officer and the Administration are jointly liable to pay compensation to such third parties for any damage arising therefrom. Where the Administration has paid compensation to third parties, it has the right to claim reimbursement from the officer concerned. Where an officer has received from his superior an order deemed by the former to be manifestly unlawful, he shall draw the matter to the attention of the superior, stating the grounds therefor. If the order is confirmed in writing, the officer shall have the duty to comply with it. In such case, the officer shall be exempted from liability, and the superior officer who issued the order shall be liable for any damage arising from the said order.

2) Legislative Functions of the Executive

a) Power to issue decree laws

Besides the application of laws, the *Executive* in the Somali Republic is vested with an exceptional power of *law-making in cases of urgent necessity* (Article 63 of the Constitution). In a case of urgent necessity, the Government may issue temporary provisions having the force of law. Such provisions are issued by decree of the President of the Republic on proposals approved by the Council of Ministers and shall within *five days from the date* of their publication be presented to the *National Assembly for conversion*

into law. If it is in session, the Assembly shall decide on their conversion into law within thirty days of the date of presentation; if it is not in session, it shall decide within thirty days of its first subsequent meeting. If they are not converted into law, such provisions shall lose their force and effect from their date of issue. The Assembly may, however, decide that such force and effect shall cease on a different date and may regulate by law the juridical relations which arose from such non-converted provisions.

b) Emergency powers of the Executive and Suspension of Rights

During a State of Emergency, the Minister of Interior or the Governor territorially competent, with the authorization of the Minister of Interior, may by ordinance provisionally provide for such restrictions on freedom of movement, association, propaganda, and the right to strike, as may be necessary to prevent disturbance of public order, public calamity or danger of disorders; the arrest, the search of premises or persons suspected of a crime or activities contrary to public order and security; the requisition of property or services against equitable and timely compensation where such requisition is necessary to prevent public calamity or succour a population in distress, or ensure the essential public services; the suspension or revocation of authorization or licences to keep or carry arms, or weapons normally used for offensive purposes; conferring upon civil or military authorities powers which are different from those ordinarily vested in them (Article 71 of the Public Order Law, Law No. 2 of September 26, 1963).

However, the restrictive measures referred to above are subject to *confirmation by a court.* Under Article 72 of the Public Order Law, all measures concerning arrest or search of persons or premises taken during a State of Emergency shall be promptly notified to the competent court for confirmation within thirty days from such notification.

c) Assumption of War Emergency Powers

On the other hand, the declaration of a State of War will confer upon the Public Authorities the powers vested in them during a state of emergency, and any other power provided for in the authorization by the National Assembly (Article 74 of the Public Order Law).

d) Delegation of the Legislative Function by the Assembly

The National Assembly also can *delegate the power of legislation to the Government.* Under Article 62 of the Constitution, the Assembly may delegate to the Government the power to issue on *specified subjects or matters* and for a *limited period*, provisions having the force of law. In delegating authority, the Assembly may

establish policy and issue directives. Provisions made under a delegated power shall be issued by decrees of the President of the Republic on proposals approved by the Council of Ministers.

e) Delegation of Power to make Decrees and Regulations

Besides, under Article 85 of the Constitution, *regulations* may be issued by decree of the President of the Republic on proposals approved by the Council of Ministers. The power to issue regulations on specific matters may be delegated by law to other organs of the State and public bodies.

Any provision of any law or regulations made under the provisions of the Constitution referred to above can be challenged before the Constitutional Court if it violates the Constitution.

(E) PROTECTION OF PERSONAL LIBERTY

5(a) How far is the right to personal liberty safeguarded in the Republic?

The question regarding the protection of personal liberty may be discussed under the following headings:

1. Criminal Process.
2. Preventive Detention.
3. Habeas Corpus.

1) Criminal Process

In the Northern Regions of the Republic, criminal process is governed by the Criminal Procedure Ordinance,¹¹ which is based on the Indian Code of Criminal Procedure, Act V of 1898, and in the Southern Regions, by the Italian Code of Criminal Procedure. A Somali Criminal Procedure Code, mainly based on the Criminal Procedure Ordinance of the Northern Regions, has been promulgated by the President of the Republic by Legislative Decree of June 1, 1963, and will come into force shortly. The references made hereunder are to the Somali Criminal Procedure Code.

a) Arrest Warrant

The first question that the framers of the Somali Procedure Code had to decide was: who should be given the power to issue arrest warrants? There was no dispute regarding giving this power to the Judges. The question to be decided was whether the Attorney General also should be given this power. Under the Italian system the Attorney General has this power, being a member of the Judi-

¹¹ Chapter VI, Laws of Somaliland, 1950.

ciary. In other systems, he is just a Prosecutor and has no right to issue an arrest warrant. A compromise was effected. He is now considered a member of the Judiciary but he is not given the right to issue a warrant. Under the Somali Procedure Code, all arrest warrants should emanate from the Judges (Article 40).

b) Arrest without Warrant

Normally, a person can be arrested only on a warrant issued by the competent judge or the President of the competent court. There are exceptional cases in which a person can be arrested without a warrant:

- i. The first exception is provided by Article 17 paragraph (3) of the Constitution, *viz.*, when a person is apprehended in "flagrante delicto". Under Article 35 of the Somali Procedure Code, if a person is caught in the act of committing an offence such as an offence against the personality of the State or murder, arrest without warrant is mandatory; and under Article 36, if the offence is punishable with maximum imprisonment of more than one year or with a heavier penalty, arrest without warrant is permitted.
- ii. The second exception is provided in Article 17, paragraph (4), of the Constitution and Article 38 of the Somali Procedure Code. Under the above provisions, a police officer may arrest a person without warrant in cases of urgent necessity when there are grounds to believe that the person concerned has committed an offence punishable by more than two years imprisonment or a heavier punishment, and there is no time to get a warrant of arrest and if the person was not arrested he would abscond.

It is provided by Article 39 of the Code that a person so arrested should be brought, within 48 hours from the time of his arrest, before the competent court or the nearest judge and the officer arresting should state the reason for the arrest. If the arrest is not confirmed by the judge within a period of five days from the day when it took place, the arrest should be considered rescinded and the arrested person should be released. It is also required that a judge should cause criminal proceedings to be instituted or disciplinary action taken against the arresting officer where the arrest was not in accordance with law or where there has been any unjustifiable delay in bringing the arrested person before him (Article 32).

c) Accusation

Further, there have been complaints that persons under trial have been kept in custody for months. To put an end to this un-

satisfactory state of affairs, it has now been provided that from the time a man is arrested, the trial should commence ordinarily within 90 days in respect of offences punishable with death or imprisonment for life; 60 days in other serious offences; and 45 days in other offences. When the case is not commenced within the stipulated time, the accused person should be released on bail. In very exceptional circumstances only, the above time-limit could be extended by the court (Article 47).

d) Remand

Furthermore, an arrested person remanded in custody should be brought before the court every week (Article 47(3)). This is a guarantee against persecution.

e) Bail

A person arrested in connection with an offence may be released on bail subject to the execution of a bond by the person concerned or by another, except in those cases where the detention in custody is mandatory (Article 59). Bail may be granted on the order of the competent judge up to the commencement of the proceedings in the first instance, and of the President of the competent court at any other stage of the proceedings (Article 60).

f) Right to be Notified of the Reasons of Arrest

Article 17, paragraph (5), of the Constitution and Article 29 of the Somali Procedure Code require that in every case of detention, arrest or other restriction on personal liberty, the reasons for such measure should be forthwith communicated to the person concerned.

g) Right to be Defended by Legal Counsel

Article 41 of the Constitution and Article 15 guarantee to an accused person the right to be defended by one or more counsel, and the right to confer freely with his defence counsel at all stages of the proceedings. In criminal proceedings where the accused is charged with an offence punishable with death, imprisonment for life or imprisonment for more than twenty years, and where a party does not have his own counsel and is poor, the court should at the expense of the State appoint a defence counsel.¹² A defence counsel shall not, without reasonable cause, abandon his duties nor absent himself from hearings in court in such a way that the accused is deprived of legal assistance. If he abandons his duties without reasonable cause, he is liable to pay compensation to his client, besides running the risk of being suspended from practising in the

¹² Article 14(2), Law on the Organization of the Judiciary.

legal profession (Somali Criminal Procedure Code, Articles 15 and 16).

h) Presumption of Innocence

When an accused person is brought to trial, he is presumed to be innocent until the conviction has become final [Article 43(2), Constitution; Article 13(2), Somali Criminal Procedure Code].

i) Trial in Public

All judicial proceedings are public except where the court, for reasons of morality, hygiene or public order, orders that they be held *in camera* [Article 97(1), Constitution; Article 96, Somali Criminal Procedure Code].

j) Protection against Double Jeopardy

Further, an accused person, after having been convicted or acquitted or after orders for the case not to proceed have been given, cannot be charged again on the same facts, even if those facts be regarded as constituting a different offence. However, where an accused has been found guilty of an act which has had consequences constituting a different and more serious offence, then the accused can be charged again if such consequences had not occurred or were not known to the court at the time of conviction [Articles 13(3) and (4), Somali Criminal Procedure Code].

k) Punishment

The Constitution provides that the death penalty may be prescribed only for the most serious crimes against human life or the personality of the State [Article 17(3)], and enjoins that punishment restricting personal freedom may not consist of treatment contrary to humanity or obstruct the moral education of the convicted person (Article 44).

l) Legal Remedies

A person convicted of an offence has two remedies, *viz.*,

- (1) Appeal, and
- (2) Revision.

(1) *Appeal*. A convicted person can appeal in person or through a special representative (Article 209). First appeals in criminal matters lie on questions of law and fact. Appeals to the Supreme Court lie only on the following questions of law:

- (i) lack of jurisdiction or incompetence of the lower court,
- (ii) violation or erroneous application of legal provisions,
- (iii) nullity of the judgment or the proceedings,

- (iv) omission, insufficiency or contradiction in the grounds on which the judgment is based relating to a material point [Article 10(2) Law on the Organization of the Judiciary].

(2) *Revision*. A convicted person, or the descendants or ascendants or the spouse of the convicted person, if the convicted person is dead, may file a revision before the Supreme Court even when a conviction has become final and even when the punishment has been served or has become extinct. Revision may be allowed in favour of the convicted person in the following cases:

- (i) if after the conviction new facts or new evidence have occurred or been discovered which either separately or in connection with facts and evidence already considered at the trial clearly establish that the offence was not committed or that it was not the accused who committed it;
- (ii) if it is shown that the conviction was the result of some false act or document or the result of another act which the law considers an offence provided that the final conviction has been pronounced as a result of such false acts or documents or such other offence;
- (iii) if the findings on which the conviction is based are incompatible with those of another penal conviction (Articles 237, 238, 239, Somali Criminal Procedure Code).

2) Preventive Detention

The related matter is preventive detention. This is contained in the Public Order Law which was adopted by the National Assembly in August 1963 (Articles 70 to 74, Law No. 21 of August 26, 1963) and which was criticised as fascist and undemocratic.

Provisions relating to preventive detention are found, in some form or other, in most of the English-speaking countries such as the United Kingdom, India, Pakistan, Ceylon, Canada, Burma, Australia, New Zealand and Malaysia. The main reason for retaining provisions relating to preventive detention is that the security of the State is not only threatened by war – prospects of war are nowadays far remote – but also by subversion, disorders and national calamities; and everywhere it is recognized that preventive detention is a necessary evil and has come to stay. The question to be considered is – how to impose reasonable restrictions on the exercise of the powers of preventive detention?

In the African conference on the Rule of Law held in Lagos in 1961 under the aegis of the International Commission of Jurists, this matter was discussed at length. The Conference enumerated a number of restrictions¹³ which should be taken into consideration in regard to the exercise of the powers of preventive detention. They are:

¹³ *African Conference on the Rule of Law*, International Commission of Jurists, Geneva (1961), *op. cit.*, p. 15.

- (i) that preventive detention should be used only during an emergency,
- (ii) the proclamation of an emergency should be approved by the National Legislature,
- (iii) that the period of preventive detention should not exceed six months,
- (iv) that the person subjected to preventive detention should be forthwith informed of the reasons for his detention,
- (v) that the cases of persons held under detention should be reviewed periodically.

In the Somali Republic, under the Public Order Law a State of Emergency may be proclaimed by the President of the Republic on the proposal of the Minister of Interior, after hearing the Council of Ministers. Such a proclamation can be made only in case of serious disturbance of public order, serious public calamities, or danger of war or disorders.

On the date of the proclamation itself, the decree should be forwarded to the National Assembly and the National Assembly should approve or disapprove it within 30 days. If the Assembly is not in session, the Assembly should consider the matter within 30 days from the date of its reassembly.

The detention effected under these provisions should be promptly notified to the competent Regional Court for confirmation, and the confirmation should take place within 30 days.

The period of detention should in no case exceed 90 days.

An appeal will lie to the Supreme Court against confirmation by the Regional Court.

Thus it will be seen that the power to detain suspected persons is hedged in by adequate safeguards. The power in the Somali Republic is more restricted than that in, say, India. In India, the maximum period prescribed is six months, while in the Somali Republic, it is 90 days. In India, the review is done by a committee of three persons who are retired Judges or who are qualified to be appointed as High Court Judges. In the Somali Republic, the Regional Court and the Supreme Court are given that competence.

3) Habeas Corpus

Another provision worth mentioning is Article 66 of the Somali Criminal Procedure Code dealing with Habeas Corpus. Under the above provision if a man is detained in custody without proper cause, a Habeas Corpus petition can be moved before the Supreme Court or the competent Court of Appeal for his release. The Court concerned will require the person concerned to be produced before it and call for records, if any, to find whether or not his being kept in custody was legal. If the arrest and custody was not legal, the Court will release the person. Before independence, the High Court of the Somaliland Protectorate had a similar power under Section

342 of the Criminal Procedure Ordinance, but none of the courts in the Southern Regions had this power. For the first time, this power is vested in the Supreme Court and in the Court of Appeal of the Southern Regions.

The above provisions afford sufficient safeguards of personal liberty.

(F) INDEPENDENCE OF THE JUDICIARY

5(b) How far is the independence of the Judiciary guaranteed in the Somali Republic?

Before answering this question, it is necessary first of all to refer to the Organization of the Judiciary in the Somali Republic.

Southern regions

The Somali Republic inherited two systems of courts. In the Southern Regions, before independence, there were the following courts:¹⁴

1) Kadis Courts

Their jurisdiction was limited to disputes between Muslims in civil matters only, but with no limit as to value.

2) Tribunal of Kadis

This was composed of three Kadis and heard appeals from Kadis Courts. A further appeal lay to the Supreme Court.

3) District Judges

They had jurisdiction in criminal cases punishable with imprisonment up to 3 years. Appeals lay to the Regional Judge and thence to the Supreme Court.

4) Regional Judges

The Regional Judge had his seat in each region. He was competent to hear all cases – civil and criminal – not falling within the competence of the Kadis or District Judges, with the exception of those cases exclusively triable by the Assize Court.

5) Judge of Appeal

His main function was to hear appeals from the Regional Judges.

¹⁴ See Law on the Organization of the Judiciary, Law No. 5 of February 2, 1956, as amended by Law No. 9 of February 19, 1958.

6) Assize Court

This was composed of a Judge of Appeal and six Assessors. It had jurisdiction in serious criminal cases, e.g., offences against the State, and homicide. Appeals lay to the Assize Court of Appeals and thence to the Supreme Court.

7) Assize Court of Appeal

This heard appeals from the Assize Court.

8) The Supreme Court

The main functions were appellate and revisionary and it was composed of a President, the Magistrate of Accounts, two Judges and two Kadis. It was divided into the following sections:

- (i) Ordinary
- (ii) Shariatic
- (iii) Special Accounts.

It performed three functions – as a Supreme Court, Audit Office, and an Administrative Tribunal.

Northern regions

In the Northern Regions there were the following Courts:¹⁵

1) Kadis Courts

They administered Shariatic law and had jurisdiction over matters regarding personal status such as marriage, divorce, guardianship, succession and maintenance.

2) Court of the Chief Kadi

It heard appeals from the Kadis Courts.

3) Subordinate Courts

They had jurisdiction in civil and criminal matters. In civil matters, the jurisdiction normally did not exceed Sh.So.5,000.¹⁶ In criminal matters it had jurisdiction over offences punishable with imprisonment up to six months.

¹⁵ See Subordinate Courts Ordinance, Cap. 4, Vol. I, Laws of Somaliland (1950); Judicial Districts and Appointment of Judges Ordinance, Cap. 3; Somaliland Order in Council, 1950; Eastern African Court of Appeal Order in Council, 1951; Eastern African (Appeal to Privy Council) Order in Council, 1951.

¹⁶ The Somali shilling is of approximately the same value as the British shilling, which equals £ .05 or (US) \$ 0.14.

4) Subordinate Court of Civil Appeal

Appeals from the decisions of the Subordinate Courts lay to the First Class Magistrate, and thence, in civil matters, to Subordinate Courts of Civil Appeals consisting of the Judge of the High Court and two Subordinate Court Judges; and in criminal matters, to the High Court.

5) District Courts of the First Class

These had unlimited original civil jurisdiction and in criminal matters could try offences punishable with imprisonment up to four years.

6) District Court of the Second Class

This had civil jurisdiction up to Sh.So. 1,500. In criminal matters it could try offences punishable with imprisonment up to six months.

7) Magistrates of the First Class

This jurisdiction extended throughout the Northern Regions.

8) High Court

In criminal matters, it had jurisdiction over serious criminal offences. In civil matters, it had appellate jurisdiction over appeals from the District Courts.

9) East African Court of Appeals

Appeals from the High Court decisions lay to the East African Court of Appeals, Nairobi.

10) Privy Council

Appeals from the East African Court of Appeals lay to the Privy Council in the United Kingdom.

The new judicial system

When integrating the courts existing in the Southern and Northern Regions of the Republic and establishing a new system, the main question that had to be tackled was whether to have two systems of courts – Shariatic Courts, and Civil and Criminal Courts.

There were advantages and disadvantages in having separate Shariatic Courts. One advantage might have been that, if the Shariatic Courts were separate, there would be some Judges with specialized knowledge in that branch and the provision of such a system would be acceptable to the conservative group among the Muslims.

On the other hand, it usually happens that Kadis have spe-

cialized knowledge only in Shariat and they do not generally know any other language except Arabic, and this could conceivably hamper the growth of the Shariatic law. Shariat law is not static, but dynamic. The sources of Shariat law are:

- (i) *The Quran*.
- (ii) *Hadies*, that is, the precepts of the Prophet.
- (iii) *Ijma*, that is, concensus of opinions of learned men.
- (iv) *Kiyas*, that is, analogy.

In a developing society, conditions may arise for interpreting Shariat Law which may not be specific on a particular matter, and the Judge is called upon to draw on analogy or give an opinion (i.e., *fatwa*). The Judge who is well versed in Shariatic and civil law will be in a better position to rely on the latter two sources of the Shariat law than a Kadi, who knows only Shariat law and Arabic. In view of this great advantage, it was decided to have only one system of Courts. There are no longer Kadis Courts and Civil Courts. There is only one system of Courts throughout the Republic.

The new system of Courts is as follows:¹⁷

1) The District Courts

Each District Court has jurisdiction over the whole territory of the District concerned. The District Court has two sections: the Civil Section and the Criminal Section. The Civil Section has jurisdiction over all controversies where the cause of action has arisen under Shariat or Customary law and any other civil controversy where the value of the subject matter does not exceed Sh.So. 3,000. The Criminal Section has jurisdiction with respect to offences punishable with imprisonment not exceeding three years or fine not exceeding Sh.So. 3,000 or both (Article 2). There are 42 District Courts.

2) Regional Courts

Each Regional Court has jurisdiction over the whole territory of the Region concerned. The Regional Court has two sections: the General Section and the Assize Section. The General Section has jurisdiction in civil matters over controversies which are not within the jurisdiction of the District Courts; in criminal matters with respect to crimes not within the jurisdiction of the District Court, the

¹⁷ See Articles 1 to 5, Law on the Organization of the Judiciary, Decree Law No. 3 of June 12, 1962. The new system of courts came into effect in the Northern Regions on September 1, 1962, (see D.M. No. 9 of August 2, 1962,) and in the Southern Regions on October 1, 1963 (see D.M. No. 201 of August 8, 1963).

Assize Section and the Military Penal Section. The Assize Section has jurisdiction with respect to crimes not within the jurisdiction of the Military Penal Section which are punishable with death, or imprisonment for not less than ten years. A Military Penal Section is established in the Regional Courts of Mogadiscio and Hargeisa, which have jurisdiction with respect to crimes committed by military personnel which are punishable under Military Penal laws (Article 3). There are eight Regional Courts.

3) Courts of Appeal

There is one Court of Appeal in Mogadiscio and another in Hargeisa. They have jurisdiction over the Southern and the Northern Regions of the Republic, respectively. The Court of Appeal has three sections: the General Appellate Section, the Assize Appellate Section and the Military Penal Appellate Section. The General Appellate Section hears appeals against judgments of the Districts Courts and the General Section of the Regional Courts. The Assize Appellate Section hears appeals against judgments of the Assize Section of the Regional Courts. The Military Penal Appellate Section hears appeals against judgments of the Military Penal Section of the Regional Court (Article 4).

4) The Supreme Court

The Supreme Court has its seat in Mogadiscio. It consists of the President, the Vice-President and four other judges. As the highest judicial organ, it has jurisdiction over the whole territory of the Republic in civil, criminal, administrative and accounting matters (Article 5, Judiciary Law). Under Article 59 of the Constitution, it has jurisdiction over petitions challenging the qualifications of deputies elected to the National Assembly. Article 94 of the Constitution further provides that the Supreme Court shall exercise jurisdiction in any other matter specified by the Constitution and by law.

5) The Supreme Court constituted as the Constitutional Court¹⁸

As referred to earlier, the Supreme Court constituted as the Constitutional Court consists of all the members of the Supreme Court with the addition of two members appointed for a period of three years by the President of the Republic on the proposal of the Council of Ministers and two other members elected for the same period by the National Assembly. The Constitutional Court has jurisdiction over questions relating to the constitutionality of laws and provisions having the force of law.

¹⁸ See Articles 98 to 100, Constitution; Articles 1 to 6, Annex I to the Law on the Organization of the Judiciary.

6) The Supreme Court constituted as the High Court of Justice¹⁹

The Supreme Court constituted as the High Court of Justice consists of all the members of the Supreme Court and six additional members drawn by lot from a special list of twelve citizens elected by the National Assembly at the beginning of the first session from among persons who are eligible for election as deputies, but who are not deputies in the National Assembly. The High Court of Justice has jurisdiction over criminal charges laid by the National Assembly against the President of the Republic, the Prime Minister or Minister under Articles 76 and 84 of the Constitution.

INDEPENDENCE OF THE JUDICIARY

The main question to be examined in this context is – how far is the independence of the Judiciary guaranteed in the Republic?

Firstly, Article 96 of the Constitution lays down that in the exercise of their judicial functions, the members of the Judiciary shall be subject only to law.

Secondly, the law guarantees permanency of tenure to the members of the Judiciary. The retirement age of the Judges of the Supreme Court, the Presidents of the Courts of Appeal and the Attorney General is sixty-five years, and the retirement age of the other judges is sixty years (Article 23 Judiciary Law).

Thirdly, the members of the Judiciary cannot be deprived of their judicial functions except as a disciplinary measure (Article 24(1) Judiciary Law).

Fourthly, they cannot be transferred or assigned to other functions except as a disciplinary measure or for urgent exigencies of the service (Article 24(2) Judiciary Law).

Fifthly, they cannot be arrested or be subject to any restriction on their personal liberty without prior authorization of the Minister of Grace and Justice in conformity with the advice of the Higher Judicial Council, except in *flagrante delicto* for which arrest is mandatory or in execution of a criminal judgment [Article 24(3), Judiciary Law].

Sixthly, no civil action lies against any member of the Judiciary for acts performed in the exercise of his functions, unless the civil liability arises from the commission of a crime [Article 24(5), Judiciary Law].

Seventhly, a Higher Judicial Council is established consisting of the President of the Supreme Court as President, the members of the Supreme Court, the Attorney General and three members

¹⁹ See Articles 101 to 103, Constitution; Articles 7 to 16, Annex I to the Law on the Organization of the Judiciary.

elected by the National Assembly for a period of three years. It is the duty of the Higher Judicial Council to ensure the independence of the Judiciary. In particular

- a) it exercises supervision over competitions, examinations and grading with respect to the members of the Judiciary,
- b) it advises the Minister of Grace and Justice regarding administrative matters concerning the members of the Judiciary. Its recommendations are binding on the Minister with respect to appointments, transfers, promotions and termination of appointments,
- c) it conducts disciplinary proceedings against the members of the Judiciary and makes binding recommendations regarding the penalties imposed (Article 28, Judiciary Law).

The aforesaid provisions no doubt constitute adequate safeguards for ensuring the independence of the Judiciary.

CONCLUDING OBSERVATIONS

From the above brief review, it should be clear that the people of the Somali Republic have freely adopted their Constitution and that the Nation Assembly was established in accordance with the will of the people. The Constitution guarantees human rights and fundamental freedoms; and adequate safeguards have been provided against excesses on the part of the Legislature and the Executive. Special provisions have also been made for the protection of the right of personal liberty. The independence of the Judiciary, which is the guardian of human rights and fundamental freedoms, has also been guaranteed. The foundations of the Rule of Law have thus been laid down in the Somali Republic. There is every reason to hope that in the days to come the people of the Republic will reap in abundance the fruits of democracy and the Rule of Law.

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THE RULE OF LAW - ANGLO-SAXON OR WORLD-WIDE?

The Rule of Law is a term which it is dangerous to use without further explanation as to its meaning. It was for this reason that Sir Ivor Jennings described it long ago as "an unruly horse", and so it is unless the horse is properly saddled and bridled, and unless its rider knows where he wants to go. Now doubts over its utility for other than common law countries have been expressed by a distinguished French lawyer, Me Nicolas-Jacob,¹ who holds that the concept of the Rule of Law is purely Anglo-American and that there is therefore no point in seeking to transplant it where different traditions and ideologies apply.

The French equivalent used by the Commission, *la primauté du Droit*, is, as the Commission is well aware, inadequate to convey a precise meaning to a French lawyer, but, if it is used as a shorthand expression for a body of principles and ideals which are understood and accepted, the only harm done is to linguistic precision. In the absence of a satisfactory term, this harm is minimal provided that its meaning is understood. With great respect, it does not appear that Me Nicolas-Jacob has understood what is behind the expression, and as a result regards its English source as a reflexion of purely Anglo-Saxon thinking.

His concern, and rightly so, is to find a universal concept, and he looks for this purpose solely to the Universal Declaration of Human Rights. Some of the difficulties are undoubtedly of terminology and of terminology only.² But they need to be faced. Even in the two most prominent common law countries, England and most of the United States, there are considerable divergences in legal terminology and fundamental differences in constitutional and administrative law, the main areas where the question arises of

¹ *La vie judiciaire*, No. 920, November 25-30, 1963, pp. 1, 3, "Réflexions sur la Primauté du Droit". The author's observations are directed in particular to the articles on the Rule of Law in *Journal of the International Commission of Jurists*, Vol. IV, No. 2 (Summer, 1963), and also raise the wider issue of the value of the Rule of Law itself. This number is hereinafter referred to as *Journal*, Vol. IV, No. 2, and page references are to the English edition.

² See especially the General Report of Professor C. J. Hamson at the Colloquium on "The Rule of Law as Understood in the West," Chicago, 1957, published in *Annales de la Faculté de Droit d'Istanbul*, Vol. 9, No. 12, 1959, pp. 1-17, at p. 4. This colloquium was organized by the International Association of Legal Science; the second part "The Rule of Law as Understood in Communist Countries," was held in 1958 in Warsaw.

properly regulating the position of the individual in society. As Me Nicolas-Jacob points out, American lawyers themselves are not accustomed to a precise, technical meaning in the expression the "Rule of Law".³ Why, he asks, is it wished to impose an Anglo-Saxon tradition, which is difficult to assimilate, on peoples with a different ideological tradition? According to him, only Anglo-American lawyers are at home with this formula, and American lawyers not as much as their English counterparts.⁴ But if the spirit is world-wide, linguistic labels should not be a barrier to its understanding.

If Me Nicolas-Jacob is right in his assumption that the Rule of Law is this largely English, but also Anglo-American, conception, he would be right in discarding it as valueless, even meaningless, outside the common law countries. But if he is right, then many of his distinguished compatriots, and many other distinguished lawyers whose background is equally not that of the common law, are seriously in error. For a glance at the list of participants at the various international congresses held by the International Commission of Jurists shows no ascendancy of participants from common law countries,⁵ and it was precisely at such congresses that the modern content of the Rule of Law was elaborated.

The Commission has repeatedly claimed that the Rule of Law transcends the frontiers of different countries and different legal systems, and the detailed elaboration of what this concept means has occupied successive congresses where the Anglo-Saxon (American) voice is obviously unlikely to have been predominant. Neither the Commission nor the numerous participants from non-common law countries have felt it necessary to spell out principles in one way for the Anglo-Saxons and another for the rest, and this is why the strong participation of non common lawyers is significant. The reason why there is not one set of criteria for Anglo-Saxons and

³ *Op cit.*, p. 1, the author cites Whitney North Seymour and Saul L. Sherman in "The Evolving Concept of the Rule of Law," in *Journal*, Vol. IV, No. 2, pp. 269-74, 271-2.

⁴ Me Nicolas-Jacob uses the expressions *anglo-américain* and *anglo-saxon* and these are understood to be used in a different sense; a slight difficulty arises over the tendency to use *les anglo-saxons* to mean the English and the Americans.

⁵ Thus, in New Delhi, 1959, the composition was as follows: On Committee I, those who came from either the U.K., the U.S.A., or any country that was or had been a member of the Commonwealth, numbered 17 out of 45 and the Rapporteur was French; Committee II, 24 out of 47, with a German Rapporteur; Committee III, 16 out of 38, with a Japanese Rapporteur; Committee IV, 28 out of 46 with a Rapporteur from the Philippines. For the purposes of this classification Burma, Ceylon, Ghana, India, Pakistan are included as in the *anglo-saxon* tradition, although they are scarcely Anglo-Saxon countries from other points of view.

another for civil and other lawyers emerges from the definition in the Working Paper for the International Congress of Jurists in New Delhi, January 1959:

The Rule of Law, as defined in this paper, may therefore be characterized as:

The principles, institutions and procedures not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often themselves of varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.⁶

With this, it is hoped that Me Nicolas-Jacob would not quarrel. His objection is to transplanting a purely Anglo-Saxon institution in soil where it cannot grow – where it means nothing outside its own Anglo-Saxon environment. But has this been done?

The idea behind the Rule of Law in the classical sense of the term is protection against arbitrary power, that law should prevail and that arbitrary power cannot be exercised against the individual.⁷ From this it has been reasoned that the concentration of power is dangerous and that the desirable distribution of power means, *inter alia*, that the Executive must be subject to rules laid down in advance and enforced by an organ which is not dependent on the Executive. This belief is fortunately not exclusively Anglo-Saxon,⁸ but different systems will provide a different solution and a different expression. It is of no importance whatsoever that this solution is different from the English (which in any event is fundamentally different from the American). If the supposed guarantee of the dignity of the individual is an English judge, steeped in the traditions of the common law, with its emphasis on individual rights, it is clear that this is totally out of place, not only in non common law countries, but also in new countries formerly under British tutelage, where far more positive rules are required in the absence of the factors which apparently make institutions work in Britain. But this is not the supposed guarantee, and the opposite appears clearly enough in, e.g., *Con-*

⁶ *The Rule of Law in a Free Society*, a Report on the International Congress of Jurists, New Delhi, 1959, Working Paper on the Rule of Law in a Free Society, pp. 187-322, at p. 197 (Norman S. Marsh).

⁷ Letourneur and Drago, "La Règle de Droit en France," *Annales de la Faculté de Droit d'Istanbul*, *op. cit.*, pp. 188-235, at p. 189. For the English version see "The Rule of Law as Understood in France" in *American Journal of Comparative Law*, (1958) pp. 147 *et seq.*

⁸ For a continental view of the essentials, as distinct from the form or the terminology, see Treves, "The Rule of Law in Italy," *Annales de la Faculté de Droit d'Istanbul*, *op. cit.*, pp. 113-138, at pp. 116-117; Judge H. G. Rupp, "Government under Law in Germany," *op. cit.*, pp. 102-112, at p. 103.

clusions, Clause V, of Committee II of the International Congress of Jurists in New Delhi:

The judicial review of acts of the Executive may be adequately secured either by a specialized system of administrative Courts or by the ordinary Courts.

Again, the *Conclusions* of New Delhi include references to the limitations which should be placed on legislative power, and the necessity of incorporating restrictions in legislative power in a written constitution "in many societies, particularly those which have not yet fully established traditions of democratic legislative behaviour".⁹ The desirability of a written Constitution incorporating restrictions on legislative power certainly impressed itself on the founding fathers in the United States, and in many of the Constitutions which have been enacted in countries in all parts of the world the same technique is employed. Britain is the most conspicuous example of countries that stand aloof; the United States is the most constitution-conscious country in the world, and particularly in respect of the fundamental civil and political rights of man. The Constitutions of Commonwealth countries show striking departures from English principles. This aspect of the Rule of Law is basically different from English legal thinking though not from English practice; more support for this principle comes from outside England than from within. The fact that the first great impetus in this direction came from the United States is more than a little ironic, in that it was a reaction against the "blessings" of English common law that inspired the written Constitution of the United States, and that much of the philosophy behind it was Continental European in origin.

More surprising, perhaps, than Me Nicolas-Jacob's rejection of the Rule of Law, *la primauté du Droit*, is his belief that instead of the Rule of Law one finds the necessary expression of the ideal in the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948. This writer would certainly not dissent from the proposition that the Universal Declaration is a noble and comprehensive ideal, but its different Articles are expressed in very general terms; it is precisely the function of lawyers who believe in these ideals to seek to find a detailed elaboration of what they mean in terms of the detailed institutions and procedures which are necessary to implement them. A study of the Commission's work will show at once the difference and the amount of attention needed. A ritualistic adherence to these ideals is too frequently found on paper in countries where the rights proclaimed in the Universal

⁹ Clause II(1) of the *Conclusions* of Committee I; *The Rule of Law in a Free Society*, p. 4.

Declaration are violated with regularity, sometimes even in terms of positive law and still in the name of respect for human rights. This is why the Rule of Law is important, and why the Commission has sought for the vital consensus of world legal opinion on the more detailed principles involved in the realisation of those ideals. This search has gone on at congresses where participation was world-wide, and also at the Regional Conference on the Rule of Law at Lagos, where blind adherence to Anglo-Saxon institutions is scarcely to be expected.

The link between the concept of the Rule of Law and the Universal Declaration of Human Rights has been pointed out on more than one occasion, not least by the Commission itself and the Congresses held under its auspices. Thus, e.g., in the obvious desire to give teeth to the Declaration, the International Congress of Jurists in New Delhi had this to say before proceeding to the more detailed principles:

Every legislature in a free society under the Rule of Law should endeavour to give full effect to the principles enunciated in the Universal Declaration of Human Rights.¹⁰

The essence of the relationship between the Rule of Law and Human Rights is admirably expressed by M. René Cassin, in an article cited, though not on this point, by Me Nicolas-Jacob:

The supporters of the Rule of Law have done well until now not to disperse their efforts in a search for over-meticulous definitions, or definitions too charged with the conceptions dominating their own particular environment. They have also rightly avoided the oversimplified concept, whether it be the professional concept of formal law, correct in itself, but profoundly inadequate and sometimes dangerous, or the attitude which exalts the law into a blind body of rules maintaining the status quo . . . There can be no new stimulus to progress without resort to those fundamental principles which lend themselves so inexhaustibly to fresh application. . . The Rule of Law can only be conceived and fully realised where Human Rights are fully recognized and respected. (Italics added.)

Finally let the United Nations Secretariat speak for itself on the relationship between the work of the International Commission of Jurists and that of the United Nations. Speaking as an observer at the International Congress of Jurists in New Delhi, Mr. Oscar Schachter, Head of the General Legal Division of the United Nations, representing the Secretary-General of the United Nations, said:

¹⁰ *Ibid.*, Clause III; *Op. cit.*, p. 5.

¹¹ "Reflections on the Rule of Law," *Journal*, Vol. IV, No. 2, pp. 224-242, at pp. 224-5.

The Charter of the United Nations has wisely recognised that the aims of the Organization require not only the efforts of Governments and official agencies, but also of private, non-governmental bodies such as yours . . . In your efforts to promote respect for the Rule of Law and for fundamental freedoms, you are sharing the common purpose of the United Nations in this field, perhaps the most difficult of all its objectives to attain.¹²

With all respect to Me Nicolas-Jacob, the Commission should be proud to have considerable Anglo-Saxon support, but it is surely not Anglo-Saxons alone who search for the elaboration of the principles which will put flesh and blood to the bones of the Universal Declaration. For this reason, the Commission should also be proud of the considerable support of jurists from countries where the common law is not to be found, but respect for and understanding of the Rule of Law exists.

DONALD THOMPSON *

¹² *The Rule of Law in a Free Society*, p. 44. Mr. Schachter was speaking at the opening plenary session.

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BOOK REVIEWS

Freedom to the Free – Century of Emancipation, 1863-1963, 1963;
Civil Rights U.S.A., Public Schools Southern States, 1962;
Civil Rights U.S.A., Public Schools North and West, 1962;
Excerpts from the 1961 Commission on Civil Rights Report,
1961; Equal Protection of the Laws in North Carolina, 1962.

THE UNITED STATES COMMISSION ON CIVIL RIGHTS,
Washington, D.C.; U.S. Government Printing Office.

The United States Commission on Civil Rights is a bi-partisan Federal agency created by the Civil Rights Act of 1957, the first Congressional move to expand the Federal role in "civil rights" since Reconstruction. It should be noted that in the American context "civil rights" refers, as the Commission says, to "those individual rights protected against denials based upon such characteristics as race, color, religion, or national origin", particularly the rights of Negroes. The Commission studies civil rights problems and reports to both the President and Congress. It is specifically authorized to investigate allegations of denials of the right to vote, to study legal developments which violate the Constitutional right to equal protection of the laws, and to appraise the laws and policies of the Federal Government with respect to equal protection. The new Civil Rights Act of 1964 expands the powers of the Commission to make it also an investigator of vote frauds and a national clearing-house for information on equal protection.

The studies of the Civil Rights Commission over the last seven years have provided a basis for action by both the legislative and executive branches: not only has Congress followed the 1957 Act with two more extensive Civil Rights Acts in 1960 and 1964, but the President has also moved to formulate new executive policies on equal opportunity in the civil service, in public housing, and in employment with firms which hold government contracts. The possibilities of further progress along these lines are limited, for most of the legal barriers to equal treatment have now fallen. The Commission reports show again and again that the problems are now more involved, the solutions more sophisticated. As de Tocqueville said in 1835, "the prejudice which repels the Negroes seems to increase in proportion as they are emancipated, and inequality is sanctioned by the manners while it is effaced from the laws of the country." The Civil Rights Commission stresses that equality of opportunity and privilege for a group which has been underprivileged

and scorned for centuries requires more than the end of legalized discrimination: it demands a co-ordinated indirect attack on many fronts, including a "war on poverty", equal education for all classes and all regions, vocational training for the unskilled, more and better jobs for the unemployed – needs which are not touched by judicial, executive, or even legislative action in the field of civil rights as such. The recent tragic riots in "liberal" Northern cities have shown dramatically how accurate the Commission is on this point.

Since 1954, when it reversed its "separate but equal" doctrine in regard to public schools in *Brown v. Board of Education*, the Supreme Court has been supervising a social revolution, a role unique in judicial history. The Civil Rights Commission reports show that, in playing this role, American federal courts have developed their powers in two ways. First, their supervision necessarily has become more detailed and more active. As one plan after another has been approved or rejected the courts have defined more clearly the criteria of an acceptable programme of integration. The original formula of "with all deliberate speed" has given way to the requirement of "quick and effective" action, for "there has been entirely too much deliberation and not enough speed". The degree of active intervention required of the courts has led to judges acting as extra-judicial mediators and even as unofficial pupil placement officers. In the Prince Edward County case, the Supreme Court declared its power to order officials to re-open schools and to levy taxes for their support in a decision which opponents have attacked as "dictatorial" and a "usurpation of power".

Secondly, the courts may have started to go beyond a mere prohibition of segregation by state agencies towards ordering affirmative steps to integrate even where the segregation was not created by the state agency in the first place. New questions are being asked: must a school be "colour-blind"? Or may it be colour-conscious in order to integrate schools where there would be racial unbalance if school districts were based on natural neighbourhood patterns? Must a school board be colour-conscious and integrate such schools because, as *Brown v. Board of Education* may hint, any schools which are completely Negro will inevitably lead to a feeling that Negroes and Negro education are inferior? In its discussion of New Rochelle and Philadelphia, the volume on Northern public schools sets forth the arguments on these questions as they are now emerging in the courts.

These publications of the Civil Rights Commission are generally well-written, fair, absorbing, and valuable from both the legal and the sociological points of view. Of course, there have been considerable changes since the publication of these books because of the passage of the Civil Rights Act of 1964 and recent federal court

decisions, but this does little to diminish their value. In particular, *Freedom to the Free* is an excellent history of the Negro in America before and after Emancipation. While the report on Southern schools exhaustively analyzes many of the plans of resistance and token integration which have been used to avoid large-scale integration, the report on the North is of even greater interest as documentation of the more complex legal and moral questions of *de facto* segregation which face the North directly today and will face the South tomorrow. The 1961 annual report and the full-scale study of equal protection in North Carolina survey the whole panorama of problems but are not of so much general interest to the reader.

ANDREW H. MOTT

A szocialista alkotmányfejlődés új elemei (New Elements of the Socialist Constitutional Evolution). By István Kovács. [Budapest: Akadémiai Kiadó, 1962. 442 pp.]

In the historical introduction, the author, a Professor of Constitutional Law and a high-ranking member of the Institute of State and Law of the Hungarian Academy of Sciences, starts from the idea that the drafting of constitutions has been a major weapon of "bourgeois" revolutions since the 18th century. The very essence of such bourgeois revolutions consisted in the establishment of a constitutional order which preserved some kind of continuity with tradition. On the other hand, Lenin's Party, the Bolsheviks, proclaimed their intention to establish an entirely new and unique social order by a complete break with the past. How did it happen, the author asks, that in spite of the intention to break completely with the past, Soviet power was established in the form of the Constitution of 1918, adopting thereby the tradition of bourgeois revolutions? Two answers are given, one in the text and one in a footnote. The answer in the text quotes Sverdlov, the Chairman of the Committee for the drafting of the Constitution, who simply declared that "it had been so decided". The footnote sets the question in its historical context and becomes thereby, as in many other instances in this book, much more telling than the text itself. Thus the reader obtains the additional information that the Constitution was proposed and pressed by the (opposition) Social Revolutionary Party and the Bolsheviks let themselves be persuaded to adopt it. Other factors which influenced the decision were the elementary desire "of the masses" for a Constitution and Lenin's sense for legal solutions.

At this point the reader is reminded that Lenin was a trained lawyer, well aware of the co-ordinating and organizational role of law. Unfortunately, during the history of Communist States, Lenin's attention to law was largely forgotten by the Marxist-Leninist theorists

on State and Law, which emphasized overwhelmingly the repressive role of the law. "Bourgeois" legal theories have maintained for long that organization is a major function of law. This basic role cannot be realized, however, according to the author, until the State starts its process of gradual withering away. This being so now in Communist countries, legal science has to take a fresh look at legal relations. This is what the author intends to do by giving a broad review of Socialist constitutions of the Soviet type.

The first parts of the book (1, 2, 3) deal with the social role, classifications and structure of socialist constitutions. Then constitutions are analyzed to see how far they express the realities of a given system (p. 4). Then provisions for various types of State organs and their relations to each other are examined (p. 5). The Constitution as a fundamental law is dealt with in Part 6 while the concluding Part 7 gives the Communist interpretation of the term 'constitution-ism' and of the legal and factual safeguards of the Constitution.

In order to give an idea how the author develops a problem, let us single out from the series of interesting analyses the treatment given to one of the most important contemporary constitutional problems in Communist States: the activities of the Legislature.

The author concedes that historical circumstances, particularly Stalinism and the absence of parliamentary traditions, were obstacles to the Legislature exercising such a prominent role in the life of the State, provisions concerning which were written in the Constitutions.

A development in the direction of the object proclaimed started during the fifties in Poland and Yugoslavia. In 1961 the idea of building up the federal Legislature as the central organ of both the State and of all social organizations was incorporated in the new Programme of the Communist Party of the Soviet Union, adopted at its 22nd Congress in Moscow. According to this Programme, the USSR Supreme Soviet should become in due course the supreme integrating organ for all activities of State organs as well as of social self-management.

The development of National Legislative Assemblies is expected to continue. In the author's view, in order to achieve the objects claimed, reforms should be carried out and should include a reshaping of the whole electoral system. Later on, he observes that Legislative Assemblies should be in constant session (except for holidays), perhaps even with deputies devoting their activities entirely to their legislative tasks and in "much closer contact with the broad masses of the population", i.e., the electors. The author advanced even the possibility that by delegating groups of members to each other's National Assemblies by "mutual representation and control" Socialist States may achieve a kind of "internal co-ordination" without any supra-state international body.

Any substantial role of the Legislative Assembly raises, however, immediately the problem of relationship between the Legislative and the ruling Communist Party of the country. This relationship, it has been put forward, is better left completely vague. The Communist Party as the supreme social organization in a country directs all State and social activity by *political* and not by *legal* means. This factual situation is supposed to have only one legal provision: an allusion inserted in the Constitution concerning the "leading role" of the Party. Based on the blank authorization of the Party's "leading role", the Party directives permeate practically all aspects and phases of the activities of State and social organizations. Attempts to codify this "leading role" are bound to lead to a limitation of the all-embracing principle of leadership, and as such, according to Kovács, should be rejected.

Events which have occurred in East European countries before and since the publication of the book under review seem to justify many of its general propositions on constitutional legal techniques. On some fundamental issues, however, as, e.g., on "internal co-ordination" and on the problem of Parliament-Party relationship the author's cautious reformism seems to have missed the point.

Instead of moving closer together for "internal co-ordination" in constitutional or economic matters, States of Eastern Europe manifest a growing desire for more independent action. On the other hand a desire for more codification of the rights and duties of both citizens and State organs is increasingly to be felt. Precision of rights and duties always limits the arbitrary use of power. This is the aim towards which people in Eastern Europe are looking. To impose such limitations on power has been for centuries the aim of those all over the world who wanted a "government of laws and not of men".

Professor Kovács's book is an interesting example of a cautious venture to deal with constitutional problems of Communist States by going beyond the former usual practice of paraphrasing existing constitutional texts and repeating the affirmation that constitutional provisions are observed in practice. It raises questions which might in the past have been in the back of the mind of constitutional lawyers in Eastern Europe, but were deemed outside the scope of enquiry of a faithfully orthodox theoretician and certainly not to be put on paper. Even if these questions are answered generally in a conformist manner, they are put and opening new horizons for reasoning.

JÁNOS TÓTH

**RECENT PUBLICATIONS
OF THE INTERNATIONAL COMMISSION OF JURISTS**

Journal of the International Commission of Jurists

Volume V, No. 1 (Summer 1964): Staff Study on Economic Crimes in the Soviet Union; The Role of the Lawyer in the Economic and Social Development of His Country within the Framework of the Rule of Law; Independence of the Judiciary in the State of Israel; The Right of Arrested Persons to Communicate with Those Whom It Is Necessary for Them to Consult in Order to Ensure Their Defence or to Protect Their Essential Interest. Documents of the meeting of the French and British Sections of the International Commission of Jurists on: Crown Privilege, Privilege and Evidence in the Criminal Courts, Right of Asylum, The Right of Asylum in France. Book reviews.

Bulletin of the International Commission of Jurists

Number 20 (September 1964): Aspects of the Rule of Law in Brazil, Cameroon, Canada, Chile, Communist China, Eastern Europe, Gambia, Ireland and Tanganyika.

Newsletter of the International Commission of Jurists

Number 15 (February 1964): Appointment of New Secretary-General. Members of the Commission. Missions and Tours. Observers. Press Releases: South Africa, Ghana, Cuba, Haiti, Ceylon, U.S.A., United Nations. Essay Contest. Organizational Notes. Publications. Law Student Seminars.

SPECIAL STUDIES

The African Conference on the Rule of Law (June 1961): Report on the first African Conference on the Rule of Law, held in Lagos, Nigeria, January 1961.

The Berlin Wall: A Defiance of Human Rights (March 1962) The Report consists of four parts: Voting with the Feet; Measures to Prevent Fleeing the Republic; the Constitutional Development of Greater Berlin and the Sealing off of East Berlin. For its material the Report draws heavily on sources from the German Democratic Republic and East Berlin: their Acts, Ordinances, Executive Instruments, published Court decisions and excerpts from the press.

South African Incident: The Ganyile Case (June 1962): This Report records another unhappy episode in the history of the arbitrary methods employed by the Government of South Africa. In publishing this report the Commission seeks to remind its readers of the need for unceasing vigilance in the preservation and assertion of Human Rights.

Cuba and the Rule of Law (November 1962): Full documentation on Constitutional legislation and Criminal Law, as well as background information on important events in Cuban history, the land, the economy, and the people; Part Four includes testimonies by witnesses.

Spain and the Rule of Law (December 1962): Includes chapters on the ideological and historical foundations of the regime, the single-party system, the national syndicalist community, legislative power, powers of the Executive, the Judiciary and the Bar, defence of the regime, penal prosecution of political offences, together with eight appendices.

Report on the Events in Panama, January 9-12, 1964 (May 1964): A report by the Investigating Committee appointed by the International Commission of Jurists.

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